Document:-
**A/CN.4/SR.1478**

**Summary record of the 1478th meeting**

Topic:
**State responsibility**

Extract from the Yearbook of the International Law Commission:-
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explanations given by the Special Rapporteur. Nevertheless, he continued to have doubts on certain points, particularly on the crucial question whether a third category of obligations really existed that bound the State to prevent a particular event. He doubted whether that was the case, since the existence of such a category of obligations depended, in his view, on the interpretation placed on the obligation of means and on that of result.

30. As an example of the third category of obligations, the Special Rapporteur had cited the obligation to prevent an attack on an embassy. That was not, however, an obligation of a special kind, but a simple obligation of result. Article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations provided that

> The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

That article made it incumbent on the State to achieve a certain result by "all appropriate steps". But that was not an obligation to prevent a particular event. Moreover, it would be quite impossible to list all the events that the State ought to prevent. Consequently the examples concerning the protection of embassies were not conclusive, for they had to be considered as examples of an obligation of result.

31. That did not mean that the question of the event should be set aside or that the role the event played in the obligation could be denied. Every rule required conduct that consisted either in preventing or in bringing about certain events. Every event covered by a rule was an act in law, because it had consequences in law.

32. The wording of article 25, the title of which was modelled on the titles of articles 20 and 21, gave the impression that the obligation to prevent a given event was a third category of obligations in addition to those of conduct (article 20) and of result (article 21). It was questionable whether it was possible to single out from among obligations of result—and so establish the existence of a subcategory—of such obligations cases in which the result was achieved through the prevention of a given event. In the case of the protection of diplomatic missions, it was clearly impossible to foresee all the events that might occur. Again, when a hospital or a historical monument was bombed, was the obligation that was breached one of result or of conduct? Personally, he considered that it was more an obligation of conduct or of means, for the State should have refrained from bombing civilian targets.

33. Whatever its content, an obligation was always either an obligation of result or an obligation of conduct. He could not conceive of a single example of an obligation that would not fall into one of those two categories. The event that might consitute a breach of an obligation was always covered by the rule establishing the obligation, whether the obligation was one of means or of result, for the object of every obligation was either to prevent certain events or to bring them about.

### Appointment of a Drafting Committee

34. The CHAIRMAN said that, following consultations in accordance with the usual practice, it was proposed that a Drafting Committee be appointed consisting of the following members: Mr. Schwebel as Chairman, Mr. Calle y Calle, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov and, *ex officio,* Mr. Pinto, the Commission's Rapporteur.

*It was so agreed.*

*The meeting rose at 12.55 p.m.*

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## 1478th MEETING

*Friday, 12 May 1978, at 10 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yankov.

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

[Item 2 of the agenda]

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

ARTICLE 23 (Breach of an international obligation to prevent a given event)[1] (*concluded*)

1. Mr. RIPHAGEN said that there were three logical steps in the work on the topic under consideration. First, it had been established that international obligations existed and, secondly, that breaches of those obligations might occur. However, the Commission's prime interest lay in the third step, namely, the consequences of the breach of an international obligation. In dealing with the first two steps, namely, the existence of an international obligation and the breach thereof, the Commission had necessarily encountered some difficulties because of its wish to avoid determining the content of the obligation itself, having decided to deal not with primary rules but only with secondary rules of responsibility.

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[1] For text, see 1476th meeting, para. 2.

2. If the content of an international obligation was clear, it was relatively easy to decide whether there had been a breach of the obligation, for it was a question of establishing the facts. However, there was an infinite variety of international obligations and it was doubtful whether their classification in two or three categories served any useful purpose. That infinite variety of international obligations could be seen from the types that were usually accepted and embodied in treaties. They were rarely very clear. For example, a common obligation was to observe good faith in the performance of a treaty obligation. It related to situations and to acts that were not clearly described in the obligation as expressed in the treaty itself, but it was none the less an international obligation and it might give rise to a breach and to responsibility on the part of the State. Other cases in which the content of the international obligation was ill-defined included those of contributory negligence by the other party, which was covered to some extent by article 22 (Exhaustion of local remedies),[2] and those of the obligation not to defeat the object and purpose of a treaty prior to its entry into force, enunciated in article 18 of the 1969 Vienna Convention on the Law of Treaties.[3] Another international obligation that was set forth with increasing frequency in international treaties was the obligation to exercise effective jurisdiction over private activities. For instance, the law of the sea required the exercise of effective jurisdiction over vessels on the high seas. In all those examples, the content of the obligation could not be regarded as crystal clear.

3. Article 20, which stated that there was a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State was not in conformity with that required by the obligation, was tautological in character. The same could be said of article 21, paragraph 2, and of article 23. Consequently, they could not give rise to any great difficulty. However, he was concerned about the link between the breach and the consequences of the breach, a link that was to be found in article 24 (A/CN.4/307 and Add.1, para. 50), relating to the *tempus commissi delicti*. Until such time as the consequences of a breach were determined, it would be difficult to arrive at a definite formulation of the *tempus commissi delicti*. It had been rightly pointed out that the *tempus commissi delicti* was an important element in assessing the amount of damages and the possibility of applying other sanctions and, more particularly, in the question of the procedure applicable for the settlement of disputes.

4. At that juncture it would not be easy to divorce the provisions on the *tempus commissi delicti* from the provisions on the consequences of the breach, which were to be considered later, and also from the primary rules, which were the international obligations themselves. The difficulty of separating those two concepts had already been encountered in article 18, which to some extent provided for a kind of retroactivity of obligations, and it would appear again in article 24, which enunciated a kind of non-retroactivity. Indeed, in all branches of the law, the concept of retroactivity was extremely difficult to deal with.

5. In short, article 23 posed no problems, precisely because it was tautological. However, it would be difficult to take decisions on the question of the time of the breach until the question of the consequences of the breach became clearer. His comments were not criticisms; they were simply intended to indicate that any attempt to go further in draft article 23 would prejudice the question of the content of the obligations themselves—a matter with which the Commission could not and would not deal.

6. Mr. REUTER said that the Special Rapporteur had shown clearly that damage was not a constituent element of the breach of the obligation referred to in article 23. He wondered, however, whether the term "event" might not be replaced by some other word, such as "situation" or "circumstance", for there was a whole category of obligations, known as obligations of due diligence, whose content it was difficult to define in advance and in the abstract: it was often necessary to wait until the situation to be prevented had arisen—in other words, until the obligation had been breached—to know exactly what the obligation entailed.

7. But was the fact that the specific substance of certain obligations could be determined only in specific cases sufficient reason for considering such obligations to be of a special kind? Clearly, there could be no question of imposing on States responsibilities that they could not assume; it was obvious that no State could guarantee that an embassy would not be attacked or that a visiting Head of State would not be the victim of an assault. However, if the State had taken absolutely no measures to prevent a given situation, was it necessary to wait until the situation actually came about before the responsibility of the State was engaged? For example, if a State were bound by a convention to take legislative measures to eliminate all forms of racial discrimination, could it not be considered, even in the absence of any practical manifestation of racial discrimination, that there was a breach of the obligation if the State took no such measures?

8. Mr. EL-ERIAN said that the treatment of responsibility, in both national and international law, traditionally took account of *faute, dommage* and *lien de causalité*, concepts that existed in common law countries, for example, in the theory of tort. The Special Rapporteur had not combined all the elements of responsibility in his definition of an internationally wrongful act of a State. As specified in article 3 of the draft, there was an internationally wrongful act of a State when conduct consisting of an action or omission was attributable to the State under international

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

[3] 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. 287.

law and that conduct consituted a breach of an international obligation of the State. However, after the very lucid explanations given by the Special Rapporteur, he was now satisfied that in article 23 the Commission was not dealing with damage, although the matter had caused him some difficulty at the beginning.

9. Abundant examples existed in case law of the concept of due diligence. For example, in a case in which foreign nuns had been victims of an insurrection in an African country,[4] the arbitral tribunal had found that the British Government had not been guilty of any negligence. The event had been viewed as unavoidable, for the Government itself had been a victim of the insurrection; it had not failed to take protective measures, and consequently it could not be held responsible. Admittedly, the State was under an obligation to protect both it its own nationals and aliens in its territory, but some aliens had an especially important status. Indeed, an alien might be engaged in such a highly political matter—for instance, the settlement of a frontier dispute—that he would be in a particularly vulnerable position, and must consequently be afforded special protection. In that respect, it would be interesting to know how the Special Rapporteur intended to deal with the question of special protection, as distinct from the due diligence that every State was obliged to exercise.

10. Lastly, the Special Rapporteur had noted in his report that a State could not be alleged to have breached its obligation to prevent a given event where the event had occurred but could not be ascribed to a lack of foresight on the part of certain State organs (A/CN.4/307 and Add.1, para. 3). Personally, he thought it would be extremely difficult to introduce the element of foresight into the concept of due diligence.

11. Sir Francis VALLAT said that the Special Rapporteur had made it clear in his report that it was not a theoretically established failure of prevention that consituted the State's breach of its obligations in the hypothetical cases envisaged, but a failure of prevention made concrete by the actual occurrence of an event that more active vigilance could have prevented and that had been made possible by the lack of it (*ibid.*, para. 16). That was the essence of the point the Commission was endeavouring to cover in article 23, although it was uncertain whether the point required a separate article or not and how it was to be covered.

12. Like Mr. Pinto (1477th meeting), he believed that a systemic link with article 21 would undoubtedly help to clarify the situation. However, great care would be needed, for the link itself might create problems. The mere insertion of a reference to article 21 in article 23 would accentuate the contrast between the positive formulation of article 21 and the negative formulation of article 23, which raised doubts about the drafting of article 21, paragraph 1.

13. In article 23, the Commission was concerned with the prevention of injury to an alien or to his property through failure by the State to take adequate protective measures. A negative formula, like that of article 23, linked into a positive formula, like that of article 21, paragraph 1, raised the question whether the latter paragraph dealt exclusively with the positive achievement of a specified result or whether it might not also include the negative aspect of the prevention of an event. Moreover, it would be useful to reflect on the meaning of the word "result", as employed in article 21, and whether article 23 might not be drafted to read:

> "There is no breach by a State of an international obligation requiring it to prevent a given result, unless the result in question occurs."

In the English version of article 23, the word "following" was ambiguous, since it was difficult to determine whether the expression in question implied cause and effect or merely implied a time sequence.

14. He fully agreed with the Special Rapporteur that article 23 should not seek to express the standards of conduct underlying the rules the Commission was formulating, for those standards fell under the heading of primary rules. However, it was not esay to give meaning and content to article 23 without to some extent considering primary rules. The reason probably lay in the fact that prevention of an event was dependent on the type of conduct that the State was bound to adopt. It had to be recognized that there was an element of conduct in an obligation of result, something that could be illustrated from the report now being considered. For example, paragraph 2 of the report stated that the preventive action required of the State consisted essentially of surveillance and vigilance with a view to preventing the event, in so far as that was "materially possible". In that instance, the standard was one of material possibility. Elsewhere—in paragraph 14, for example—the standard was absence of negligence, and in paragraph 16 it was "more active vigilance". Different standards of conduct might be required in different circumstances, but the standard of conduct was so closely allied to the obligation to prevent an event that it was extremely difficult to deal with one without dealing with the other. It should be made plain that any examples cited in the commentary were given simply to illustrate how the article would apply and not for the purpose of varying the content of the article itself.

15. In conclusion, he noted the statement, in paragraph 18 of the report, that the definition of the conditions for the occurrence of the breach of an obligation of the type in question might in practice have decisive consequences for the determination of the *tempus commissi delicti*. The time element was in fact of the utmost importance, and instead of providing in article 23 that there was no breach of an ob-

[4] Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) *v.* Great Britain (United Nations, *Reports of International Arbitral Awards*, vol. VI (United Nations publication, Sales No. 1955.V.5), p. 42).

ligation "unless" the event occurred, it might be better to say that there was no breach "until" the event occurred. Consequently, the Drafting Committee might perhaps consider article 23 not only in relation to article 21 but also in relation to article 24.

16. Mr. SCHWEBEL observed that it had been suggested, in the course of the discussion of article 23, that the distinction—made in articles 20 and 21—between obligations of conduct and obligations of result might, in practice, be difficult to maintain, in other words, that a particular international obligation might at times be one of conduct and at other times one of result, or even both simultaneously. He had been impressed by that suggestion and by what it might imply for the practical utility of the distinction between obligations of conduct and obligations of result. He had also been impressed by Mr. Riphagen's point concerning the infinite variety of international obligations.

17. The position adopted in article 23 was, for all that, no less sound. To say that there was no breach by a State of an international obligation requiring it to prevent a given event unless that event occurred was true; indeed, it was a truism. As Mr. Riphagen had put it, the article was tautological. However, it might be difficult to avoid tautology when drafting principles of a relatively abstract nature which eschewed primary rules of State responsibility.

18. If the obligation was more than one of preventing the occurrence of a given event, then the liability of the State would be correspondingly greater. Thus, if the obligation of the State was to prevent an attempt to bring about an event, as well as to prevent the event, the State would be responsible for the making of the attempt unless it had been impossible for it to take action to prevent the attempt. The obligation in question might, for instance, be one of preventing harassment of an embassy. No breach of an international obligation occurred unless, following a lack of prevention on the part of the State, harassment actually occurred. If, however, the obligation was to prevent even an attempt at harassment of an embassy, as article 22 of the Vienna Convention on Diplomatic Relations[5] seemed to imply, the attempt, even if unsuccessful, would result in a breach of the host State's international obligation, at least in circumstances where it had failed to prevent the making of the attempt.

19. In that connexion, he noted that one member of the Commission had suggested that a State could protest when it believed that its embassy enjoyed inadequate security, even in circumstances where there had been no assault or even attempted assault upon the embassy. Although that was quite true, he did not think that it detracted from the force of article 23 because it did not follow that in such a case the host State was in breach of an international obligation. States could make representations, raise questions, express anxieties and even protest at the possibility of occurrences without alleging actual violations of international law. Indeed, diplomatic relations usually involved such exchanges rather than the maintenance of international claims or the invoking of State responsibility, as the Special Rapporteur had rightly pointed out in foot-note 17 to his seventh report.

20. To return to the suggestion that a given situation might entail obligations both of conduct and of result, he would take the case of a government that informed a foreign company of its decision that foreigners might no longer hold majority control in a particular sector of business activity. To the government's offer to buy the majority of the company's shares at a certain price, the company replied that it was willing to sell a majority of its shares at a price reasonably close to their value or at their value as appraised by an independent third party, but not at the price offered by the government. If the government then told the company to sell at the price it had offered to avoid expropriation, the company—it might be assumed—would conclude that it had no choice but to accept the government's offer, since it believed that diplomatic protection by its own government would not do much that would actually protect its investment. Was there a breach of an international obligation when the host government threatened what might be seen as a confiscatory expropriation? If the two governments concerned had concluded a treaty ensuring that the persons and property of their nationals would enjoy the most constant security, the mere threat of expropriation might well be a breach of an international obligation requiring the parties to adopt a particular course of conduct. Even in the absence of such a treaty, the actual consummation of such a forced sale, in the hypothetical circumstances he had described, might be tantamount to expropriation without adequate compensation and, consequently, a violation of customary international law. Such a violation would, it seemed, be a breach of an obligation to achieve the specified result—payment of adequate compensation—required by customary and conventional international law.

21. Could it also be said that such an act would be a violation of article 23? In the case he had described, the State had the obligation to produce a certain result, namely, payment of adequate compensation. Article 21 was relevant in that connexion. The other aspect of the question was that the State had an obligation to prevent a given event, namely, a forced sale. That aspect could be dealt with in a separate article, such as article 23.

23. Another example, drawn from the sphere of human rights, also came to mind, namely, that of a State acceding to the International Covenant on Civil and Political Rights[6] and making no reservation to article 6, paragraph 5, prohibiting the execution of minors. Under the law of the State in question, however, such matters were not dealt with at the federal

[5] See 1476th meeting, foot-note 6.

[6] General Assembly resolution 2200 A (XXI), annex.

level; the federal government was therefore unable to abolish capital punishment nationally. Was the federal government by that fact in breach of the Covenant? He was inclined to think that it was not, unless it had specifically undertaken in the Covenant to enact legislation prohibiting the execution of minors or unless a minor had actually been executed after its accession to the Convenant in other words, unless "the event in question", as article 23 put it, had actually occurred.

23. Other members of the Commission had pointed out that there was necessarily a clear and intimate connexion between articles 20 and 21 and article 23, but in his opinion that did not mean that article 23 was not useful or, as Sir Francis Vallat had rightly noted, that it was a simple matter to draft language clarifying the link between those articles.

24. He was inclined to agree with the Special Rapporteur, Mr. Riphagen and Sir Francis Vallat that words such as "manifest" or "reasonable" should not be used to characterize the "lack of prevention" referred to in article 23.

25. Mr. QUENTIN-BAXTER was not concerned about the tautological character of the draft articles, for in an area of such importance the Commission was obliged to spell out propositions which, outside legal circles, would normally be taken for granted. His concern was more about the question of the relationship of the article to earlier articles of the draft and the possibility that false inferences might be drawn from that relationship. Sir Francis Vallat's suggestion of a time sequence might perhaps prove useful and help to indicate the place of article 23 in relation to the broad propositions contained in articles 20 and 21.

26. With regard to the term "prevention", it was quite obvious that, since States were not all-powerful, they could not possibly prevent the occurrence of certain events. Consequently, rather than phrase the article in terms of a duty to prevent an event, it would be better to speak of a duty to take precautions to prevent an event.

27. The CHAIRMAN, speaking as a member of the Commission, said that, following the clarfifications made by the Special Rapporteur, his doubts about the nature of the obligation covered by article 23 had been dispelled.

28. He was satisfied that the obligation to prevent an event was an obligation of result, and that it should be embodied in a separate article. It was a very particular kind of obligation of result, for it was breached only in the case of a certain type of conduct, namely, lack of prevention on the part of the State coupled with occurrence of the event. That special link, which was stressed throughout the report, had no place in article 21, which dealt with obligations of result in the strict sense of the term.

29. Some thought should be given to qualifying the obligation of the State by what Sir Francis Vallat had termed the standard of conduct. Due weight should be attached to the arguments advanced by Mr. Calle y Calle (1476th meeting), Mr. Díaz González (1477th meeting) and Mr. Francis (1476th meeting), but he agreed with the Special Rapporteur that the Commission should not move into the realm of the primary rules of international law. Perhaps the whole matter might best be clarified in the commentary.

30. Mr. AGO (Special Rapporteur), replying to the comments made on article 23 since his statement at the previous meeting, noted first that all the members of the Commission now seemed to agree that the links between that article and articles 20 and 21 should be made clearer. It would be for the Drafting Committee to find the right formulation.

31. The example of nationalization, expropriation and other similar measures, which Mr. Pinto had been the first to mention, showed clearly the vital importance of the distinction between obligations of means and obligations of result. In the sphere of respect for foreign property, as in others, States reached among themselves the arrangements they preferred. Sometimes, albeit rarely, they took upon themselves obligations of conduct, as when they undertook to enact a law prohibiting expropriation without compensation. More often than not, however, what was required of them was not the adoption of specific measures, but the achievement of a result—to ensure that foreigners were not victims of acts of expropriation without compensation. In such a case, the State that enacted a law authorizing its administrative authorities to carry out expropriations without compensation could not already be considered as having breached its obligation by that action alone. There would be a breach only if the administrative authorities, acting under the law in question, carried out an expropriation without compensation. It was obvious that, prior to that event, there was nothing to prevent another State from drawing the attention of the State in question to the possible consequences of the application of the law it had enacted. Such action would come within the scope of normal diplomatic relations. But it was also obvious that there could be no allegation of a breach of an international obligation to prevent a particular event, and of the resulting responsibility, as long as the State that had assumed that obligation confined itself to taking measures that might make such prevention less easy, and the objectionable event had not occurred. As Mr. Pinto had pointed out, the conduct of the injured party might be taken into consideration, but only after the breach of the obligation had been established.

32. Mr. Sucharitkul (1477th meeting) had indeed emphasized an essential aspect of the breach, namely, the occurrence of the event. As Sir Francis Vallat had pointed out, it was necessary to establish the relationship between the rule stated in article 23 and the problem of *tempus commissi delicti,* which would be dealt with in the next article.

33. Many members of the Commission had spoken of the infinite variety of international obligations, and it was precisely because of that variety that so

many articles of the draft had to be separately devoted to the breach of international obligations. The Commission's task was to identify the principal kinds of obligations and to determine what were the distinctive conditions of a breach in each case. As far as obligations of conduct were concerned, a breach undoubtedly occurred if the State in question adopted a conduct not in conformity with that required of it. With regard to obligations of result, a breach occurred only if the required result was not achieved; but there was no breach if the State concerned achieved the result by means other than those that might have been expected or, in certain cases, achieved it later than expected.

34. Some members of the Commission found articles 20, 21 and 23 acceptable because they regarded them as tautological. Actually, a provision was not tautological simply because it was clear. Besides, as was shown by the inconclusive international case law and practice of States, it was not so easy to translate into practice the principle that a breach of an international obligation of result occurred only if the required result was not achieved; it had often been mooted that the obligation might have been breached even before the result had become unattainable. It was in order to settle that question that, in the current instance, the Commission had to lay down a precise rule. For example, the obligation to protect foreign embassies against attacks by private persons might perhaps be said to have been breached by the mere fact that a State had failed *in abstracto* to take appropriate action, whereas it must be clearly stated that, for the existence of a breach to be established, the regrettable event that ought to have been prevented must have occurred.

35. It seemed to him that his disagreement with Mr. Ushakov arose more from a misunderstanding with regard to terminology than from a difference of opinion. Obviously, it was impossible to draw up a catalogue of the events to be prevented without entering into the subnect-matter of the primary rule. Certain primary rules, including those in article 22 of the Vienna Convention on Diplomatic Relations, were formulated in language that might leave some doubt. In each practical case it had to be determined, for example, whether the peace of a mission had been disturbed or its dignity impaired by a certain event, and for that purpose allowance also had to be made for what might reasonably be expected of the receiving State.

36. With regard to the word "event", it meant *stricto sensu* an occurrence, a happening. In the example of an attack on an embassy, the regrettable event to be prevented was really external to the State's conduct. Mr. Reuter had drawn a parallel with the obligations of due diligence. In his own opinion, great caution was necessary in drawing such comparisons, for there were obligations of due diligence that were obligations of conduct, and which might therefore be said to have been breached by the mere fact that the requisite due diligence had not been exercised. In the case the Commission was considering, where the object was to prevent the occurrence of some event, the obligation did not require that due diligence should be exercised in a particular form, but that care should be taken to ensure that the event did not occur, which was another matter. Once the event had occurred, the law could take it into account and attach particular consequences to it. The internationally wrongful act was not an act of failure to adopt specified conduct, but of failure to prevent the occurence of the event. If, as Mr. Reuter suggested, the word "event" were replaced by the word "situation" the language would become even more vague. The word "event" faithfully reflected the idea of something supervening independently of any action by the State. Under article 25, paragraph 1, of the 1958 Geneva Convention on the High Seas,[7] States pledged themselves to take measures to prevent the pollution of the seas from the dumping of radioactive waste. The event to be prevented under that provision was not the dumping of such waste; the States had pledged themselves only to take action to prevent the pollution of the seas as a result of such dumping. As long as there was no pollution, therefore, a State could not be blamed for omitting to take action against such pollution. Only when a case of pollution occurred did the omission to take appropriate action become apparent. He had already stated earlier that the event played the part of a catalyst in the conduct of the State. In the final analysis, that was the subject-matter of the article under discussion.

37. Mr. Schwebel, referring to the duty to protect diplomatic envoys, had commented, that the mere abortive attempt to attack such an envoy might constitute an event to be prevented. That was true, but, once again, the Commission should be wary of defining the subject-matter of the primary rule. The subject-matter of primary rules could not, of course, be completely ignored, as Sir Francis Vallat had remarked, since the Commission was trying to determine, on the basis of the content of the obligations, how a breach of international obligations materialized. But it should do no more than proceed case by case: it was enough to say that, if the subject-matter of an international obligation were of a certain kind, then, under specified conditions, there was a breach of the obligation. The Commission had been bolder when drawing a distinction, in the light of the content of the obligations, between international crimes and international delicts. At the same time, however, it had been careful not to define the content of the obligations in question.

38. Several members of the Commission, and in particular Sir Francis Vallat, had illustrated the connexion between the article under discussion and the future provision that would deal with the time of the breach of the international obligation. The article under discussion, like the earlier ones, was undoubtedly closely bound up with the idea of time. However, the temporal question did not arise until after the ques-

[7] United Nations, *Treaty Series*, vol. 450, p. 83.

tion dealt with in article 23, which logically had priority, had been settled, for only after it had been established that an international obligation had been breached would the question arise of the time of which the breach had occurred. Unlike Mr. Riphagen, he did not think it necessary at that juncture to inquire what would be the consequences of a breach of the category of international obligations under consideration.

39. In his persuasive statement, Mr. El-Erian had argued that the protection of certain persons, such as diplomatic envoys, demanded a greater degree of due diligence on the part of the State than did the protection of private persons. Although pertinent, that argument should not tempt the Commission to venture into the sphere of the content of the primary rules and to repeat the mistake of the Conference for the Codification of International Law (The Hague, 1930).

40. Mr. Quentin-Baxter had wondered whether a reference to precautions to be taken should not be introduced in article 23. Personally, however, he considered that there were scant grounds for adding a reference in the article that might give the impression that the breach of the obligation might precede the occurrence of the event to be prevented. On that point no ambiguity should be allowed to subsist. On the other hand, the commentary would obviously have to explain that the performance of any international obligation had to be seen from the point of view of its feasibility, which varied considerably from case to case. But at that point the debate reverted to the subject-matter of the primary rule.

41. The CHAIRMAN suggested that article 23 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*[8]

*The meeting rose at 12.50 p.m.*

[8] For consideration of the text proposed by the Drafting Committee, see 1513th meeting, paras. 1 to 4 and 10 to 18.

## 1479th MEETING

*Tuesday, 16 May 1978, at 3.10 p.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. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### 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. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 24, which read:

***Article 24. Time of the breach of an international obligation***

**1. If a breach of an international obligation is constituted by an instantaneous act, the time of the breach is represented by the moment at which the act occurred, even if the effects of the act continue subsequently.**

**2. If a breach of an international obligation is constituted by an act having a continuing character, the time of breach extends over the entire period during which the act subsists and remains in conflict with the international obligation.**

**3. If a breach of an international obligation is constituted by a failure to prevent an event from occurring, although prevention would have been possible, the time of the breach is represented by the moment of the occurrence of the event.**

**4. If a breach of an international obligation is constituted by an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases, the time of the breach extends over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation.**

**5. If a breach of an international obligation is 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, the time of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.**

2. Mr. AGO (Special Rapporteur) said that article 24 was the last article in chapter III devoted to the objective element in an internationally wrongful act, namely, the breach of an international obligation. The object of that article was to determine the time of the breach of an international obligation in the different cases of breaches which the Commission had considered in chapter III. It might seem that such determination was a matter of noting the acts rather than or applying legal criteria. In reality, it generally required the application of such criteria, in international law quite as much as in internal law. Moreover, it was a simple matter in only one case, which was not even the most frequent, namely, that of an instantaneous act. The perpetration of the breach of the obligation did not extend beyond the moment when it occurred: the moment and the duration coincided, as when the breach of the international obligation took place through the murder of certain persons or through the destruction of certain property. But an internationally wrongful act, such as the wrongful occupation of the territory of a State, which had begun at a given moment, might not cease to exist until much later; the breach then had a continuing character. In internal law, the receiving of goods was a continuing offence. Was the "time of perpetration" of an internationally wrongful act of