Document:-
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Summary record of the 1205th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

study were begun after the first study had been concluded, it might give the impression that they were two successive stages of the same question rather than two separate questions.

53. Mr. KEARNEY said that the English version of paragraph 5 of the Special Rapporteur's third report made it clear that the Commission was not in any way inhibited in the timing of its consideration of the subject of responsibility for risk. The last sentence of that paragraph stated that the Commission "intends to consider separately the topic of responsibility arising from lawful activities", subject only to one qualification "as soon as progress with its programme of work permits".

54. He was therefore led to think that the question of responsibility for risk should perhaps be considered by the Commission in connexion with the review of its long-term programme of work, particularly as the Commission was also to examine the priority to be given to the topic of the law of the non-navigational uses of international watercourses,[5] a subject which gave rise to problems of responsibility for lawful activities.

55. Mr. ELIAS said that, while it was technically possible for the Commission to undertake a parallel study of responsibility for risk, he wished to warn his colleagues of the danger of confusion that would result from the consideration of two sets of papers—one dealing with responsibility for wrongful acts and the other with responsibility for lawful acts. There would inevitably be a danger of members transferring their thoughts on one subject to the other and of the discussion on one subject having an undesirable impact on the discussion of the other.

56. To make real progress, the Commission should concentrate on the present topic and clarify its thoughts before going on to examine supplementary rules on responsibility for lawful acts. That, of course, would not prevent members from referring to the question of responsibility for risk when discussing problems of the environment or of the non-navigational uses of international watercourses.

57. Mr. BILGE said that, in internal law too, there was always a responsibility based on risk. He did not think the word "separately", used by the Special Rapporteur, was sufficient. As Mr. Elias had said, it should be made clear that it was a new topic.

58. Mr. TSURUOKA said he did not think it necessary to decide immediately on the procedure to be followed in considering the question of responsibility for lawful acts. The Commission should first examine the Special Rapporteur's reports. In the meantime, the officers of the Commission could discuss how to deal with the second topic.

59. He would like the Drafting Committee to pay particular attention to the used of the words "international" and "internationally". The term "internationally wrongful" did not seem clear. Did it mean an act that was wrongful under international law? In his view, the word "internationally" had political overtones.

[5] Item 5 of the agenda.

60. Mr. AGO said that he had begun by using the expression "*fait illicite international*" ("international illicit act") in his report.[6] As far as he could see, the two terms were synonymous and interchangeable.

61. The CHAIRMAN said that no formal proposal had been made during the discussion that the Commission should undertake a study of the question of responsibility for risk. The problem of the action to be taken by the Commission with regard to the new topic could, of course, be raised in connexion with item 5. Meanwhile, if there were no further comments, he would take it that the Commission agreed to refer article 1 to the Drafting Committee which would be set up, for consideration in the light of the discussion.

It was so agreed.[7]

The meeting rose at 12.50 p.m.

[6] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, footnote to table of contents of the second report.

[7] For resumption of the discussion see 1225th meeting, para. 50.

1205th MEETING

Monday, 14 May 1973, at 3.15 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov.

Co-operation with other bodies

[Item 8 of the agenda]

1. The CHAIRMAN said that the European Committee on Legal Co-operation had invited the Commission to be represented at the session it was to hold from 21 to 25 May. As the Commission could not delegate one of its members while it was itself in session, he proposed that it should convey its regrets to the Committee and request it to send the Commission its report as usual.

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]

(resumed from the previous meeting)

2. The CHAIRMAN invited the Commission to resume consideration of the draft articles submitted by the Special Rapporteur.

ARTICLE 2

3. *Article 2*

Conditions for the existence of an internationally wrongful act

An internationally wrongful act exists when:

(*a*) Conduct consisting of an action or omission is attributed to the State in virtue of international law; and

(*b*) That conduct constitutes a failure to comply with an international obligation of the State.

4. The CHAIRMAN invited the Special Rapporteur to introduce article 2 of his draft.

5. Mr. AGO (Special Rapporteur), introducing article 2, pointed out that according to the basic principle laid down in article 1, there was not, in international law, any wrongful act which did not involve responsibility. The continuation of his study hinged on two notions following from that principle: the internationally wrongful act and the consequences of that act. Once the principle stated in article 1 was accepted, the conditions for establishing the existence of an internationally wrongful act should be stated, and that was the purpose of article 2.

6. Writers, jurisprudence and the practice of States were practically unanimous in recognizing that at least two elements—one subjective and one objective—were required for that purpose. First, there must be an act or omission capable of being attributed to the State, in other words of being considered as an act of the State; and secondly, that act must constitute failure to fulfil an international obligation of the State which committed it. Reading his third and fourth reports, members would have appreciated the number of problems raised by the questions of attribution of an act to the State. It would subsequently be necessary to solve another group of problems—those raised by the recognition of an international violation, that was to say, the conditions in which an act or omission attributed to the State under international law constituted failure to fulfil an international obligation, bearing in mind the cases in which there was no violation because an exceptional circumstance had relieved the act of its wrongful nature.

7. Certain fundamental points should nevertheless be made clear from the start. First, it was necessary to state precisely the general principle that the two elements he had mentioned must be present for there to be an internationally wrongful act.

8. It was clear from the practice, doctrine and jurisprudence, and also from the previous attempts at codification, in particular the 1930 Codification Conference and the replies given by States to the request for information submitted to them by the Preparatory Committee, that the act of the State could equally well be an omission as an act. To attribute an act or omission to the State, it was not necessary to find a natural link of causality between the author of the act and the act itself. Attribution to the State, as subject, of conduct that was necessarily the conduct of human beings, was always an operation of legal connexion.

9. Further, the State to which conduct was attributed was the State as a person, as a subject of law, not the State in the sense of the legal order. What was more, it was the State as a subject of international law, not as a person in internal law. The attribution of an act to the State in international law was made with respect to a subject which was not the same as the subject of internal law.

10. The act was attributed to the State as a subject of international law, and was attributed to it at the level of the international legal order. Thus there were three essential points which the Commission should keep in view: the attribution of an act to the State was an operation of legal connexion; it was carried out under international law; and the act was attributed to the State as a subject of international law, not as a subject of internal law.

11. He had said that the second condition for the existence of an internationally wrongful act was that the conduct attributed to the State must constitute failure by the State to fulfil an international obligation incumbent on it. Opinions were unanimous on that point, but it should be emphasized that the failure must be defined from the point of view of subjective law, in other words, not as the breach of a rule, but as the violation by a subject of law of the obligation imposed on it by the rule. In international law, the idea of failure to fulfil an obligation was equivalent to the idea of infringement of the subjective right of another.

12. Three other questions arose in connexion with article 2: the abuse of rights, the possible distinction between different kinds of violation, and injury. With regard to the abuse of rights, the Commission had decided, at its twenty-second session, to revert to that question later.[1] He himself still thought there was no need to examine the substance of the problem; for if there were situations in international law in which the exercise of a right was subject to limits, that was because there was a rule which imposed the obligation not to exceed those limits. In other words, the abusive exercise of a right then constituted failure to fulfil an obligation. Hence the statement of the principle that an internationally wrongful act was considered to be the violation of an obligation was enough to cover the case of abuse of a right.

13. As to the possible distinction between different kinds of violation, the conduct as such might alone be sufficient to constitute failure to fulfil an international obligation of the State: for example, if the State failed to carry out a treaty by which it had undertaken to enact certain legislation.

14. In other cases an additional element, an outside event, must be added to the conduct to make it an internationally wrongful act: for instance, if in time of war the aircraft of a State bombarded a town without taking the necessary precautions not to damage hospitals, there would nevertheless be failure to fulfil the international obligation to spare enemy hospitals only if a hospital were hit. It could thus be seen that the offence relating to mere conduct and the offence relating to an event existed in international law, as in internal law. He had considered whether he should refer to that distinction in article 2, but reached the conclusion that it was prefer-

[1] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 308, para. 79.

able not to do so and to revert to the matter when the Commission came to consider the question of violation of an obligation in its various aspects. For the time being it was enough to say that the conduct of the State must constitute failure to fulfil an international obligation. That covered all cases.

15. Lastly, should injury be included as a further separate element among the constituent elements of the internationally wrongful act? There again, the Commission should try to exclude internal law. In internal law there could be a criminal offence without injury. In several countries, for example, attempted suicide was a punishable offence. The idea of injury in international law normally related to injury as recognized in civil law, that was to say, economic injury. The French word "*préjudice*"—in English "injury"—which was the term used by Mr. Reuter in his course,[2] meant the harm naturally caused by any action which constituted failure to fulfil an international obligation. But it was not necessarily injury in the economic sense generally ascribed to that term. The reason why certain writers considered injury to be a third constituent element of the internationally wrongful act was that they had considered responsibility only in connexion with injury caused to aliens, that was to say in a sphere in which the obligation violated was, precisely, an obligation not to cause, and to prevent, injury. In other cases, the injury was confused with the event, that was to say, with the external element which must sometimes be added to conduct if injury was to be caused to others.

16. There were, however, many examples showing that in international law there could be failure to fulfil an obligation without injury. For instance, a State which did not enact the legislation it had undertaken by treaty to enact, did not, strictly speaking, inflict an injury on the other States parties to the treaty, though it had failed to fulfil an obligation. Nevertheless, all writers recognized that every failure to fulfil an obligation entailed an injury. Consequently, it could not be said that the element called "injury" was the third condition necessary for the existence of an internationally wrongful act, for there were internationally wrongful acts which did not result in economic injury, and if it was true that every failure to fulfil an obligation entailed injury, then the element of injury was already covered by the failure to fulfil the obligation.

17. Mr. TAMMES said he wished to make a few remarks, not so much on article 2 as on the considerations which preceded it in the Special Rapporteur's third report (A/CN.4/246).

18. In paragraphs 66 to 70 the Special Rapporteur dealt with the concept of abuse of rights and gave his reasons for believing that it would be premature to include it among the objective elements of the wrongful act. The concept had certain obviously dangerous aspects and its formulation would involve making a substantive or primary rule of international law, as distinct from the typical rules of State responsibility.

19. He did not wish to enter into a discussion of the contents of the doctrine, but he was convinced that, at some later date, the Commission would have to decide whether abuse of rights should be included among the objective elements of the internationally wrongful act. Several members had already noted that international legal convictions were at present in a stage of fluidity and rapid development. There was an increasing probability that an international court would respond to that change in legal convictions by means of general concepts, even before those convictions were embodied in progressive rules.

20. There might be legal danger in applying a concept such as abuse of rights, but there would also be factual danger in ignoring it. There were many formulations of abuse of rights in international texts which did not actually use that expression. One example was article 2 of the 1958 Geneva Convention on the High Seas,[3] in which the exercise by States of the four freedoms of the sea set forth in that article was made subject to "reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

21. He agreed with the Special Rapporteur that any non-tautological formulation of the concept of abuse of rights as an objective element of State responsibility would involve working on a substantive rule. Such a rule, however, would not be any more substantive than such concepts as self-defence, state of necessity and due diligence, which would be dealt with later. As indicated in the Special Rapporteur's note of 15 June 1967,[4] those subjects belonged to State responsibility and could not be dealt with as separate topics. If the Commission did not deal with them in the context of responsibility, which was the only place for them, they would not be dealt with at all.

22. In a later passage of his report (paras. 70 *et seq.*), the Special Rapporteur drew attention to cases in which the wrongful act did not lead to any physical or otherwise ascertainable effects. In his view, guidance should be sought in those cases from the distinction made in sub-paragraph (*a*) of article 2, between conduct by action and conduct by omission. Conduct by action was the manner in which a State would violate an international prohibition. As he saw it, in most cases of that kind, the State would be responsible for an attempt at violation, even if no physically harmful effects resulted.

23. Conduct by omission, on the other hand, would create a situation of latent danger which the law intended to prevent by imposing upon the State an international responsibility, even though proof would be extremely difficult and no interests of any particular State were as yet affected. He himself would not object to such a radical rule, but was not at all certain that that was the real intention of the Special Rapporteur in sub-paragraph (*b*) of article 2.

24. Perhaps the point could be clarified in the commentary to article 2. As it stood at present, the text of

[2] *Recueil des cours*, 1961, II, vol. 103, pp. 425-655.

[3] United Nations, *Treaty Series*, vol. 450, p. 82.

[4] See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 325-327.

sub-paragraph (*b*) would entail responsibility for the frustration of any state of affairs aimed at by the law. There might be some restrictive rules, as suggested in the report, but it did not seem possible to place those restrictions systematically in the draft as a whole without affecting the final formulation of article 2 itself.

25. Mr. ELIAS said that, subject to some points of drafting, he could accept both sub-paragraphs of article 2. The reason was that the new text of that article took into account most of the objections to the original text which had been voiced in the Commission's extensive debate in 1970 and in the subsequent discussions in the Sixth Committee. Moreover, it would be sound law to accept the two conditions set out in sub-paragraphs (*a*) and (*b*) for engaging the international responsibility of States.

26. As far as the subjective element was concerned, the criterion laid down in sub-paragraph (*a*) was that the conduct in question must be attributed to the State as a subject of international law; if a particular conduct could be attributed to a State rather than to an individual or to a group, then that State could be held responsible.

27. The objective element, set out in sub-paragraph (*b*), was that the conduct must constitute failure to fulfil an international obligation. Conduct in that sense covered both acts and omissions, but the Special Rapporteur had rightly observed that the omissions were probably more numerous than the acts. That was well illustrated by the cases which had come before the former Permanent Court of International Justice and the present International Court of Justice.

28. It was important to remember that the act of the State had to be an act attributed to it by the law, but the question was whether in that case the law meant internal law or international law. The generally accepted view was that it meant in international law and that view had been accepted even by writers like Anzilotti and Kelsen, who had at first thought differently. Personally, he thought it could hardly be otherwise, since the violation was specifically a breach of international law; although considerations of internal law could not be overlooked, the standard must be that laid down by international law.

29. He agreed with the Special Rapporteur that the somewhat ambiguous doctrine of abuse of rights should not be introduced into article 2 as one of the elements of an internationally wrongful act. The article was concerned with violations of international obligations, of duties laid upon States by international law, and not with the exercise, whether excessive or otherwise, of a right by a State. If the Special Rapporteur could include a provision on the subject of abuse of rights at a later stage, he would have no objection, but there was no place for it in article 2.

30. There were a number of references in the report to the question of damage, which some writers had considered as a third element for the existence of State responsibility. The Special Rapporteur had been right to leave that question outside the scope of article 2; the concept of damage had been introduced into the subject of State responsibility at a time when the subject was confused with that of injury to individual aliens. The Commission was at present concerned only with the injury which one State could do to another international law and not with the injury that might be caused by a State organ or official to an individual alien.

31. In his view, the concept of economic damage was not strictly relevant to the topic of State responsibility. Mere failure to comply with an international obligation involved an injury to the State to which the obligation was due.

32. Lastly, there were two points of drafting in sub-paragraph (*a*) that he wished to mention. First, the formula "act or omission" was more appropriate in English than "action or omission". Secondly, the words "in virtue of", before "international law", should be replaced by a preposition such as "by" or "under", in order to render better the intended meaning.

33. Mr. SETTE CÂMARA said the Special Rapporteur considered that the wrongful act contained two elements. The first was the subjective element, consisting of conduct which had to be attributed to the State and not to individuals or groups of individuals who were the physical instrument of that conduct. When the Special Rapporteur referred to the State in that context, he meant the State as a subject of international law and not the State as a system of norms. The second was the objective element, which was the fact that, by its conduct, the State had failed to fulfil an international obligation incumbent on it.

34. In his carefully chosen wording, the Special Rapporteur had avoided the traditional terminology, which had sometimes favoured the term "imputability"; in so doing he had deliberately refrained from drawing dangerous analogies with concepts of internal criminal law. Indeed, the notion of imputability in criminal law involved elements such as the intent, or *voluntas sceleris*, which obviously could not be taken into account in international law.

35. The Special Rapporteur had also been very cautious in his drafting when dealing with the objective element: he spoke of "failure to comply with an international obligation" instead of using such broad expressions as "breach of a rule" or "breach of a norm of international law". Responsibility arose from a new legal relationship deriving from an objective situation in which an international obligation had not been fulfilled. That nuance was very important, since the majority of cases in which responsibility would be in question would not involve a breach of a rule or norm of international law, but merely failure to carry out an international obligation. The phraseology used by the Special Rapporteur was supported by practice and was in conformity with the solution which the Commission itself had favoured when it had examined the subject previously. The use of terms such as "breach of an international norm" would unduly restrict the field of application of responsibility and would be contrary to the practice of States.

36. With regard to sub-paragraph (*a*) of article 2, nobody would question that conduct which could be considered a violation of an obligation might be the result of either an act or an omission. As the Special Rapporteur had pointed out in paragraph 55 of his third

report, it could be said that the cases in which the international responsibility of a State had been invoked on the basis of an omission were perhaps more numerous than those based on action taken by a State.

37. With regard to the important problems of determining when and how an act by an individual or group of individuals could be considered an act of the State, the Special Rapporteur contended that the attribution to the State was a legal connecting operation which had nothing in common with a link of natural causality. That point was very important in the development of the whole philosophy of the draft, since State responsibility would depend on some special relationship existing between the individual or group of individuals who were the physical instruments of the conduct, and the State itself.

38. Another important aspect of the text proposed by the Special Rapporteur was the one emphasized in paragraph 60 of his third report (A/CN.4/246), namely, that an individual's conduct could be attributed to the State as an internationally wrongful act only under international law. It was obvious that if responsibility was considered under internal law, an entirely different problem was involved: the case of an individual who was seeking redress from the State under its own system of norms, for a wrong he had suffered and which could be attributed to the State. That would be a purely internal matter not involving relations between one State and another. It was only when the internal remedies were exhausted and when the conduct was attributed to the State as a subject of international law that the problem of international responsibility, as such, arose.

39. In his opinion, the Special Rapporteur had been right in not dealing in the text of the articles, with the problem of the abusive exercise of a right. The doctrine of abuse of rights was far from being established by the practice of States in international decisions. In paragraph 68 of his report, the Special Rapport had adopted a pragmatic approach to the problem. If there was international recognition of the existence of a rule establishing limitations on the use of rights, the abusive exercise of such rights would constitute a violation of an international obligation, namely, the obligation to respect those limitations. In such a case, the objective element of the wrongful act would be duly established. That solution was very much in the spirit of what the Commission itself had decided at its twenty-second session.

40. In paragraph 73 of his report, the Special Rapporteur had discussed at length the question whether "damage" should be included as an element of the wrongful act. He had drawn a distinction between the concept of damage as such, and the necessity of the existence of an external event to trigger the mechanism of international responsibility. He considered insistence on the inclusion of the element of damage to be the result of the habit of thinking in terms of municipal law and of considering only cases in which responsibility arose from injuries to individual aliens. In the view of the Special Rapporteur, the problem of the economic element of damage was fully covered by the rule which established the obligation not to cause injury to aliens. However, there was still some doubt in the Commission about the necessity of considering damage as an essential element of the wrongful act. Mr. Reuter had expressed some misgivings on that point and Mr. Thiam had been very clear in expressing his doubts.[5] He thought the Special Rapporteur should give further thoght to the matter, in order to dispel any remaining hesitation.

41. The problem of responsibility in fact should also be considered from a practical point of view. It was not enough to establish clearly that every wrongful act of the State involved its international responsibility, since in practical terms that principle was the source of a new relationship between one State and another, based always on the concept of injury and reparation for injury. If there was no injury, and no claim for reparation of any kind, responsibility would remain a theoretical principle from which no consequences would follow.

42. When the Special Rapporteur had discarded the idea of including damage as an element of the wrongful act, he had had in mind a very specific notion, that of "economic damage"—concrete injury to individuals which could be measured in material terms. But there was a very wide range of damage that went far beyond the material losses of individuals. Such damage could be suffered by the State and not by an individual. If a Customs Officer opened the diplomatic pouch belonging to a State, for example, that was a wrongful act capable of entailing international responsibility, even if the pouch did not contain any confidential documents or materials. No direct material damage could be alleged, but there was a moral injury to the dignity of the State which was the victim of the wrongful act—an injury to its right to carry on its diplomatic work in a normal way, in addition to the violation of an international duty proper.

43. It was always the element of damage that entitled one State to make a claim against another and demand redress. It had been traditionally recognized by doctrine that in practice an internationally wrongful act, or "an international delinquency", to use the old terminology, gave rise to a right of the wronged State to request from the delinquent State reparation for the wrong done. He hoped that the Special Rapporteur would clarify that point on the basis of a broader concept of damage than the one discussed by him in paragraphs 73 and 74 of his third report.

44. Article 2 provided the Commission with new elements for tackling the problem of responsibility arising from lawful acts of the State. As the discussion had clearly demonstrated, the key to the problem was the fact that the modern practice of States with respect to new technological activities would necessarily lead to rules imposing new obligations on States. Those rules were still in the process of development and, as Mr. Hambro had observed, many activities which had hitherto been considered lawful were now becoming unlawful.

45. Mr. HAMBRO said that he hesitated to encourage a debate on the question of abuse of rights, since he feared that it might be only a "red herring". In his opinion, one of the most interesting parts of the Special Rapporteur's third report was paragraph 60, in which he emphasized the importance of distinguishing between national law

[5] See 1202nd meeting, paras. 36 and 39.

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,