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Summary record of the 1206th meeting

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and international law. However, he hoped that that distinction would not be taken as precluding useful analogies with municipal law, when appropriate. He underlined, in particular, the importance of the "general principles of law" and warned the Commission against accepting the statement of the Permanent Court of International Justice that national law should only be regarded as a fact.

46. Mr. KEARNEY said he was flattered that the Special Rapporteur, in footnote 69 to his third report, had referred to the fact that he (Mr. Kearney) had particularly stressed the close connexion between the subjective and the objective elements of an internationally wrongful act. He was prepared to accept the substance of article 2, as formulated by the Special Rapporteur.

47. He was not sure that the question of abuse of rights would necessarily become the "red herring" Mr. Hambro feared; it did arise in connexion with article 1, in regard to the changes occurring in international law, though he agreed that it was a problem which could be left for future consideration. That was also true of the problem of damage, which, while not an essential element in the definition of an internationally wrongful act, was a difficult subject that would probably call for a special chapter in view of the many aspects it presented.

48. He could agree to the two proposed amendments to the wording of sub-paragraph (*a*) of article 2, and was himself inclined to question the wording of sub-paragraph (*b*). He suggested that, instead of the words "That conduct constitutes a failure to comply with an international obligation of the State", it would be better to use the wording of Article 36, paragraph 2, *c*, of the Statute of the International Court of Justice and say "That conduct constitutes a breach of an international obligation of the State". He considered that a particularly clear formulation, since the fact of an omission itself constituted a breach of an international obligation, as, for example, when a State failed to provide an adequate number of security guards for a foreign embassy.

49. Mr. REUTER said that, at first sight, he could accept article 2 as it stood.

50. In his drafting, the Special Rapporteur seemed to have considered internationally wrongful acts from an entirely general standpoint, which had led him to conclude that only two conditions had to be met in all cases. That was why he had discarded, as not constituting an absolutely general condition, the existence of damage or even of injury. But he had not meant that those two conditions were always sufficient; he had recognized that, in a number of cases of responsibility arising from a wrongful act concerning private persons, damage was an element that had to be taken into account. That was not always the case, however: for instance, when a State acted contrary to the European Convention on Human Rights, a complaint could be lodged against it by a State other than that to which the injured person belonged; that was none the less enough to set international reparation machinery in motion. Nor had the Special Rapporteur said that the existence of damage was never a requirement when a State was the direct victim of failure to comply with an international obligation.

51. It would therefore be advisable to specify, later, in what cases damage must have been suffered and of what kind it must be. For to limit the criteria for the existence of an internationally wrongful act to the two conditions selected by the Special Rapporteur would mean adhering to something like the criminal machinery of internal law. Yet classical international law tended to measure the rights of States according to the nature of the injury they had suffered. For instance, article 60 of the Vienna Convention on the Law of Treaties[6] established distinctions according to the nature of the injury caused by the breach of a treaty.

52. The Special Rapporteur had duly explained why the term "obligation" should be preferred to the term "rule", but he had not specified to whom the obligation was owed. Presumably he was contemplating both wrongful acts which injured the international community as a whole and acts which injured certain States. But a distinction should be drawn between those different sorts of internationally wrongful act.

53. The Special Rapporteur appeared to consider that the element of damage or injury was contained in the concept of obligation, but that it did not constitute a third element, because it was not of a sufficiently general character. It was from that angle that the draft article should be interpreted at present.

54. Mr. USHAKOV said he supported the substance of article 2 in principle, but wished to make a few comments on the drafting. The wording "An internationally wrongful act exists when" called for a statement of the facts of the case. The next phrase, on the other hand, particularly the expression "is attributed to the State in virtue of international law", implied that somebody must attribute a certain conduct to a State. Perhaps it might be better to use the word "attributable".

55. The words "in virtue of international law" could be deleted, since an internationally wrongful act could sometimes take place by reason of the very existence of a State's conduct, without any need to refer to international law.

56. As for the concept of "obligation", to which the Special Rapporteur had given preference, it was so close to that of "duty" that it might perhaps be well to mention both in article 2, unless the Commission defined the term "obligation" later, in the article containing definitions.

The meeting rose at 6 p.m.

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[6] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 297.

1206th MEETING

Tuesday, 15 May 1973, at 11.55 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter,

Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

Filling of casual vacancies in the Commission

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

[Item 1 of the agenda]

(resumed from the 1202nd meeting)

1. The CHAIRMAN announced that, at a private meeting, the Commission had elected Mr. Juan José Calle y Calle, of Peru, Mr. C. W. Pinto, of Sri Lanka, Mr. Alfredo Martínez Moreno, of El Salvador, and Sir Francis Vallat, of the United Kingdom, to fill, respectively, the casual vacancies caused by the death of Mr. Gonzalo Alcívar and the resignations of Mr. Nagendra Singh, Mr. José María Ruda and Sir Humphrey Waldock, on their election as Judges of the International Court of Justice.

State Responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.446 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 2 (Conditions for the existence of an internationally wrongful act) *(continued)*

2. The CHAIRMAN invited the Commission to resume consideration of article 2 in the Special Rapporteur's third report (A/CN.4/246).

3. Mr. YASSEEN said he approved in principle of the wording proposed by the Special Rapporteur for article 2. The two elements set out were undoubtedly the essential constituent elements of an internationally wrongful act.

4. He agreed with the Special Rapporteur that for an internationally wrongful act to exist there must be conduct—an act or omission—attributed to the State, that was so attributed in virtue of international law. It was clear that the wrongful act could be either an act or an omission, and that it must be attributed to the State as a subject of law, not as a legal order, and as a subject of international law, not of internal law. Lastly, it was essential that all that should take place entirely under international law. The attribution meant that the act of an individual or group of individuals was regarded by international law as an act of the State. It was not a matter of natural causality, but of a legal bond created in accordance with the rules of positive international law, to the exclusion of all other rules.

5. The existence of the internationally wrongful act was also subject to the existence of the second element mentioned in the article—the objective element. The Special Rapporteur had been right to use the words "failure to comply with an international obligation", since the expression "failure to comply" was more neutral than "violation" and the term "obligation" was more appropriate than "rule". He doubted whether it was necessary to add other elements to the conditions for the existence of an internationally wrongful act.

6. Some members had raised the question whether the notions of abuse of rights and damage should not also be taken into account. With regard to abuse of rights, he agreed with the Special Rapporteur that it would be better to leave that question aside for the time being. The topic which the Commission was called upon to codify was international responsibility; to introduce the notion of abuse of rights—the importance of which he did not underestimate—would entail making a detailed study which was not within the scope of that topic. If it were accepted, as it was by certain jurists, that the right ended where the abuse began, the consequences of abuse of a right could easily fall within the province of responsibility. But the concept of abuse of rights might follow a course of its own and suitable means might be found for remedying the consequences of the abuse. It would therefore be better for the Commission not to study that question for the moment.

7. With regard to damage, it was difficult to conceive that there could be responsibility in the absence of any damage or injury. The maxim that no one could maintain an action unless he had an interest seemed as valid in international law, as in internal law. The damage or injury might take the form of infringement of a right. But as the Special Rapporteur had said, every failure to fulfil an international obligation entailed infringement of a subjective right. Consequently, the idea of damage or injury was implicit in that of failure to fulfil an obligation, though of course the damage need not be material. Hence it was not necessary to mention damage separately as a third constituent element of an internationally wrongful act.

8. For all those reasons he believed that article 2, as drafted, reflected positive international law.

9. Mr. TSURUOKA said he thought that article 2, the wording of which he approved in principle, was in its right place in the general plan of the draft. It was a basic article which stated an essential general rule. It was clear and unambiguous, and the settlement of subsidiary questions such as injury and abuse of rights could therefore be left until later. The practical value of the article would depend to a great extent on the way those questions were settled, or even on the position taken by the Commission with regard to them in the commentary.

10. Mr. BEDJAOUI said he agreed, in general, with the conditions for the existence of an internationally wrongful act, as clearly and simply set out in article 2. There was no doubt that the subjective element must exist and that it entailed legal attribution of an act to a State as a subject of international law. It was not difficult, either, to accept the objective element, that was to say the existence of conduct constituting failure to fulfil an international obligation, the violation of an obligation or failure to perform a duty, though he did not see much difference between those two terms.

11. He also approved of the wording adopted by the Special Rapporteur, including the formula "in virtue

of international law", which should be retained in spite of the criticisms it had received. It was, indeed, only to a State as a subject of international law and in conformity with the rules of international law, not of internal law, that an act could be attributed.

12. He regretted, however, that the subject of abuse of rights had been provisionally left aside. He hoped the Commission would revert to it at a later stage in its work of codification, for it was a subject that offered very great possibilities for progressive development. The characteristic feature of abuse of rights was not a limit fixed by a legal rule which blocked the exercise of the right, but rather the existence of a potential rule in process of formation; otherwise there would merely be conflict between two rules.

13. He was grateful to the Special Rapporteur for not having adopted the prior existence of damage or injury as a third condition for the existence of an internationally wrongful act. The exclusion of that notion might be a way of including injury in the wider sense of the term, since there could be, if not material injury, at least a moral injury deriving from impairment of the dignity of the State.

14. Mr. THIAM said he approved of article 2 as proposed by the Special Rapporteur. He agreed that the questions of injury and abuse of rights were not within the scope of the article, but it was obvious that, for practical reasons, the Commission would have to revert to those questions sooner or later, examine them thoroughly and decide whether they should be dealt with in the draft and if so where.

15. Mr. BILGE said that he had not been a member of the Commission when it had decided how to deal with the topic of State responsibility, but he fully endorsed the decisions taken.[1]

16. He fully approved of article 2. The two conditions it laid down were always required, both by international jurisprudence and by State practice and doctrine. The subjective element raised no difficulty: the attribution of a certain conduct to a State as a subject of law was made in virtue of international law.

17. The objective element, on the other hand, raised three questions. First, should the concept of abuse of rights be introduced into article 2? He was convinced that it had its place in the international legal order, but neither doctrine nor international jurisprudence seemed ready to accept it in the context of the internationally wrongful act. It would therefore be better to leave the question aside for the time being.

18. Secondly, should a distinction be drawn between different kinds of failure to comply with an obligation, particularly between conduct which it itself constituted a wrongful act and conduct which needed the addition of some external event? Like the Special Rapporteur, he saw no need to make such distinctions and thought that attention should be confined to the nature and purpose of the obligation.

[1] See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 227-228 and vol. I, p. 86, para. 75.

19. Thirdly, should injury be regarded as a third condition of the existence of an internationally wrongful act? Was it possible to dissociate the internationally wrongful act from injury, and treat the latter element as a separate issue? It would appear not, for although wrongfulness was always linked with the concept of injury an internal law, the existence of injury was not a decisive factor in inter-State relations. Moreover, where injury to aliens was concerned, the State did not intervene, as in internal law, as a genuine holder of rights. Consequently, only two conditions should be adopted for the existence of an internationally wrongful act.

20. Article 2 was therefore acceptable as it stood. At most, the Drafting Committee might make a few drafting changes in accordance with the suggestions made during the discussion, and perhaps reverse the order of sub-paragraphs (*a*) and (*b*) since, chronologically, a failure to comply with an international obligation of the State must already have occurred before it could be attributed to the State in virtue of international law.

21. Mr. BARTOŠ said he approved of article 2 as proposed by the Special Rapporteur. Nevertheless, he wished to draw attention to a possible situation which would admittedly make the drafting awkward if it were introduced, but which should at least be considered by the Commission. It might happen that certain conduct, without being really proved and attributed to a State, constituted a simple presumption of responsibility. Thus it was sometimes merely presumed that a State had failed to comply with an international obligation, before certain conduct could be attributed to it with certainty.

22. In his opinion, abuse of rights could be a source of responsibility only if rules specifying the limits to the exercise of a particular right had been broken. In internal law, there could be abuse of rights if the limits to the exercise of a particular right had been laid down and then transgressed, or if the abuse was so manifest that it was contrary to the normal interpretation of a rule. But in international law it was essential, in the interests of world security, to lay down limits to the exercise of rights. Without such limits, it was difficult to determine at what point failure to comply with an obligation engaged the international responsibility of a State.

23. The question was not only of theoretical interest. State practice could constitute a source of law. Any conduct not in conformity with that practice should be treated as a violation of the international legal order. Without changing the proposed text, the Commission should therefore agree on the notion of normal exercise of rights.

24. His position with regard to injury as an element of the internationally wrongful act was that it was essential to determine whether any interest had been injured. In the case of failure to comply with an international obligation, it was the international order which was injured. Generally speaking, States had an interest in maintaining the international order. They also had a duty to protect it since, in the event of violation of an international obligation, they were the direct or indirect victims.

25. Article 2 as proposed by the Special Rapporteur was therefore satisfactory, subject to any improvements the Drafting Committee could make in the light of the discussion.

26. The CHAIRMAN, speaking as a member of the Commission, said he was in agreement with the formulation of article 2 and with the theoretical and practical considerations which preceded it in the Special Rapporteur's third report (A/CN.4/246, paras. 49 to 74).

27. He supported the basic conception of State responsibility as consisting of two elements: a subjective one and an objective one. The subjective element was constituted by conduct capable of being attributed to the State concerned, not to an individual or a group of individuals. That link with the State was of a legal character. It was not a natural connexion. As Kelsen had pointed out, the link was not that which connected cause and effect but, like all legal links, that which connected means and ends.

28. In that respect, he fully agreed with the view that the legal connexion in question had to be established in international law and not in internal law. The attribution of responsibility to the State was a matter governed by international law, not by internal law.

29. With regard to the objective element, he agreed with the Special Rapporteur that what gave rise to State responsibility was not the breach of a primary rule of international law, but failure to comply with an international obligation incumbent upon the State. Such an obligation could have its source, for example, in treaty rights or in a judgement or arbitral award.

30. He supported the Special Rapporteur's treatment of the problem of abuse of rights. The importance of that problem in the context of State responsibility was not in doubt, but it did not affect the secondary rules governing State responsibility as such. The problem was really whether there was a primary rule of international law which limited the exercise by the State of its rights or capacities. If international law recognized such a limitation, the abuse of a right by a State would then necessarily constitute a breach of the primary rule which laid down that limitation.

31. The Special Rapporteur had rightly not included injury among the constituent elements of State responsibility. Some confusion had arisen on that point because in regard to the treatment of aliens it had been repeatedly held that no claim could be preferred in the absence of an injury to the alien concerned. The reason was, of course, that a State's obligation in the matter was, essentially, not to injure aliens wrongfully or allow them to be injured under certain circumstances. Where no injury could be established, there was no breach of the relevant primary rule of international law, so that State responsibility did not come into play. That did not mean, however, that the existence of injury was a necessary component of State responsibility.

32. Lastly, there were certain omissions which in themselves constituted violations of an obligation under international law and generated State responsibility. An example was a treaty which required a State to enact certain legislation as part of its national law; failure to do so would engage its international responsibility. The omission was in itself sufficient, since injury—moral or material—to the other States parties to the treaty was inherent in such a situation. Treaties dealing with human rights laid an obligation on States to take certain legislative measures for the benefit of their own citizens; failure to do so could be invoked by any of the other States parties to the treaty since it was sufficient in itself to cause injury to them.

33. He supported the proposal that article 2 should be referred to the Drafting Committee for consideration in the light of the discussion.

The meeting rose at 1 p.m.

1207th MEETING

Wednesday, 16 May 1973, at 10.10 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, Sir Francis Vallat, Mr. Yasseen.

Welcome to Sir Francis Vallat

1. The CHAIRMAN welcomed Sir Francis Vallat, who had been elected a member of the Commission to fill one of the four casual vacancies which had occurred since the last session. Sir Francis had been known to many members of the Commission since 1950 as a distinguished and friendly colleague in the Sixth Committee of the General Assembly at United Nations Headquarters.

2. Sir Francis VALLAT said he regarded election to the Commission as one of the greatest honours which could be paid to an international lawyer. He was grateful for the warmth of the welcome he had received and, while not wishing to intervene at the present stage of the discussion, he hoped little by little to be able to make some contribution to it.

Appointment of a drafting committee

3. The CHAIRMAN suggested that the Commission appoint a drafting committee of eleven members, consisting of the First Vice Chairman as Chairman, the General Rapporteur, and the following members of the Commission: Mr. Ago, Mr. Elias, Mr. Kearney, Mr. Pinto, Mr. Reuter, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat, together with one of the two newly elected Latin American members—either Mr. Martínez Moreno or Mr. Calle y Calle.

It was so agreed.