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Summary record of the 1368th meeting

Topic:
State responsibility

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raise a problem, since the obligation had still been in force at the time when the act had been committed, though it had subsequently terminated. It was tempting to conclude, by analogy with internal criminal law, that the State could not be held responsible when the obligation breached no longer existed. But the Special Rapporteur had clearly shown the difference, in that respect, between international law and internal law, and had rightly affirmed that an act of the State constituted a breach of an international obligation if it had been committed while the obligation was in force.

26. It was also necessary, however, to take into consideration the content of the rule which had voided the obligation. For it was possible to imagine cases in which the international community could not agree that a State should be held responsible for a breach of an international obligation which had subsequently ceased to exist for reasons connected with the vital interests of the international community. It could rightly be maintained that to hold a State responsible for the breach of an obligation which had ceased to exist by reason of the supervention of a new rule of *jus cogens* would in itself be contrary to that new peremptory rule of general international law.

27. The Special Rapporteur had thus been right to take account of the rules of *jus cogens* by providing, in paragraph 2 of article 17, that the responsibility of the State was not engaged when the obligation breached no longer existed by reason of the supervention of a peremptory rule of international law. He did not find the wording of the paragraph entirely satisfactory, however, and thought it could be improved by modelling it on article 71 of the Vienna Convention on the Law of Treaties, entitled "Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law". Paragraph 2 of that article provided that termination of a treaty "releases the parties from any obligation further to perform the treaty" and "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination", and added that "those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law".[9] Consequently, if a State had breached an international obligation before the entry into force of the rule of *jus cogens* which had voided that obligation, and if the injured State had obtained reparation, it was not possible to go back on the arbitral award or judgment which had been rendered.

28. He therefore proposed that paragraph 2 of article 17 should read:

> However, an act of the State ... does not engage its international responsibility if the obligation breached by the State no longer exists by reason of the supervention of a peremptory rule of general international law and if the fact of holding the State responsible is in conflict with that rule.

29. In the third case considered by the Special Rapporteur, the obligation had arisen after the conduct of the State. The Special Rapporteur then envisaged three forms of conduct. In the case of continuing conduct, there was a breach of an obligation if the obligation had been in force for at least part of the duration of the conduct.

30. In the case of composite conduct, the responsibility of the State was entailed if the repetition of the acts composing the conduct had been sufficient, while the obligation was in force, to constitute a practice contrary to that obligation. It might be compared with the case of the "habitual offender" in internal law, which was characterized by the commission of several acts.

31. In the case of complex conduct, the Special Rapporteur had considered that the responsibility of the State was entailed if the obligation had been in force when the conduct began. But it might be thought that the responsibility of the State was also entailed when the obligation arose after the beginning of the conduct, if the organs responsible in the final instance refused reparation for the fault committed by other organs of the State before the obligation arose. It might indeed be considered that that final decision constituted a breach of the obligation, since it was taken by an organ of the State at a time when the obligation was in force.

The meeting rose at 1.5 p.m.

1368th MEETING

Thursday, 13 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

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

ARTICLE 17 (Force of an international obligation)[1] (*continued*)

1. Mr. AGO (Special Rapporteur) said that he had never intended to suggest in paragraph 2 of article 17 that when an international obligation ceased to exist, the wrongful act committed when the obligation was in force ceased retroactively to be wrongful. On the con-

[9] *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. 299.

[1] For text, see 1367th meeting, para. 3.

trary, he had been careful to emphasize that, under international law, the consequences of an act must be determined on the basis of its wrongfulness when the act was performed, and that all the rights acquired by another State through the wrongfulness of an act remained rights of that State even if the obligation no longer existed when the wrongfulness of the act was invoked. Even if an obligation ceased to exist by reason of the supervention of a rule of *jus cogens*, an act previously committed in breach of that obligation did not automatically cease to be wrongful, since the wrongfulness of an act had to be judged on the basis of the law in force when the act was committed. In his view there was only one exception to that rule, namely, the case where the rule of *jus cogens* which terminated the previous obligation made the previously wrongful conduct of the State not only lawful but mandatory. That exception was stated in paragraph 2.

2. As Mr. Ushakov had rightly pointed out at the previous meeting, if a State seized a trawler beyond the limits of its territorial sea but within a limit of 200 miles, at a time when the latter limit had not yet been recognized by international law, it committed a wrongful act and that act would remain wrongful even if the limits of the "patrimonial sea" had later been increased to 200 miles by a rule of international law. After the adoption of that rule, of course, the country in question would be entitled to seize a fishing vessel within a 200-mile limit, but it would certainly not be obliged to do so. Its act would have become lawful but not mandatory.

3. The situation was quite different in the cases already referred to of the slave trade or the supply of arms to a country intending to commit aggression or genocide. In such cases, the confiscation of the vessel and freeing of the slaves, or the refusal to supply arms, had not only become lawful acts; they had become "due". When the British authorities had seized the vessel *Enterprize*, which had had to put into a port in Bermuda, and had freed the slaves found on board, they had performed an act which had been wrongful at the time but had subsequently become conduct that was internationally "due". Consequently, the only exception stipulated to the rule set forth in paragraph 1 was where an act of a State which had been wrongful at the time it was performed had become "proper conduct by virtue of a peremptory rule of international law".

4. Mr. USHAKOV said that, in his opinion, the obligation of the State subsisted, since a rule of law always entailed a right for one State and an obligation for the other.

5. Mr. AGO said that, in the case of the *Enterprize*, the British Government had had the obligation to respect foreign property. However, the conscience of States had since developed in such a way that it had become impossible to regard human beings as the property of a government and a State was under a duty to free the slaves if a ship carrying slaves fell into its hands. When the obligation had simply ceased to exist and the wrongful act had become lawful, but no more, as in the case of the fishing vessels mentioned by Mr. Ushakov, a State which had committed a wrongful act when the obligation existed continued to be responsible when the obligation had ceased. In the case contemplated in paragraph 2, however, the wrongful act had become not only lawful but mandatory, and it was unthinkable that it should any longer entail the responsibility of the State.

6. Mr. KEARNEY said that article 17, particularly in the English version, raised a number of drafting problems. Paragraph 1 embodied a desirable and reasonable rule. The language should be improved, however, and in particular should be brought into closer harmony with that of earlier articles.

7. He had considerable difficulty with the provisions of paragraph 2, difficulties which had if anything been made greater by the discussion between the Special Rapporteur and Mr. Ushakov. The paragraph was couched in terms of a problem arising from a peremptory norm of international law. In that connexion, reference had been made to the proposed 200-mile economic zone at present under discussion in the Third United Nations Conference on the Law of the Sea. As he saw it, if such a zone were to emerge from the work of that Conference, it would at best give rise to a contractual obligation resulting from a deal between a number of countries on how to divide up among themselves certain economic resources of the sea. It was hard to see how a rule of that kind could be elevated to the status of a peremptory norm of international law.

8. The type of case that could involve the application of the provisions of paragraph 2 was more likely to be one where there was an antithesis between two norms of basic importance to the international community and where eventually one of them was given supremacy over the other or achieved supremacy. A situation of that kind could perhaps result from the operation of the norm set forth in Article 1, paragraph 2, of the United Nations Charter regarding "respect for the principle of equal rights and self-determination of peoples". Self-determination was continually being referred to as a basic norm of international law and not infrequently in terms that would make it a peremptory norm. There was first, of course the basic difficulty in defining a "people". Assuming, however, the existence of a people, having as such a basic right to self-determination but scattered over States A, B and C, and the existence also of a movement to bring that people together in a State of their own, and that the movement was being repressed by States A and B but supported by State C, which had closer relations with the people concerned, in that hypothetical example, State C might finally take armed action against States A and B and in effect free the people concerned and let them establish their own State. That action, however, would run counter to a rule which would be regarded by most as a peremptory norm of international law, namely, that of refraining in international relations from the threat or use of force against the territorial integrity or political independence of any State (Article 2, paragraph 4, of the United Nations Charter).

9. As he saw it, in such a situation, there would inevitably be a conflict between those two norms. In due course, one of them might well predominate in such a

way as to rule out the possibility of relying on the principle of self-determination in order to engage in aggressive action against another State. A situation of that kind would then be covered by a provision such as that in paragraph 2 of article 17. The State which had acted in reliance on the rule since prohibited in the particular circumstances might find itself required to pay damages. It seemed to him unlikely, however, that one rule could be made to predominate so completely over the other as to make it desirable to achieve the result stated in paragraph 2 as it stood.

10. Another factor to be considered was the time that would necessarily be required for a rule to be accepted by the world community as a peremptory norm of international law. Such a process would in all probability not take place within such a short period that a rule of customary international law in conflict with it could remain in full force and effect. A considerable time would be required for such a process, and during that time, rules in conflict with the emerging peremptory norm of international law would be steadily losing their force.

11. As he had pointed out, the 200-mile economic zone did not provide a good example of a peremptory norm of international law. The judgment of the International Court of Justice in the *Fisheries Jurisdiction* cases,[2] however, provided a perfect example of what might be called the disintegration of a prior norm as a result of the emergence of a new norm of international law. A careful reader of that judgment was forced to the conclusion that nothing definite could be said on the extent of fisheries jurisdiction unless it was governed by a binding treaty commitment. The judgment of the International Court of Justice had upset the pre-existing position and what had formerly been the traditional rule had disappeared. The same was bound to happen in connexion with the emergence of a peremptory norm that would overcome the right of self-determination.

12. The situations which paragraph 2 attempted to cover, even if they occurred at all, would be far from frequent. Moreover, the provisions embodied in that paragraph were bound to provoke a good deal of discussion and give rise to serious concern. He therefore had considerable doubts regarding the inclusion of paragraph 2 in article 17.

13. As for paragraph 3, he thought that all three situations envisaged in it required consideration, but there were difficulties with respect to each one of them.

14. Subparagraph (*a*), as Mr. Ushakov and other speakers had pointed out, seemed to add little to paragraph 1. His own impression was that, if it did add anything, it was of doubtful accuracy. In the form in which it was drafted, subparagraph (*a*) was ambiguous on one point. It appeared to say that, if the obligation was in force during at least part of the duration of the continuing act, the entire continuing act might possibly be subject to the obligation and be a source of responsibility for the entire time for which the act continued. He did not believe that such an effect would be correct, but the English version of the article at any rate seemed to suggest it. If the intention was to avoid that effect, subparagraph (*a*) of paragraph 3 would constitute merely a different way of expressing the thought in paragraph 1.

15. Subparagraph (*b*) referred to "an act consisting of a series of separate conducts relating to separate situations". The provision would be clearer if the passage were reworded so as to refer to "a series of separate acts making up a course of conduct". The provision which followed seemed somewhat ambiguous, at least in its English version. It seemed to refer to a course of conduct containing a series of acts that were legitimate and a series of acts that were illegitimate, all of them separable, and to say that, because they were all part of the same course of conduct, that entire course was illegitimate and was subject to a régime of responsibility, even though a large part of the course of conduct was perfectly legitimate. No such consequence was perhaps intended but the language used in subparagraph (*b*) suggested that conclusion. On the other hand, that language perhaps meant only that where a course of conduct included wrongful acts which were separable and which had taken place while the obligation was in force, those wrongful acts would give rise to responsibility regardless of the fact that they formed part of a course of conduct which included acts that were lawful. It was difficult to see the exact scope and intent of the provisions of subparagraph (*b*) but if the result contemplated was the second one he had mentioned, the subparagraph was perhaps not necessary. In any case, the intended consequences should be clarified.

16. Subparagraph (*c*) dealt with a complex act but it was difficult to see the effects of that provision. Although the procedure was somewhat different, it brought to mind the *Mavrommatis Concessions* case, which had led to prolonged litigation before the Permanent Court of International Justice.[3] The case had arisen because of the refusal of a British official to take a certain action which was incumbent upon him. Mavrommatis had applied for a review of that decision by a higher official but the delay had resulted in the withdrawal by the bankers' consortium of the financing arranged by Mavrommatis to build a dam. The lower decision had in due course been reversed by the higher official but the resulting collapse of the financing could not be reversed. It would seem that, under the rule set forth in subparagraph (*c*), a person in Mavrommatis's position would be entitled to get paid because, when he had originally been refused, there had been an obligation on the United Kingdom. If he had construed the provision correctly as covering cases of that kind, it seemed to him a reasonable rule.

17. Article 17 necessarily had a place in the draft and some of the ramifications dealt with in it were useful, but much of the wording required rephrasing in order to make it clearer.

18. Mr. SETTE CÂMARA said that article 17 appeared very complicated at first sight but the Special Rappor-

[2] *I.C.J. Reports 1974*, pp. 3 and 175.

[3] *P.C.I.J.*, Series C, No. 5, vol. I; No. 7, vol. II; No. 13 (III).

teur's commentaries and introductory statement had clarified its meaning.

19. The article embodied in fact a single basic principle, namely, that an act of the State contrary to an international obligation constituted a breach if committed at a time when the obligation was in force. The crucial point was the validity of the obligation at the time when the act was committed. That proposition emerged from all the complex situations of intertemporal international law envisaged in the article. In other words, the provisions of the article confirmed the propositions embodied in paragraphs 1 and 2 (*f*) of the resolution on "The Intertemporal Problem in Public International Law" adopted by the Institute of International Law in 1975 and quoted by the Special Rapporteur in his fifth report (A/CN.4/291 and Add.1-2, para. 60). In all the intricate situations arising from the various applications of the intertemporal law, the principle was that all facts must be assessed in the light of the rules of law contemporaneous with it. That principle was illustrated by the Special Rapporteur by the example of the different awards delivered in the *Enterprize* and *Lawrence* slave trading cases by J. Bates, umpire of the United States-Great Britain Mixed Commission set up under the Convention of 8 February 1853, and more recently, in 1937, by the arbitrator in the *Lisman* case and by the International Court of Justice in its judgment of 2 December 1963 in the *Northern Cameroons* case (*ibid.*, paras. 45-47). The inductive method adopted by the Special Rapporteur clearly demonstrated that the principle set out in article 17 had always been respected as the basic solution of every situation of intertemporal law.

20. The single exception to that rule was the case envisaged in paragraph 2 of the article. Incidentally, the wording of that paragraph, particularly in the English version, did not adequately reflect the Special Rapporteur's intention, which was to refer to an act which had become compulsory conduct by virtue of a rule of *jus cogens*, and not to an act which had merely become "proper conduct". The problem was not simply one of translation, although the French version (*comportement dû*) was closer to the intended meaning. Great care was needed, as Mr. Yasseen had urged, in dealing with the retroactive application of *jus cogens*, and he fully shared the view that any such retroactive application should be made subject to the limitations set forth in article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law) of the Vienna Convention on the Law of Treaties.[4] That remark applied with even greater force to article 18 of the Special Rapporteur's draft, which dealt with international crimes, in respect of which retroactivity would be very dangerous; in fact, it would conflict with the principle of *nullum crimen sine lege*, which could also be considered as a rule of *jus cogens*. Moreover, he shared Mr. Kearney's view that only in very rare cases would a breach of an international obligation become required conduct under a rule of *jus cogens*. For that reason it would seem wiser not to deal with such rare cases in article 17 since a provision of that kind was bound to give rise to controversy.

21. That being said, he wished to draw attention to a few points of drafting, or possibly translation. In the first place, the rather awkward title "Force of an international obligation" should be changed so as to indicate that the article dealt with the question whether an obligation was valid or not. Similarly, the reference in paragraph 1 to "the State implicated" (*mis en cause*) stood in need of improvement. The wording of paragraphs 2 and 3 would also have to be carefully reviewed. In particular, he agreed with Mr. Kearney that the provision in paragraph 3 (*b*) related to conduct consisting of a series of separate acts and not to "an act consisting of a series of separate conducts".

22. He fully supported the basic principle stated in the Special Rapporteur's article 17 and suggested that the article be referred to the Drafting Committee.

23. Mr. HAMBRO said that he was fully convinced by the arguments advanced by the Special Rapporteur in support of the general rule set out in article 17—arguments that were based on jurisprudence, practice and the doctrine. He simply wished to add a further element which strengthened those arguments and that was paragraph 53 of the advisory opinion of the International Court of Justice, of 21 June 1971, in the *Legal consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) case, where it was stated:

> Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary; [5]

and that consequently, viewing the institutions of 1919, the Court must take into consideration in its interpretation "the subsequent development of law, through the Charter of the United Nations and by way of customary law".[6] In addition, in paragraph 94 of the same opinion, the Court declared that

> The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach ... may in many respects be considered as a codification of existing customary law on the subject.[7]

24. The very pertinent remarks of Mr. Kearney and Mr. Yasseen demonstrated the complexity of the Commission's task as far as *jus cogens* was concerned. The Special Rapporteur had rightly said that it was impossible to go into details concerning the content of *jus cogens*.

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[4] For the text of the Convention, 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. 289.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.*

[6] *Ibid.*

[7] *Ibid.*, p. 47.

However, the fact that a problem was difficult and complex did not mean that it should be avoided. On the contrary, that was all the more reason for trying to solve it, particularly since the question of the content of *jus cogens* might have important consequences with regard to the wrongfulness of an act. Mr. Ushakov had illuminated the problem by his remark that, even if the Conference on the Law of the Sea fixed the limits of the economic zone at 200 miles, that new rule would in no way detract from the wrongfulness of the act committed by a State which had seized a vessel in that zone before the adoption of the rule. But he (Mr. Hambro) drew a different conclusion from that of Mr. Ushakov. As the Special Rapporteur had pointed out, the essential point in that connexion was that the 200-mile rule would not be a peremptory rule; it would not oblige States to adopt the 200-mile limit, but would simply entitle them to do so. The act committed by the State before the adoption of that rule would therefore remain wrongful. Paragraph 2 of article 17, on the other hand, contemplated the emergence of a peremptory rule of international law which required States to adopt a particular conduct. That must be explained very clearly in the commentary, which must also point out that the paragraph represented a progressive development of international law. Unlike Mr. Kearney and Mr. Sette Câmara, therefore, he considered the rule laid down in paragraph 2 to be necessary.

25. Mr. USTOR said that, like other speakers, he supported the ideas set out by the Special Rapporteur in article 17. He only wished to try to simplify the expression of those ideas.

26. The main issue for discussion was the case dealt with in paragraph 2. The rule stated in that paragraph was clearly based on the nineteenth century cases relating to the slave trade. Article 1 of the draft on State responsibility adopted by the Commission in 1973 stated that "Every internationally wrongful act of a State entails the international responsibility of that State".[8] That meant that the international responsibility of the State was entailed at the moment when the State concerned had committed an internationally wrongful act. It was therefore not altogether correct to say in paragraph 2 of article 17 that an act which constituted a breach at the time of its commission ceased to be an internationally wrongful act as a result of an event which had taken place later. Subsequent events did not alter the fact that, at the moment of the breach, the act had been wrongful and that the State concerned had engaged its international responsibility. The intention in paragraph 2 was no doubt to state that a tribunal adjudicating upon a case of the kind envisaged in that paragraph would take into account changes which had occurred in the law between the time of commission of the breach and the time of rendering the award. If that was the case, the text of paragraph 2 would have to be redrafted.

27. Nor was he altogether satisfied with the drafting of paragraph 1. The statement that a certain act constituted a breach of an international obligation if performed when the obligation was "in force" for the State implicated seemed to imply that an international obligation could exist and yet not be in force. As he saw it, if an international obligation existed, it was necessarily in force; if it was not in force, it ceased to be an international obligation. The basic rule in paragraph 1 was that stated by Max Huber in his award in the *Island of Palmas* case, referred to by the Special Rapporteur in his commentary (A/CN.4/291 and Add.1-2, paras. 40 and 44). The purpose of the paragraph was to state that a breach of an international obligation entailed the international responsibility of the State concerned immediately, in virtue of the law in force at the time.

28. In the case envisaged in paragraph 2, the same basic rule applied: the State concerned engaged its responsibility at the very moment of performing the act which constituted the breach. In appropriate cases, however, the competent court or tribunal could take into consideration changes and new developments in the law. The results could be quite extraordinary, as shown by the illustrations given by the Special Rapporteur. His doubts regarding the desirability of including paragraph 2 had not been altogether dispelled by the explanations given by the Special Rapporteur in reply to the point raised by Mr. Ushakov. If the paragraph was to be retained, more cautious wording was required. As it stood, it appeared to envisage the possibility of a new category of legal rules emerging, within the category of rules of *jus cogens*, which would peremptorily compel a State to adopt conduct which previously constituted a breach of an international obligation.

29. As for paragraph 3, subparagraphs (*a*) and (*b*) followed from the proposition which he had just put forward that every international obligation which was in existence was necessarily in force. The only question which arose in the cases envisaged in those subparagraphs was whether the international obligation existed at the time when the act had been committed; in the absence of an international obligation, there was of course no international responsibility.

30. Subparagraph (*c*) dealt with the case of an initial act which was subsequently confirmed or annulled by the organ of the State concerned. If the initial act was annulled, no violation of international law could be said to have been committed. There could, however, be exceptional cases in which the delay in handling the initial act would result in injury and even be tantamount to a denial of justice.

31. Mr. AGO (Special Rapporteur) said he would be grateful if members of the Commission would preferably base their comments on the French version of the article, which was the original version.

32. Mr. ŠAHOVIĆ said that he approved the basic rule stated in paragraph 1 of article 17. That rule concerned the simultaneity of the existence of an international obligation and the performance of an act of the State contrary to what was required by the obligation. It was an important rule, not only because it made it possible to establish the existence of an internationally wrongful act, but also because it was a source of legal

[8] *Yearbook... 1975*, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B.

certainty, in that States could foresee the legal consequences of their actions and omissions. The Special Rapporteur had rightly constructed article 17 from such well-established principles of international law as the principle of the temporal coincidence of the act of the State with the obligation breached by that act and the principle of non-retroactivity.

33. In view of the development of international law in recent years and the need to take account of the international legal order recognized by States as a whole, there should be a proviso excluding the application of the general principle in the case where a peremptory rule of international law transformed into required conduct an act which, at the time it was performed, had to be considered as a breach of an international obligation. He therefore approved the content of paragraph 2, particularly since the Special Rapporteur, at the present meeting, had said that he had not envisaged all the cases where *jus cogens* operated, but only those in which *jus cogens* made it mandatory to perform an act of the same kind as the act which, at the time it was performed, had been considered as wrongful. However, he wondered whether the Special Rapporteur should not have mentioned, in paragraph 2, the general exception represented by the conclusion by interested States of a special convention derogating from the basic principle stated in paragraph 1.

34. Paragraph 3 made provision for three categories of act whose performance continued in time. It showed that acts were not always as simple as might be imagined from looking at the general principle. Nevertheless, the paragraph might not be indispensable, since the Commission would have to consider later the distinctions to be drawn between instantaneous acts and continuing acts, simple acts and complex acts, and single acts and composite acts, as the Special Rapporteur had pointed out in a foot-note to his report (A/CN.4/291 and Add.1-2, foot-note 101). It might therefore be unnecessary to go into details regarding those distinctions in article 17.

35. Lastly, he would point out that the exception provided for in paragraph 2 concerned not only the general rule laid down in paragraph 1 but also the different cases envisaged in paragraph 3. It might therefore be wise to reverse the order of paragraphs 2 and 3.

Mr. Reuter, first Vice-Chairman, took the Chair.

36. Mr. TAMMES said that reading article 17 gave the impression that the Commission had already started to distinguish between international obligations according to their content, for an exception to the classic and fundamental rule of *temporis delicti*, embodied in paragraph 1, had been made on the basis of a hierarchy of norms. An act which led to condemnation might eventually constitute compulsory conduct because of a change in the moral climate—something which, not long ago, would have been considered revolutionary. Since there was only one practical case to test the soundness of that concept, the inductive method would be of little help to the Commission. Yet the Special Rapporteur had courageously drawn the right conclusions and reversed those reached by Umpire Bates in awards delivered more than a century earlier (*ibid.*, para. 45).

37. However, as other speakers had pointed out, the case in question, relating to the slave trade, might be *sui generis* and it would be prudent not to generalize from one case. In the first half of the nineteenth century, or even earlier, condemnation of slavery had perhaps existed as a kind of "dormant" obligation. A French author had referred to the self-evident truth, stated in the American Declaration of Independence, that all men are created equal. The implications of that statement, although clear to some at the time, had not been generally and fully understood until 90 years later. That was, perhaps, an historical illustration of a "dormant" obligation. A similar observation could be made regarding the Special Rapporteur's example of an international agreement to supply weapons for the purpose of genocide. No doubt, the fulfilment of such an agreement would have been questioned and the obligation declared null and void long before the Convention on the Prevention and Punishment of the Crime of Genocide came into existence.

38. Nevertheless, he had more hesitation over other examples which had been mentioned. In the seal-hunting case, if the seizure and confiscation of the schooner *James Hamilton Lewis* (*ibid.*, para. 46) outside territorial waters had become permissible, not by virtue of a subsequent treaty but because of a change in the general attitude towards the human environment which called for the conservation of irreplaceable species—as compared to species which constituted economic goods—he very much doubted whether the Commission would be prepared to state that such a sudden and unexpected change in man's respect for his environment would affect the application of the rules of international law in the same way as a change in humanitarian attitudes. Nevertheless, it had been claimed, and recommended, that nature's irreplaceable resources should be protected by peremptory rules of international law.

39. The time had come, in the interest of legal certainty, to be more specific in dealing with test cases and in determining the hierarchy of international obligations. The whole problem had become rather confusing and the provision contained in paragraph 2 touched on much wider problems than might have been expected, seeing that it formed an exception. In general, he agreed with the three situations differentiated in paragraph 3, but the drafting of that paragraph could be discussed at a later stage.

40. Mr. TABIBI said that article 16, concerning the source of an international obligation, should indeed be complemented by article 17, which dealt with the force, time and circumstances of an international obligation—facts that were essential in pinpointing the obligation and its breach. The rule set out in article 17 might seem complex but it considered two situations: first, the time factor, the time when the breach of an existing obligation occurred; secondly, the question which rule of international law was applicable in order to remedy the breach of the obligation.

41. Some rules of international law, for example those of humanitarian law, were a part of life and seldom changed. Some were rules of *jus cogens*, from which no

derogation was permissible. But some rules evolved according to the needs of society and it was for precisely that reason that the Commission should be careful in its phrasing of article 17. The Special Rapporteur had referred to the *Island of Palmas* case, in which the arbitrator, Max Huber, had concluded that the rules governing the acquisition of territories which had been *res nullius* had changed and had been replaced by the concepts of *res publica* and *res communis*. Clearly, the rules had evolved because of the needs of society. The role of judge and arbitrator had also become important, especially when the rule was not clear and cases had to be settled by examining all the various elements involved.

42. The basic principle underlying article 17 was that the State should be held to have incurred international responsibility if it adopted conduct different from that required by an international obligation incumbent on it at the time such conduct took place. Paragraph 1 was acceptable, but paragraph 2 called for further reflection and clarification. Similarly, paragraph 3 (*a*) was acceptable because it was an application of the rule stated in paragraph 1, but, like paragraph 3 (*c*), it needed redrafting in the light of the comments made in the course of the discussion.

43. Mr. REUTER said that the complexity of the questions dealt with in article 17 was bound to create drafting and translation problems. With regard to the title, it should indicate that the article dealt with intertemporal problems.

44. Although he understood the doubts expressed by some members of the Commission, he thought that paragraph 2 should be retained, for the reasons stated by Mr. Hambro. He personally was not convinced of the existence of a *jus cogens*; in any case, the theory of *jus cogens* was still at the embryonic stage. If the Commission accepted the theory, it would have to accept all its logical consequences, and paragraph 2 would then be necessary. But it should surely be stated that the only case envisaged by the Commission was the case where *jus cogens* imposed certain conduct, and not the case where it conferred a faculty. A rule of international law was a rule of *jus cogens* if a State could not repudiate it. If there were an anti-imperialist rule of *jus cogens* forbidding States from waiving their sovereignty in certain circumstances, for example by agreeing to be subject to a protectorate, that rule would not be the kind of peremptory rule envisaged by the Special Rapporteur in paragraph 2.

45. The distinction between composite acts and complex acts, dealt with in subparagraphs (*b*) and (*c*) of paragraph 3 respectively, was a subtle one and merited more extensive treatment in the Special Rapporteur's report. Perhaps the Special Rapporteur should have done more than simply mention in a foot-note the course he had given at the Academy of International Law at The Hague in 1939 (A/CN.4/291 and Add.1-2, foot-notes 45 and 105).

46. It might be possible to merge subparagraphs (*b*) and (*c*) in a single provision to the effect that the acts of which a wrong might be composed would have to have been performed while the obligation was in force. He wondered whether the case contemplated in subparagraph (*c*) was really different. If the first act was already wrongful, it was sufficient that it had taken place while the obligation was in force; that was simply an application of the general rule. On the other hand, if the Commission wished to distinguish the very special case in which the first act was lawful and had to be confirmed by a second act for the State's responsibility to be entailed, it would have to set that case forth very clearly, especially if it was to be linked with the rule of the exhaustion of local remedies. More detailed explanations on that point would have to be given in the commentary.

The meeting rose at 12.55 p.m.

1369th MEETING

Friday, 14 May 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Twelfth session of the Seminar on International Law

1. The CHAIRMAN invited Mr. Raton, the Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

2. Mr. RATON (Secretariat) said he wished first to thank Mr. Tabibi, the then Chairman of the Commission, for having so admirably defended the interests of the Seminar on International Law at the thirtieth session of the General Assembly. The twelfth session of the Seminar would take place from 17 May to 4 June 1976. Several members of the Commission, as well as Mr. Pilloud, of the International Committee of the Red Cross, had kindly agreed to give lectures. The Seminar would have 26 participants chosen by the Selection Committee in accordance with the principle of the broadest possible geographical representation. The statistics for 1965-1975 showed that a number of countries had never nominated candidates for the Seminar, and he hoped they would be encouraged to do so.

3. Thanks to the generosity of Denmark, Norway, Sweden, the Federal Republic of Germany, the Netherlands and Finland, whose contributions for 1976 amounted to $15,710, it had been possible to award 14 full fellowships and two fellowships confined to subsistence at Geneva. Although some of those contributions had been increased from their level of earlier years, two or three more States would have needed to make a contribution of $2,000-2,500 for all the qualified candidates to be able to participate in the Seminar. At the thirtieth session of the General Assembly, the representative of Sweden in the Sixth Committee, sup-