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Summary record of the 1369th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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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had concluded that the rules governing the acquisition of territories which had been *res nullius* had changed and had been replaced by the concepts of *res publica* and *res communis*.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-

ported by Mr. Tabibi, had suggested that the regular budget of the United Nations should include an appropriation for the award of fellowships for the Seminar. [1] That was an interesting suggestion, but it could have far-reaching implications. So far, the Seminar had been organized on a more or less informal basis, which gave it a certain flexibility and kept costs to a minimum. If the Seminar were institutionalized and its secretariat, for example, substantially enlarged, there was a danger that it might become too rigid a structure. Some solution must be found for the future, however, because it was only through the co-operation and devotion of members of the Commission that the Seminar had been able to continue until now.

4. The publication entitled *The Work of the International Law Commission*,[2] which was an essential tool for Seminar participants, was nearly out of print. He hoped that a revised edition would appear very soon.

5. The date of the Gilberto Amado Memorial Lecture would be 3 June 1976 and it would be given by Sir Humphrey Waldock.

6. Mr. TABIBI said that the Seminar on International Law provided extremely valuable assistance to young jurists, particularly those from the developing countries. In some ways, it could even be said that such assistance, in the excellent programmes arranged by Mr. Raton, was more important than technical and economic assistance. That was why for many years he had tried to secure financing for the Seminar by means of a substantial appropriation in the regular budget of the United Nations. In 1975, members of the Sixth Committee had expressed considerable support for the Seminar, and the Swedish representative had suggested that, in a resolution, the Sixth Committee should raise the question of including the cost of the Seminar in the regular budget. At the next session of the General Assembly, the Chairman might endeavour to gain support for a proposal of that type, for it was not possible to carry out such a useful and beneficial programme solely on the basis of limited voluntary funds. A fresh effort was required from the wealthier nations and he urged the members of the Commission, in the interests of international law, to enlist the support of their Governments.

7. Mr. USHAKOV suggested that the question be discussed by the enlarged Bureau.

8. The CHAIRMAN said that it would certainly be helpful if the question were first discussed by the enlarged Bureau.

9. The publication entitled *The Work of the International Law Commission* was truly indispensable. The most recent edition had appeared in 1973, and he hoped that the Commission would authorize him to express to the Secretariat its wish that the publication should be not simply reprinted but revised so as to include a number of recently adopted conventions which were based on the work of the Commission.

10. He would like to express the Commission's appreciation of the efforts of the outgoing Chairman and of Mr. Raton and his assistant.

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) [3] (*continued*)

11. Sir Francis VALLAT said that the principle set out in paragraph 1 of the draft article was clearly stated, and the three cases enumerated in paragraph 3, assuming for the moment that they were indeed three different cases, were examples of the particular categories of conduct that might have to be identified in order to elucidate that principle.

12. As Mr. Šahović had suggested,[4] it might be better to place paragraph 2 at the end of the article, in order to make it clearer that it formed an exception or quasi-exception to the general principle, whatever the nature of the conduct. He still had some doubts about paragraph 2, however, for its inclusion might mean that the Commission was moving into the field of the discharge of an obligation rather than application of the temporal element in the question of responsibility. The breach of an obligation might give rise to the responsibility of the State and the responsibility might give rise to a further obligation, in most cases an obligation to make reparation. Subsequently, the law might change in the way contemplated by the Special Rapporteur and, as a result, the obligation to make reparation would be discharged. He therefore felt some hesitation as to the advisability of including paragraph 2 in article 17. The matter should be considered by the Drafting Committee, which could prepare a text, based on paragraph 2, for inclusion in the draft article for submission to Governments. Later, in the light of the comments of Governments, it would be possible to consider whether or not the paragraph should be retained. For the time being he was of the opinion that, despite any doubts concerning the underlying philosophy and the *raison d'être* of the paragraph, it should remain within the ambit of the Commission's work on article 17.

13. The title of the article should be changed and an attempt should be made to express the temporal element, which was the essence of the article. Again, the article itself was drafted in terms of the act of the State and some adjustment might be needed to the English version in order to reflect more clearly the way the ideas were expressed in the French. It might be better to follow the plan of article 3, which divided consideration of an internationally wrongful act of a State into two parts, namely, conduct consisting of an action or omission

[1] See *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1545th meeting, para. 33.

[2] United Nations publication, Sales No. E.72.I.17.

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

[4] 1368th meeting, para. 35.

attributable to the State under international law, and conduct which constituted a breach of an international obligation of the State. In that way, article 17 would be drafted in terms of conduct which constituted a breach of an obligation of the State and could then move on to speak of actions or omissions, if the aim was to discuss particular cases. Such a procedure would be more in keeping with the whole scheme of the draft, for matters covered by article 3 (*a*) had been dealt with in chapter II and, in chapter III, the Commission was, in effect, now considering article 3 (*b*).

14. With regard to paragraph 1, he preferred to speak simply of an international obligation and not to qualify it by any such word as "specific".

15. On a literal reading, paragraph 3 (*c*), which stated that an act constituted "a breach of the obligation in question if that obligation was in force when the process of carrying out the act of the State began", raised considerable difficulties. For example, an immigration regulation might provide for an initial screening by an immigration officer and, if the officer decided not to admit an immigrant, for automatic reference to a higher adjudicator, without any need for an appeal by the individual concerned. It would be extremely harsh to aver that the State incurred responsibility as from the provisional decision by the immigration officer. To his mind, the act of the State occurred at the time of the decision of the adjudicator or appeal tribunal. Again, the paragraph would be unacceptable in the case of legislation. Laws passed by parliaments came into force on approval by the Head of State, but the legislative process often started much earlier, in other words, when the laws were submitted to parliament. Consequently, paragraph 3 (*c*) might call for more than mere drafting changes.

16. Mr. AGO (Special Rapporteur) said that he wished to clarify the meaning of paragraph 3 (*c*). In the case of a complex act, international responsibility could only take effect at the end of the process of carrying out the act, in other words at the point when it was definitely established that the result which the international obligation was intended to achieve could not be attained. As long as there was a possibility, within the State, of remedying the breach by the first organ which had acted, the internationally wrongful act, though initiated, was not complete. It was, however, obvious that, for it to be possible for the act to be initiated, the obligation must have been in force at the time when the process of carrying out the complex act began.

17. Mr. MARTÍNEZ MORENO said that article 17 was undoubtedly complex and difficult, but it was apparent from the discussion that paragraph 1 clearly stated a general rule and did not give rise to any problems of substance. But the drafting could be improved and, in his opinion, the Special Rapporteur had used a better formulation in his report when he had said that there was "a breach of a specific international obligation by a State if that obligation was in force for the State at the time when it adopted conduct contrary to that required by the obligation" (A/CN.4/291 and Add.1-2, para. 61). The Special Rapporteur had explained that the general rule could be modified by the terms of a treaty. Unlike the Special Rapporteur, however, he considered that, since the Commission was endeavouring to prepare a comprehensive text, it would be advisable to incorporate a reference to the possibility of establishing an exception to that general rule by treaty.

18. Paragraph 2 of the article should be retained. In internal law, there were two exceptions to the principle of the non-retroactive character of laws: first, in criminal law, when an exception was favourable to the accused, and secondly, as provided in the legislation of a number of Latin American countries, in the sphere of public order. Admittedly, the latter exception had sometimes led to abuse, but it did constitute an exception and, by analogy, the supreme notion of public order could also exist in international law. Consequently, it should be stated that *jus cogens* formed an exception.

19. The Commission might also consider the possible existence of further exceptions which did not relate to *jus cogens*. For instance, in the nineteenth century, El Salvador had signed a number of commercial treaties, which did not contain the now common stipulation, or exception, that third countries were not entitled to the national or preferential treatment accorded to members of an economic community, common market or customs union. When the agreements establishing the Central American Common Market were being signed, some countries had at least hinted that, since the treaties concluded in the nineteenth century had not contained any exception, they should continue to enjoy the preferential treatment granted to third States, in other words, to Central American countries, which enjoyed a privileged position. Evidently, some interests were so great that a country might not fulfil an obligation to grant special treatment to another State for the more urgent reason that it wished to form part of a common market. While the example might not be entirely valid, it was worth consideration as yet another exception, and not one of *jus cogens*. In paragraph 2, the words "proper conduct" might appropriately be replaced by the words "unavoidable obligation" (*obligación ineludible*).

20. The situations described in paragraph 3 were perfectly clear; the necessary drafting changes could be made on second reading, in the light of the views expressed in the Sixth Committee of the General Assembly. The Special Rapporteur had reached his conclusions by the inductive method and, if he could provide more examples and further clarification, he would be making a truly constructive contribution to the development of international law.

21. Mr. QUENTIN-BAXTER said that the subject now being considered, particularly the principle of non-retroactivity, aroused such strong reactions that an effort of will was required to put aside preconceptions and consider from the available evidence whether the principle was vindicated in all cases. In the circumstances, it was admirable that the Special Rapporteur had been able to follow his inductive method. Yet, if the results afforded an assurance that reason and instinct were correct, the Commission was also entitled to attach weight to the more immediate feeling that retroactivity in itself

was a wrong, something to be avoided, and something that was quite contrary to accepted practice for the settlement of international disputes. In the field of responsibility of the individual for acts of war, however, it would be possible to find another type of vindication. Without exception, tribunals for war crimes had found it necessary and natural to decide whether the terms under which they operated were vindicated by the existing state of international law so that the judges could pursue their task in good conscience.

22. He sympathized with Mr. Ustor's view[5] on the question whether an obligation could exist at all if it was not in force. Everyone was familiar with the notion of treaties which existed in a kind of limbo and imposed no obligations, perhaps because of an insufficient number of ratifications or because a stated period of time had to elapse before they came into force. In current thinking, that notion was entirely acceptable and necessary. However, the whole point was that the treaties were not in force precisely because no obligation was created, and he wondered whether obligations could be regarded in the same way as treaties.

23. The Commission was now solely concerned with the temporal dimension of an obligation; yet an obligation also had a spatial dimension, possibly extending to the whole community of nations or possibly only to the nations harmed by a particular course of conduct. But the temporal and the spatial dimensions continually intersected. For example, a State's obligation towards eight rather than nine States was spatial, but a temporal element might be involved inasmuch as the ninth State had either not acceded to, or had denounced, the treaty in question. Thus, an obligation existed in space and in time and, in the absence of one of those dimensions, it was not possible to speak of the existence of the obligation.

24. With regard to the central problem, which was paragraph 2 of the article, the precedent concerning the slave trade cited by the Special Rapporteur[6] had to be recognized and dealt with on its merits. In doing so, however, the Commission might be qualifying the notion that an obligation was never retroactive. The exception set out in paragraph 2 extended only to peremptory norms, those special and so far elusive cases in international law in which there was no right of derogation. But even admitting the narrowness of the exception, he shared the general anxiety lest any exception whatsoever to the principle of the non-retroactivity of the law be regarded as challenging the very principle itself.

25. A further problem was the doubt whether the rule contained in paragraph 2 necessarily applied in all cases of *jus cogens*. It manifestly applied in the case of the slave trade. It was also easy to suggest preposterous hypothetical cases—for example, an attempt to seek satisfaction for failure to comply with an ancient secret treaty compelling the parties to make war on an innocent third State. But he wondered whether all possible cases of *jus cogens* had been covered. Mr. Tammes had referred to the human environment,[7] where new rules might well emerge having the character of *jus cogens* but attaching no kind of moral stigma to different standards applied in the past, when the world's natural resources had not declined drastically and there had been enough for all. It had been suggested that peremptory norms would be created so slowly that it was not necessary to consider a possible conflict between the old and the new. That had certainly been true with respect to international legislation on the slave trade. Nowadays, on the other hand, in a period of international organization and of immense pressure on a shrinking world, there was every reason to suppose that peremptory norms, dealing with situations of emergency, would be established much more rapidly.

26. The real nature of the situation was that, when a statute covering a particular offence was repealed, it was not simply that the offence disappeared from the calendar as from the time of repeal and not earlier, but that the jurisdiction to try and punish the offence also ceased to exist. The Special Rapporteur had drawn attention to precisely that principle in referring to the Convention between Switzerland and Italy concerning social insurance (A/CN.4/291 and Add.1-2, para. 58). Obviously, if one of the parties failed to give effect to the convention before it entered into force, no wrong was committed. But if, after its entry into force, one of the parties failed to ensure that the benefits were applied retroactively, that would constitute a wrongful act.

27. The Commission would do well to bear in mind at all times the distinction between time past and time present and to confront the problem in paragraph 2 in those terms. In his view, the principle was not one of retroactivity at all. Because of changes in the law, a situation might arise where the mere act of setting up a tribunal and bringing a case before it could contradict a norm that was in force when the tribunal was set up. If that was a valid approach, the conclusion was that the issue dealt with in paragraph 2 need not necessarily be stated as a temporal problem. Such a conclusion, assuming it to be possible, would afford certain advantages—for example, the possibility of deferring, at least temporarily, consideration of the problem of further defining the nature of *jus cogens*. It would also be advantageous in relation to the structure of the draft, for paragraph 2 of article 16 stated that it was the substance and not the form which determined the régime of responsibility, in other words, not only the kinds of consequences of the wrongful act but also the relationships between States. Nevertheless, the actual structure of the draft articles could be more readily shaped after the Commission had discussed article 18. While he was not sure that the exception expressed in paragraph 2 should be retained in the article, he agreed with Sir Francis Vallat that the problem should certainly be confronted by the Commission and set before Governments.

28. With regard to paragraph 3 (*c*), it was odd that so little material existed that could be applied inductively to the problem under consideration. The reason was

[5] *Ibid.*, para. 27.

[6] 1367th meeting, para. 8.

[7] 1368th meeting, para. 38.

undoubtedly that, because international law in general lacked a system of compulsory jurisdiction, analogies from private law must be considered sparingly. Precedents like the *De Becker* case cited by the Special Rapporteur (*ibid.*, para. 63) would undoubtedly multiply and the rule propounded in paragraph 3 (*c*) would find enormous practical application. Consequently, it was gratifying to know that the subject was one that must continue to attract the attention of the Commission.

29. Mr. TSURUOKA said that he subscribed to the principle set forth in paragraph 1 of article 17. Paragraph 2, however, he considered unnecessary, since the rule it expressed was applicable in only very few cases and, in his opinion, was undeserving of special mention in a set of draft articles dealing with the broad outlines of international responsibility. If paragraph 2 were nevertheless retained, he would like the prerequisites for the application of the rule to be defined with precision. The Special Rapporteur had rightly stated that, for that rule to be applicable, a peremptory rule of international law must override the previous rule and the wrongful act must become "due" conduct.[8] Those two conditions were a safeguard against any abuse of the rule. The Commission might supplement those two conditions by a time element and say that the period between the conduct and the emergence of the new rule should not be too long.

30. With regard to paragraph 3 (*c*), he wondered whether, in the case envisaged by the Special Rapporteur in a foot-note to his report (*ibid.*, foot-note 109) the conduct of the first organ itself was not internationally a wrongful act attributable to the State. If, in the internal legal order, a second or third organ could annul the decision taken by the first organ, the conduct of the second or third organ from the international point of view would free the State of the responsibility which flowed from the first decision. If, on the other hand, the first decision was wrongful at the internal level only, no conduct would begin in international law until the last decision was taken. He therefore questioned whether it was right to say "the process of carrying out the act of the State began", and he would like some clarification of the point from the Special Rapporteur.

31. Mr. ROSSIDES said that, in order to overcome the drafting and translation difficulties to which attention had been drawn during the discussion, he would suggest the following rewording for the English version of the first two paragraphs of article 17:

> 1. An act by a State, which at the time of its performance runs counter to the requirements of a specific international obligation then in existence, constitutes a breach of that obligation.
>
> 2. Nevertheless an act as above shall not be considered a breach of an international obligation by the State concerned, nor shall it entail the consequent international responsibility of such State, in cases where by supervening circumstances an act of that nature has become the due norm of conduct in virtue of a peremptory rule of international law.

32. As far as the substance was concerned, paragraph 1 did not give rise to any problem; the provision embodied in it was consistent with the accepted rules of international law. The essential problem was in paragraph 2, dealing with the effect of a succession of rules of international law in the course of time upon the international obligations of States; it was in a sense a problem of transtemporal law. The question was one of a conflict of norms —not merely as between posterior rules and anterior rules but, what was more important, as between different categories of norms from the point of view of their hierarchy, having regard to their content as well as their origin or source. That point was clearly brought out by the reference in paragraph 2 to the posterior norm as being in the category of peremptory norms of international law. Incidentally, the terms of that provision supported the view that the source of an international obligation was relevant to State responsibility.

33. Paragraph 2 of article 17 made provision for an exception to the generally accepted rule stated in paragraph 1 that no international responsibility arose without the existence of an international obligation at the time when the relevant act of the State took place and that consequently any supervening change in that obligation did not affect the position of the parties in regard to the obligation as it existed at the time of the occurrence of the act. The exception stated in paragraph 2 absolved the State from international responsibility for non-compliance with its obligation only in cases where the supervening norm was a peremptory rule of international law. Paragraph 2 expressed very clearly the idea that only in that case was there an exception to the principle of non-retroactivity of the law.

34. During the discussion, some speakers had expressed doubts regarding the propriety of that exception on the ground that the concept of a peremptory norm of international law—in other words, a rule of *jus cogens*— was much too vague. At the previous meeting, Mr. Kearney had referred to the lengthy discussions in the Commission during the consideration of the draft on the law of treaties and to the Commission's inability to agree on a definition of the rules of *jus cogens* or an enumeration of those rules. Mr. Kearney had also pointed out that article 66 of the Vienna Convention on the Law of Treaties referred the determination of the rules of *jus cogens* to the International Court of Justice.

35. It was of course true that no exhaustive list of rules of *jus cogens* could be given but he could not subscribe to the view that those rules were unduly vague. As he saw it, the notion of *jus cogens* was basic to the very concept of law; it was the legal expression of the law of nature and of the law of the universe. It responded to the need for balance and harmony which was expressed in human affairs by the sense of justice and the requirement of equality. It was essentially moral in content and responded to man's spiritual needs. Article 53 of the Vienna Convention defined a peremptory norm of general international law as "a norm accepted and recognized by the international community of States

[8] See 1367th meeting, para. 10.

as a whole as a norm from which no derogation is permitted".[9] Bearing that definition in mind, a list could be drawn up of matters which were governed by rules of *jus cogens* such as the prohibition of aggression, genocide, piracy and slavery; the rules of *jus cogens* were those which protected the most fundamental human rights and covered all questions concerned with human freedom, such as the principle of self-determination of peoples.

36. The rules of *jus cogens*, however, certainly did not include rules on purely economic matters, such as the proposed 200-mile economic zone of the high seas. Any rule that might be adopted on such a subject would merely constitute a compromise in the competition for the resources of the world; it would be entirely outside the scope of the basic norms of international law, since it did not affect life, peace or freedom but merely material interests.

37. The rules of *jus cogens* constituted a means of adapting man's behaviour to the required legal order in human society, both nationally and internationally. At the present critical stage of world affairs, it was becoming increasingly necessary to look more closely into the fundamentals of life and human behaviour. When the law of nature, as expressed by peremptory norms of international law, was ignored too long, situations suddenly arose in the world which showed how necessary it was to codify such norms.

38. That need was particularly apparent with regard to international crimes, in respect of which the experience of the war crimes trials at the end of the Second World War was very significant. At that time, crimes against the peace, war crimes and crimes against humanity had been tried on the basis of rules of law not previously in existence. The relevant principles had been enunciated at the time and given retroactive effect, contrary to the basic concept of non-retroactivity of laws; it had not been possible to do otherwise because of the enormity of the crimes and their implications if they had gone unpunished. The purpose had been to give the world a necessary example. He doubted, however, whether the lesson had been learned and whether the world situation had since improved.

39. The experience of the Nuremberg trials showed the need to proceed expeditiously with the codification of international law. The Commission should therefore go ahead speedily with its codification, especially in matters connected with *jus cogens*. Those matters included the offences against the peace and security of mankind covered by the draft code adopted by the Commission in 1954[10] as well as aggression, which had been covered not by that code but by a General Assembly resolution adopted much later.[11]

40. As for the provisions of article 17 as prepared by the Special Rapporteur, he found them sufficiently attuned to present day requirements and could accept them as progressive development of international law.

The meeting rose at 12.45 p.m.

1370th MEETING

Monday, 17 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, 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. The CHAIRMAN, after welcoming the participants in the twelfth session of the Seminar on International Law and expressing the hope that it would prove as fruitful as previous Seminars, invited the Commission to continue its consideration of article 17.

2. Mr. BILGE said that he would confine his comments to paragraph 2, since paragraph 1 set forth an accepted general principle which was confirmed by jurisprudence, State practice and doctrine. Paragraph 2 expressed an exception to that principle, and one which he personally hesitated to accept. The paragraph concerned the effect which a peremptory rule that emerged after the performance of a wrongful act might have on the wrongfulness of the act or on the consequences of its wrongfulness. The Special Rapporteur had cited as an illustration the examples of the slave trade and the sale of arms. The sale of arms to be used for aggression was certainly contrary to international law, since the use of force was prohibited by the Charter of the United Nations and by the conventions governing relations between States. After concluding a sale of arms, the selling State might learn that the buying State intended to use those arms to commit aggression against another State, and might accordingly refuse to deliver the arms which it had sold to the aggressor State; it would thereby breach its obligation under the contract of sale, but in accordance with paragraph 2 it would not be responsible internationally, since its non-performance of the contract would have

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[9] *Official Reports of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 296.

[10] *Yearbook... 1954*, vol. II, pp. 149-152, document A/2693, chapter III.

[11] Resolution 3314 (XXIX), of 14 December 1974.

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