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Summary record of the 1481st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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gate or composite act and a breach by a complex act. The common characteristic of those three classes of breach was the duration of the act in question. It might not, therefore, be necessary to devote a separate article to the *tempus commissi delicti*. It would be enough to supplement the enumeration begun in article 20 by one or two articles dealing with the breach of international obligations by a continuing, composite or complex act. In that way it would be possible to avoid some of the drawbacks, noted by Mr. Reuter (1419th meeting), Mr. Ushakov and Mr. Pinto, that would be inherent in an article dealing specifically with the time of the breach of an international obligation.

28. In conclusion, he thought that the expression "succession of actions or omissions" in the English version of paragraph 5 was a mistranslation of the French "une succession de comportements".

29. Mr. SCHWEBEL fully agreed with the Special Rapporteur that the time of the breach of an international obligation was of particular importance in deciding the amount of reparation to be paid, determining the jurisdiction of an international tribunal with regard to a dispute arising out of such a breach and dealing with questions of the continuity of nationality in the maintenance of international claims. Indeed, he hoped that, later in the draft, an article would be devoted to the rule of continuity in the nationality of claims, which was frequently applied in an unpalatable and inequitable manner and might therefore be an appropriate subject for the progressive development of international law.

30. In paragraph 23 of his report, the Special Rapporteur had referred to the breach of an international obligation resulting not from a single act, but from a "practice" consisting of similar individual acts committed in a number of separate cases. Examples of such acts could, of course, be found, particularly now that the United Nations was concerned about situations revealing a pattern of constant and flagrant violations of human rights and fundamental freedoms. On the whole, however, he thought that treaty prohibitions of a practice rather than of an act were exceptional. For example, the rights embodied in treaties of establishment, friendship, commerce and navigation usually provided guarantees for individuals, and there did not have to be a pattern of violations for the individuals concerned to claim that their rights under the treaty in question had been infringed.

31. Although he had no difficulties with paragraphs 1, 2 and 3 of the article under consideration, he could see the advantage of reversing the order of paragraphs 2 and 3. With regard to paragraph 4, he noted that Mr. Ushakov had said that a breach of an international obligation occurred only at the time of the last of the individual acts constituting the series in conflict with the international obligation, if the discrete acts themselves were not in conflict with that obligation. His own opinion was that, in most cases, the discrete acts would also be in conflict with the international obligation. If, however, in exceptional cases, they were not and only the aggregate act constituted the breach of the international obligation, would it be correct to say that the time of the breach extended over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation? He would be grateful to the Special Rapporteur for a clarification of that point.

32. He confessed to a certain amount of confusion with regard to paragraph 5, for he was not sure that it was consistent with article 22. Paragraph 5 stated that the time of the breach of an international obligation constituted by a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case extended over the entire period between the action or omission which initiated the breach and that which completed it. If that reasoning were transposed to the context of article 22, the logical conclusion would be that the time of the breach was not the time of the exhaustion of local remedies, but rather the entire period between the action or omission which initiated the breach and that which completed it. To take the example of a breach of a treaty obligation, supposing a national of State A claimed that State B had breached an international treaty obligation of which he was the beneficiary and carried his claim to the courts of State B, it could be said that he had exhausted local remedies only when the courts of State B rejected his claim; yet he would probably maintain that the time of the breach of the international obligation that he could invoke, and thus the amount of damages payable to him should be calculated not from the time of the exhaustion of local remedies but from the time of the act or omission by State B constituting the breach. It seemed to him that paragraph 5 in fact supported such a sensible conclusion; but if it did, it might not be consistent with article 22. He would be grateful to the Special Rapporteur for a clarification of that point also.

Gilbert Amado Memorial Lecture

33. The CHAIRMAN announced that the 1978 Gilberto Amado Memorial Lecture would be given by Judge T.O. Elias of the International Court of Justice on 7 June, at 5.30 p.m.

The meeting rose at 1 p.m.

1481st MEETING

Thursday, 18 May 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-

Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Sir Francis Vallat, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/307 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 24 (Time of the breach of an international obligation)[1] (*continued*)

1. Mr. ŠAHOVIĆ said that it was beyond doubt that the Commission must now study the question of the *tempus commissi delicti,* not only because it had put off doing so several times when considering the earlier articles in the draft, but also for practical reasons that had been clearly demonstrated by the Special Rapporteur. Moreover, several members of the Sixth Committee had stressed the need for the Commission to take a decision on the question.

2. To judge from various passages in his report (A/CN.4/307 and Add.1), the Special Rapporteur seemed inclined to consider article 24 as an interpretation clause. In the opinion of Mr. Pinto (1480th meeting), that was indeed how the article should be seen, since it was designed to make possible the practical definition in certain cases of the competence of international tribunals. Personally, he considered that that was only one aspect of the problem, the notion of time being one of the constituent elements of the breach of the international obligation, and therefore of international responsibility. As it stood, article 24 did not stress that point sufficiently. Perhaps an effort should be made to bring out clearly, in the first paragraph of the article, the importance of the time element for the entire section on the objective element of the internationally wrongful act. To that end, emphasis would have to be placed on three main aspects of the problem: the breach of an international obligation, the internationally wrongful act and the duration of the international obligation whose breach, through an internationally wrongful act, engendered international responsibility.

3. In article 24, the Special Rapporteur dealt with the question of time according to the specific character of different types of internationally wrongful acts. He contrasted the notion of the "moment", in paragraphs 1 and 3 of the article, with that of the "period", in paragraphs 2, 4 and 5. It ought to be possible to place at the head of article 24 a general definition of the notion of the time of the breach of an internatinal obligation. Admittedly, such a definition might also be given in the article on the use of terms, but its inclusion in the article under study would be in keeping with the practice of the Commission, which had already given definitions in the body of the draft, notably in article 3.[3]

4. There was a certain formal parallelism between articles 18 and 24, and he wondered what would be the implications for article 24 of paragraph 2 of article 18, which dealt with the case of an act of the State which, at the time when it was performed, had not been in conformity with an international obligation of that State, and had subsequently ceased to be considered an internationally wrongful act. Another matter on which clarification was necessary was that of the links between article 18 and article 21, paragraph 2.

5. With regard to the structure of article 24, the order of paragraphs 2 and 3 would probably have to be reversed. Despite the distinction based on the nature of the obligations which the Special Rapporteur made between the acts referred to in paragraphs 1 and 3, it was the principle of instantaneity that applied in all the cases concerned, and the paragraphs might therefore be combined. As for continuing, aggregate and complex acts, they all entailed the application of the same principle, namely, that of the duration of the breach. In view of the general requirement for contemporaneity between the "force" of an international obligation and any commission of a breach thereof through an aggregate or complex act, it would probably be useful to specify the criteria that should be applied in establishing the existence of such a breach. In one way or another, the notion of time always entered into the establishment of the breach of an international obligation engaging the international responsibility of the State.

6. With regard to the wording of article 24, the fact that there had been no systematic reproduction of the expressions employed in article 18 might be a source of misunderstanding. In paragraphs 2 and 4, it was stated that the time of the breach extended over the entire period during which the act or acts in question remained in conflict with the international obligation; perhaps a reference to that fact should also be added in paragraph 5. Finally, as in other articles, it might be made clear that the acts referred to in the various paragraphs of article 24 were internationally wrongful acts, or at least acts of the State.

7. His comments and reservations notwithstanding, he could accept article 24, which constituted an essential part of the draft.

8. Mr. SUCHARITKUL said that for a lawyer who, like himself, came from a Buddhist country, the time element was of vital importance. According to Buddha, there was nothing permanent in the world: everything changed with the passage of time. The same was true of the rule of law, which existed only in time and could not exist outside it. It followed that the temporal dimension was a constituent element of international law, and therefore of the very notion of the international responsibility of a State. For that

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[1] For text, see 1479th meeting, para. 1.

[2] See 1476th meeting, foot-note 1.

reason, he believed that it was impossible to study the question of State responsibility without examining its temporal aspect.

9. Time could be defined only by reference to a measurable concept of duration.[3] To speak of a "depth of time", in the phrase of Mr. Reuter, cited by the Special Rapporteur,[3] necessarily implied a measurement that could be made only with the help of a straight line, which was itself but the protraction of two points. In the final analysis, what counted were the two instants marking the beginning and the end of the given period. He therefore agreed with the Special Rapporteur that cases in which those two instants coincided, thereby giving rise to an instantaneous act, might be placed in a first category. In such cases, the concept of time was purely academic. All other cases, by contrast, involved a measurement of time. The determination of the time of the breach of an international obligation was important not only from the theoretical but also from the practical point of view. Since time was a constituent element of the breach of an obligation, it was important, particularly for engendering the right of action, to establish precisely the moment at which the breach occurred. The examples given by the Special Rapporteur regarding the competence of international tribunals showed that both the starting point and the finishing point must be taken into account.

10. The clause "although prevention would have been possible" should be retained in paragraph 3 of article, because it marked the difference between the case to which that paragraph referred and the case covered in paragraph 1. Under paragraph 3, it was necessary, for a breach of the international obligation to have occurred, not only that a given event should have taken place but also that prevention of that event should have been possible. It should be noted that the obligation of true diligence on the part of the State persisted even after the occurrence of the event which the State had been required to prevent. An example of what he meant was the case of the occupation of the Embassy of Israel in Thailand by Palestinians. On the very day of the occupation, which had been the Inauguration Day of the Crown Prince of Thailand, the Government had managed to persuade the occupants that their action was inauspicious in view of the feelings expressed by the Thai people in celebrating the occasion, and promptly to ensure their safe conduct to Egypt. In that way, any material damage had been avoided.

11. On the whole, he approved article 24, which could now be referred to the Drafting Committee.

12. Mr. TABIBI agreed with other members of the Commission that article 24 was of great significance and occupied an important place in the draft articles on State responsibility. Its purpose was to provide guidelines for the determination of the time of the breach of an international obligation, and hence for the moment when State responsibility arose. Once the *tempus commissi deliciti* had been determined, it was immaterial whether the act consituting the breach was instantaneous or extended over a period of time. However, since the acts determining breach of an international obligation took different forms, the Special Rapporteur had rightly divided them into five categories corresponding to the five paragraphs of the text under consideration.

13. Although he had no objection to Mr Šahović's suggestion that a new general paragraph should be added at the beginning of the article, he thought it should be left to the Special Rapporteur to take a decision on that matter in the light of the Commission's discussion and of the content of articles 18, 21 and 23.

14. With regard to section 9 of the Special Rapporteur's seventh report, it would have been more useful had it been submitted in condensed form and had it included a broader range of specific examples.

15. Mr. DADZIE noted that the Special Rapporteur had divided the problem of the time of the breach of an international obligation into five categories, which were dealt with in the five paragraphs of article 24. Paragraph 1, which called for no particular comment, stated that the time of a breach of an international obligation constituted by an instantaneous act was represented by the moment when the act occurred.

16. Paragraph 3 contained a similar provision relating to the case of a failure to prevent an event from occurring. Like Mr. Francis (1480th meeting), however, he had some doubts about the need for the words "although prevention would have been possible", used in paragraph 3. He noted that, in the *Laura M. B. Janes et al. (United States of America)* v. *United Mexican States* case, in which the United States had received damages for Mexico's failure for eight years to take steps to arrest the murderer of a United States citizen, the General Claims Commission had stated that:

> At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanour... The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibily have prevented the crime, is that nonpunishment must be deemed to disclose some kind of approval of what has occurred...[4]

Although he found that statement an acceptable basis for the use, in paragraph 3, of the words "although prevention would have been possible", he was not convinced that the words were necessary. The paragraph could probably stand equally well without them, since failure to prevent an event from

[3] See A/CN.4/307 and Add.1, foot-note 33.

[4] United Nations, *Reports of International Arbitral Awards*, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 86 and 87.

occurring occasioned the liability of the State whether prevention were possible or not.

17. In paragraphs 2, 4 and 5, an element of duration had been introduced in the determination of the *tempus commissi delicti*. Despite the convincing arguments offered by the Special Rapporteur, his own opinion was that the interests of the progressive development of international law would be better served if, in each case, the moment of the breach of an international obligation were taken as the time at which a particular act or omission occurred. Under paragraph 2, where the act had a continuing character, the time of the breach could be any moment when the breach actually occurred during the period in which the act subsisted. Under paragraph 4, which referred to an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases, the time of the breach could be the time of the first act, the time of an intermediate act, or the time of the last act constituting the series in conflict with the international obligation. With regard to paragraph 5, which referred to a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case, he suggested that the time of the breach should be that of the last in the succession of actions or omissions. Thus, in all those cases, there would be a moment when the responsibility of the State arose. The question of the duration of the act or omission consitituting the breach and the problem of determining the amount of reparation payable would then be matters to be decided by the competent court or adjudicating body.

18. Mr. QUENTIN-BAXTER said that a sign that a new article probably had its proper place in the set of draft articles on State responsibility was that it caused the Commission to reassess the strength of the structure of the draft articles as a whole. He had seen such a sign at the previous meeting, when many of the questions raised by members of the Commission had related more to the text of previous articles than to that of article 24. Mr. Ushakov had even gone so far as to suggest that article 24 might be more appropriate in a later set of draft articles, dealing with the content of international obligations. In his own view, however, there was no doubt that article 24 belonged in the set of draft articles under consideration.

19. Although the Special Rapporteur had explained the significance of article 24 in terms of a jurisdictional bond, of the continuous nationality of claims and of the determination of the amount of reparation payable, he himself thought that the draft article went still further and concerned the very existence of the breach of the international obligation. Indeed, in considering obligations of a conventional or contractual nature, the same kind of texts used to determine whether a matter was justiciable, or whether a court was competent to deal with a dispute, had to be applied to the question whether there was a breach of an international obligation at all. Thus, in a very fundamental sense, article 24 was a complement to article 18. He considered that the Commission must take the greatest care to achieve complementarity and to avoid conflict and circularity.

20. Like Mr. Ushakov and other members of the Commission, he had been compelled by article 24 to think back to decisions that had already been adopted. For example, at the time the Commission had dealt with articles 20 and 21,[5] Mr. Ushakov had said that obligations of conduct were frequently accompanied by obligations of result. During that discussion, he himself had asked whether it was not necessary to consider those two articles not as watertight divisions, but rather as different aspects of a same subject. The Special Rapporteur had answered that question by saying that the Commission was concerned with the anatomy, the bare bones, of international obligations, not with the many forms they could assume. In fact, any set of circumstances that was likely to become the subject of an international dispute could take a variety of forms. It would therefore be unreasonable to expect article 24, or the articles preceding it, to resolve the many problems that could arise when attempts were made to determine the way in which a particular breach of an international obligation occurred.

21. In the case, for example, of a State that reserved part of the high seas for a certain period of time in order to conduct gunnery exercises, it could immediately be seen that a dispute arising out of damage to a foreign vessel which had entered the test area could be characterized in many ways. For instance, the State's action might be open to challenge on the grounds that it had had no right to reserve an area of the high seas for test purposes, that it had failed to maintain the standard of care due to other users of the sea, that it had failed to give adequate warning, or that it had failed to exercise proper vigilance. Its action could also be characterized as particularly hazardous. Indeed, if the Commission had been right in the way it had expressed the rule embodied in article 23, the action of the State conducting the gunnery exercises could also be regarded as a failure to prevent an event, although prevention would have been possible. There were thus many ways in which the rules now being formulated could be applied to particular situations. Their main purpose, however, was to provide a foundation of correct thinking for the building of future structures that would deal more practically with particular problems.

22. If he was right in thinking that article 24 was a necessary extension of article 18, it must be tested in simple ways. Unlike some members of the Commission, he was of the opinion that paragraphs 1 and 2 of the article belonged together, because they both related to the essential distinction between an act and its effects. He also thought that the Commission should avoid the use of the word "instantaneous", which detracted from the simple and direct message of paragraphs 1 and 2, where it might be enough simply to say that a breach of an international obli-

[5] *Yearbook... 1977*, vol. I, pp. 213 *et seq.*, 1454th-1457th, 1460th and 1461st meetings.

gation occurred when the act constituting it took place and that, if the act had a continuing character, it continued throughout the period of the breach. On that point he agreed with Mr. Sucharitkul that, scientifically and philosophically, it must be assumed that every act had some duration and that there was no such thing as an act that finished at the same moment as it began.

23. In studying paragraph 3 of article 24, he had encountered the same difficulties to which he had referred when the Commission had dealt with article 23. He was very attracted to the view expressed by Sir Francis Vallat (1478th meeting) that the essential need in article 23 was one of meeting a time consideration. Thus, it should be asked whether the simple rules of paragraphs 1 and 2 of article 24 were adequate in all circumstances, or whether the justification for paragraph 3 was that there were certain circumstances in which the jurisdictional bond, or the existence of the breach, which were determined by time considerations, could be measured only by the occurrence of the event, in other words, by the effect of the act, not by the act itself. Normally, a duty of prevention—if it was correct to use such an absolute term—was a duty whose breach constituted a continuing act of omission and which, as such, was amply covered by the basic rules already formulated by the Commission. In certain cases, however, the effect might be the result of an instantaneous act, rather than of an act having a continuing character. For example, if a State caused radioactive fallout that was carried by the winds to another area, where it was detected by scientific equipment, and if later, other scientists detected further harmful consequences of such fallout, could it be said, in terms of justiciability, that in such a case only the moment at which the act causing the damage had occurred should be taken into account? He thought that it was on that kind of question that the Commission must base its view concerning the need for paragraph 3 of article 24.

24. He was not sure that the type of case dealt with in paragraph 4 was as rare as Mr. Schwebel (1480th meeting) had suggested, for the many ways in which a breach of an international obligation could be characterized must be taken into consideration in that paragraph as well. Indeed, in cases in which there was, for example, an obligation not to discriminate against the nationals of a particular State, there might be the greatest difficulty in establishing that a certain standard of conduct had not been maintained even after a number of cases of discrimination had occurred.

25. He noted that paragraph 5 of article 24 referred to a complex act consisting of a succession of actions or omissions "by different organs of the State in respect of the same case", whereas paragraph 5 of article 18 referred to a complex act constituted by actions or omissions "by the same or different organs of the State in respect of the same case". In his opinion, the wording of paragraph 5 of article 18 was preferable, since it took account of the requirement of the exhaustion of local remedies, whether the rehearing of a case by the same tribunal or an appeal against the decision of a lower court to a higher court.

26. Mr. EL-ERIAN said that the Special Rapporteur, in his report, had established beyond doubt that the time of the breach of an international obligation was a matter of practical importance, more particularly in determining the amount of any reparation payable and in determining jurisdiction *ratione temporis*.

27. Article 24 followed smoothly and logically from the preceding articles of the draft. While article 19 drew an important distinction between internationally wrongful acts according to the importance of the norm violated in order to determine their degree of gravity and their characterization as international crimes or international delicts, article 24 differentiated between wrongful acts according to their duration or their repetition in time. No one could fail to notice that the repetition or persistence of a wrongful act could introduce the element of gravity. In internal law, for example, it was not a single act of lending money at interest above the legal rate but a repetition of such acts that constituted the crime of usury. Many examples could be given of crimes for which the punishment was more severe when there was a repetition of the wrongful act. Indeed, it had been pointed out, and rightly, that a Member of the United Nations could be expelled for persistent breaches of its obligations under the Charter. Again, a fine but accurate distinction had been made between an instantaneous act producing continuing effects and an act having a continuing character, in other words, an act which, because it was continued, could be considered as repeated, and thus occasioned different legal consequences. To draw once again on internal law, building a house in violation of zoning regulations was a continuous or continuing contravention until the house was removed. It was very useful to emphasize the difference between those two types of wrongful act, especially when an act having a continuing character fell within the serious category of an international crime. Plainly, the gravity of an act derived not only from the nature but also from the continuing character of the act.

28. Unquestionably, the Special Rapporteur had proved in his report that, for the purpose of determining jurisdiction, a distinction must be made between acts producing continuing effects and acts having a continuing character, and that there were good grounds for such a distinction in international law, as could be seen from the decision of the Permanent Court of International Justice in the *Phosphates in Morocco* case and from the decisions of the European Commission of Human Rights.

29. The articles of the draft, with the exception of articles 18 and 19, were relatively short. Perhaps the Special Rapporteur and the Drafting Committee could consider the possibility of breaking down article 24 into a number of separate articles that would come under a single heading and require only one commentary to cover them all.

30. Mr. CALLE y CALLE wondered whether, in

considering the time element, the Commission was speaking in terms of the duration of the material act or of the duration of the conduct of the State. It should be remembered that there were courses of conduct which became the conduct of the State only after a certain period; at the time at which they occurred—in the case of the conduct of individuals, for example—they were not yet the conduct of the State, but they could constitute the initiation of the breach of the obligation. Consequently, it was possible to speak of the duration of the act, the duration of the conduct and the duration of the breach.

31. The Special Rapporteur had rightly noted, in paragraph 49 of his report (A/CN.4/307 and Add.1), "the scant material of relevance provided by international judicial decisions", and there was little in State practice to indicate what positions might be adopted by governments with regard to the duration of a breach attributed to them. Nor, again, could it be said that the literature, except perhaps that on criminal law, dealt with the matter at all extensively. The Commission would therefore have to call on the Special Rapporteur to look for and include in the commentary a number of examples, even hypothetical examples, to justify the formulation of a norm concerning the duration of the breach of an international obligation.

32. Personally, he found logical justification for article 24 in its consistency with the rest of the draft, and practical justification for it in its handling of the questions of the jurisdiction of international tribunals, the determination of the amount of reparation payable, and the continuity of nationality for the diplomatic maintenance of international claims. Furthermore, the Sixth Committee had already referred to the question of *tempus commissi delicti* and would certainly wish to see an article dealing with that matter included in the draft. Many States would consider it necessary to examine the time problems relating to the validity of the obligation, in other words, the existence of the obligation at the time of the commission of the wrongful act. Article 18 already included a retroactive provision whereby an act ceased to be considered as internationally wrongful if, subsequently, it became compulsory by virtue of a norm of *jus cogens*.

33. In article 24, the Commissions was considering the time element in terms not of the validity of the obligation but of the duration of an internationally wrongful act. Such an act was made up of two elements, since article 3 specified that an internationally wrongful act was conduct consisting of an act or omission attributable to the State and conduct constituting a breach of an international obligation of the State. With regard to conduct, however, it was not appropriate to make a distinction in article 24 between obligations of conduct and obligations of result. As Mr. Ushakov had noted (1480th meeting), all legal rules called for a particular course of conduct, and that course of conduct must produce a particular result. It was the function of every legal norm to guide the conduct of the subject of the norm.

34. At the previous meeting, Mr. Verosta had suggested a change in the order of the articles under consideration. He himself thought that article 24 should retain its existing place in the draft and not precede article 22. Paragraph 3 might well be placed after paragraph 1, for it dealt with failure to prevent the occurrence of an event, and therefore involved the element of instantaneity rather than that of duration. On the other hand, he was somewhat concerned about the use of the term "instantaneous". Sinking a ship by gun-fire might be regarded as an "instantaneous" act, but in fact the ship might take several hours to sink. Perhaps paragraph 1 might be formulated to read:

> "If a breach of an international obligation is constituted by an act which takes place at a single moment in time, the time of the breach is represented by that moment, even if the effects of the act continue subsequently."

In paragraph 3, the phrase "although prevention would have been possible" should be retained, for it related in fact to the time element; the event had to occur during the period of time in which it had been possible for the State to prevent the event from occurring. Finally, in the Spanish version of the article, the word "emanados", in paragraph 5, was not appropriate and should be deleted. The paragraph should follow the formulation of article 18, paragraph 5, which spoke of actions or omissions "by the same or different organs of the State".

35. Sir Francis VALLAT said that, following the Special Rapporteur's completely convincing written and oral presentations, he experienced no difficulties with regard to the concept, or indeed the content, of article 24. Admittedly, there were some points of drafting, but they were inevitable in such a delicate and important matter as the time element. Clearly, the article must be in keeping with the previous articles and, at least as the English text was concerned, paragraphs 4 and 5 should be brought into line with paragraphs 4 and 5 of article 18.

36. The presentation of the article in the Commission's report was of special importance. Three basic questions were involved: the justification for inclusion of the article in the draft, the actual content of the article, and its structure. In his opinion, it would be desirable to make the commentary very digestible, for the subject was by it its very nature somewhat indigestible. In the matter of the justification for the article, it should be remembered that numerous factors were involved in the time element, such as the terms of the treaty in question or the date of the State's accession to independence. Therefore, in illustrating the need to deal with the time element in the draft, the commentary should not give the impression that the examples given in any way constituted an exhaustive list. Similarly, it would be advisable to adopt a selective approach.

37. In the course of the discussion, many references had been made to nationalization, but he doubted whether it was one of the best illustrations for the

purposes of presentation of the Commission's report to the General Assembly. It was a highly controversial subject and not everybody would accept the right to full compensation as being axiomatic. At the same time, it would be a pity if the whole of the argument were based on the *Phosphates in Morocco* case. The Permanent Court of International Justice had considered the time element and the exception *ratione temporis* in the *Mavrommatis Palestine Concessions* case and the *Electricity Company of Sofia and Bulgaria* case, and the International Court of Justice had done the same in the *Interhandel* case and the *Rights of Passage over Indian Territory* case. After all, as the report indicated, the question of the *tempus commissi delicti* really arose only indirectly, for normally the exceptions dealt not with the commission of the breach, but with the date on which the dispute occurred, or the date of the facts or acts concerning the dispute. Reference to the more recent jurisprudence of the Court would help to restore the balance; for the purpose of achieving a rather wider perspective, reference could also be made to arbitral awards, in which the time element was frequently very important.

38. Great care should be taken in defining a single act which constituted a breach. Mr. Calle y Calle had referred to the sinking of a ship by gun-fire. A more obvious example was a case of murder, where death might occur a considerable time after the act had been committed. Indeed, in some cases, a charge of grievous bodily harm might not become a charge of murder until some weeks after the act in question. In that case, it was not the act itself that determined the time, but the date of death. He mentioned that example simply to illustrate the great care that would be required in the entire drafting of article 24.

The meeting rose at 1.10 p.m.

1482nd MEETING

Friday, 19 May 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/307 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 24 (Time of the breach of an international obligation)[1] (*concluded*)

1. Mr. TSURUOKA thought article 24 was in its proper place in the general economy of the draft. However, the debate clearly showed that it dealt with very sensitive questions and that its practical application might prove difficult. In order to be useful, the rule to be established must not be too flexible, because it had to define a precise time or moment; at the same time, however, it must take account of the various possible types of obligations, because the *tempus commissi delicti* varied according to the actual nature of the obligation and according to the circumstances that had provoked the breach. What was needed, therefore, was a rule that was precise, but easy to apply in international practice.

2. Mr. RIPHAGEN wished first to express his admiration for the Special Rapporteur's report and oral introduction, which had brought such clarity to a difficult subject.

3. As he had said in connexion with article 23 (1478th meeting), if the content of an obligation was clear, the question of a breach of the obligation did not present any great problem. The time of the occurrence or period of duration of the breach usually involved straightforward fact-finding, for that moment or period was simply part of the facts of the case. However, the legal relevance of that moment or period for the purposes of the application of rules other than those that established the obligation was quite another matter. Even in respect of the relationship between articles 18[2] and 24 of the draft articles, some members had already referred to article 28 of the Vienna Convention on the Law of Treaties,[3] which made provision for the possible retroactive effect of a treaty obligation. At the same time, it could be claimed that the performance in good faith of a treaty obligation might imply that a party to the treaty remained bound by provisions of the treaty concerning facts or situations existing even after the treaty was no longer in force for the party in question. In other words, article 28 of the Convention provided not only for the retroactive but also for what might be called the "prospective" effect of a treaty.

4. Consequently, the text of draft article 24 should make it clear that the article did not prejudge the possibility that a treaty might be binding on a party "in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party", to use the terminology of article 28 of the Convention on the Law of Treaties, and that it did not prejudge the possibility that a treaty might be binding on a party in relation to any act or fact that took place or any situation that existed after the date of the expiry of the treaty with respect to that party.

5. Article 18, paragraph 2, of the draft expressly provided for the retroactive effect of an international obligation—admittedly, not on the basis of a treaty

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[1] For text, see 1479th meeting, para. 1.

[2] See 1476th meeting, foot-note 1.

[3] See 1478th meeting, foot-note 3.