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# Summary record of the 2574th meeting

Topic:
**State responsibility**

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## 2574th MEETING

*Wednesday, 19 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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**State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)**

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 20, 21 AND 23 (*concluded*)

1. Mr. AL-KHASAWNEH said that the Commission had been perfectly aware that the distinction between obligations of conduct and obligations of result might be difficult to apply, but had nevertheless chosen to adopt it because it was of fundamental importance in determining how the breach of an international obligation was committed, as stated in paragraph (4) of the commentary to article 20.[4] The Special Rapporteur's extensive review of judicial decisions had shown that the distinction did not in fact play a useful, let alone a fundamental, role. Nor did it appear to fulfil, in the overall structure of the draft, any normative function in terms of the substantive consequences of breaches in part two. In addition, the distinction had been taken from civil law, but, in the process of its transformation into a rule of international law, it had in fact been reversed. Thus, obligations of conduct, which were normally understood as nothing more than obligations to endeavour, were treated as obligations requiring the following of specific conduct over and above the result to be achieved, and were accordingly more onerous than obligations of result. Similarly, obligations of prevention, which were obligations of conduct in the great majority of cases, were treated as obligations of result. The confusion that ensued from that inversion was not likely to advance the codification of the topic, all the more so as the two types of obligations constituted a continuum and the decision to place certain obligations in one compartment and not the other rested on a subjective notion of the probability of their achievement in a particular field. Such overcodification was likewise not useful because the question of how the obligation was breached depended on the formulation and content of the primary rule and the importance of the obligation involved.

2. Two lingering doubts argued against abandoning the distinction between obligations of conduct and obligations of result, however, at least for the time being. First, while the distinction had been shown not to be so important as the Commission had first envisaged in determining how a breach of an international obligation took place, it might still be useful in determining when a breach took place. The examples given in paragraph 59 and in the relevant footnote of the second report of the Special Rapporteur on State responsibility (A/CN.4/498 and Add.1-4) clearly showed that the temporal aspect should not be overlooked in determining the moment of the breach, if only because it could have a bearing on reparations. Secondly, while the main features of the draft could now be ascertained, it was impossible to foresee with certainty the impact on the rest of the draft of the removal of such an important stone from Ago's edifice. Under the circumstances, the solution proposed by the Special Rapporteur, namely, to simplify articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 21 (Breach of an international obligation requiring the achievement of a specified result) and 23 (Breach of an international obligation to prevent a given event) in the form of the new article 20 placed in square brackets, appeared to be the best one.

3. Mr. ELARABY said that the fact that courts had found the distinction between obligations of conduct and obligations of result useful, even if only occasionally, was an argument against abandoning the distinction completely. A simplified article should therefore be retained or, alternatively, as Mr. Economides had proposed, the distinction should be mentioned in square brackets pending the review of the entire text of the draft articles.

4. Mr. CRAWFORD (Special Rapporteur), summing up the discussion on the second cluster of draft articles, said the best case for the deletion of articles 20, 21 and 23 had been made, not by Anglophones from the realm of the common law, but by the French Government, which considered that they related to the classification of primary rules and had no place in the text under consideration. He, too, was in favour of deleting those articles, which had never been cited in case law, even if the distinction itself was occasionally mentioned. Nevertheless, he was attentive to the concerns about deleting the distinction expressed by a significant minority of members of the Commission. Turning to specific points, he said that, by and large, it was agreed that article 21, paragraph 2, was an instance of overcodification. Article 21 confused a situation that was quite common, when the State had a choice between various modes of compliance (*aut dedere aut judicare*, for example), with a situation when a prima facie breach was cured by subsequent conduct. The second situation was extremely rare (especially if, as it was to be hoped, the Commission decided that exhaustion of local remedies did not fall into that category) and to deal with it in the draft articles would only create confusion.

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.

[4] See 2567th meeting, footnote 9.

The Special Rapporteur on prevention of transboundary damage had spoken forcefully for the retention, in a developed way, of the distinction between obligations of means (that term being preferable to "conduct") and obligations of result, since, in the light of the work it had done on the topic of transboundary damage, the Commission could not adopt a position that would make obligations of prevention into obligations of result. The general view was that, whereas most, but not all, obligations of prevention were obligations of means in the original sense of the distinction between the two types of obligations, to try to force them into a single matrix was to transgress the distinction between primary and secondary rules on which the text as a whole was founded.

5. The distinction between obligations of means and obligations of result was more than occasionally useful for the classification of obligations and might be helpful for determining when there had been a breach. There was a significant minority of members of the Commission who thought that the distinction should be mentioned in the draft, not necessarily in separate draft articles, not necessarily in the new article 20, but possibly in article 16 (Existence of a breach of an international obligation). There was, however, a fundamental problem in the fact that, when the distinction was actually used, it was used in the original sense, according to which obligations of means or of result did not necessarily correspond to obligations that were determinate or indeterminate. There might be a tendency for obligations of means to be more determinate, but the distinction was not one based on that criterion. The fact that the Commission had taken one conception of the distinction and turned it into another conception had given rise to enormous confusion. The solution proposed by Mr. Economides (2573rd meeting), namely, to take note of the distinction, but not to define it in the draft articles, was not necessarily a way of evading the problem. He himself had proposed the same approach to the very important distinction between completed and continuing wrongful acts. The Drafting Committee, which had a substantive function and not merely a redactional one vis-à-vis the draft articles, should therefore consider whether it was possible to articulate the distinction in a satisfactory way in the original terms, in which most obligations of prevention were to be understood as obligations of means. If it could not, it should then try the "minimalist" solution of Mr. Economides, namely, to mention the distinction, possibly in the framework of article 16. If neither of those solutions worked, then articles 20, 21 and 23 as adopted on first reading would simply have to be deleted. He was convinced that they were a case of unnecessary overcodification which explained why they were so often criticized, both within the Commission and outside it, and why even the courts that used the distinction between obligations of means and obligations of result did not refer to those articles. The majority of the members of the Commission seemed to share that view.

6. Mr. ROSENSTOCK said that it was essential for the Drafting Committee to consider the three possibilities described by the Special Rapporteur, including the idea of simply deleting the three draft articles, a solution that was favoured by the majority of the members of the Commission.

7. Mr. LUKASHUK said that he was against constantly putting off the solution to problems and wondered whether it might not be more appropriate to set out the distinction in the commentary.

8. Mr. KABATSI said he preferred the approach of combining certain aspects of the distinction in a single article that would be accompanied by an appropriate commentary.

9. Mr. PAMBOU-TCHIVOUNDA recalled that the Drafting Committee had always been seen as a body in which substantive discussions were not to be reopened. At the present stage of the debate, he said he feared that sending the text to the Drafting Committee would only lead to an impasse. He thought it would be more appropriate to adopt the solution proposed by Mr. Elaraby.

10. The CHAIRMAN said he agreed that the Drafting Committee would not have an easy task, but, because of its limited size and the resulting operational efficiency, it could more easily resolve the problems raised by the draft articles in question, even if it subsequently gave the Commission, not one version, but a choice of several. He therefore suggested that article 20 as proposed by the Special Rapporteur in his second report should be transmitted to the Drafting Committee, together with the three draft articles as adopted on first reading, of which certain elements might be retained, and all the views expressed and comments and suggestions made during the discussion, on the understanding that the results of the Drafting Committee's work would then be reviewed by the Commission.

*It was so agreed.*

ARTICLES 18, PARAGRAPHS 3 TO 5, 22 AND 24 TO 26

11. The CHAIRMAN invited the members of the Commission to consider articles 24 (Completed and continuing wrongful acts), 25 (Breaches involving composite acts of a State) and 26 bis (Exhaustion of local remedies), which had been proposed by the Special Rapporteur in his second report and corresponded to articles 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time), 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time), 26 (Moment and duration of the breach of an international obligation to prevent a given event), 18 (Requirement that the international obligation be in force for the State), paragraphs 3 to 5, and 22 (Exhaustion of local remedies) adopted on first reading.

12. Mr. LUKASHUK said that he endorsed the Special Rapporteur's analysis and his proposals on those provisions. Only article 26 bis posed a problem. The important issue of the application of the rule of the exhaustion of local remedies was dealt with only from the standpoint of diplomatic protection, although it should also be considered in the context of human rights, since so many human rights instruments referred to it. He would like the term "corporations" and its equivalent in the other languages, which usually referred to commercial enterprises, to be replaced by a more general term. Enterprises were, after

all, not the only entities that had to comply with the rule of the exhaustion of local remedies.

13. Mr. CRAWFORD (Special Rapporteur) said he admitted that he had not dealt in any detail with the scope of the rule of the exhaustion of local remedies. He had simply followed the original text, which had been adopted on first reading after a discussion of the need to state explicitly that the rule applied to human rights obligations. As noted by Mr. Lukashuk, human rights instruments explicitly stipulated that the rule in question was applicable to complaints by individuals of a violation of one of their provisions. That was as it should be. Nevertheless, the rule was not always applicable in the same way, for example, in the case of wholesale violations.

14. It was not the purpose of article 26 bis to specify when the rule was applicable or when local remedies were exhausted. There were two reasons for that. First, the issue would be addressed in connection with the subject of diplomatic protection. Secondly, in the event of a breach of a treaty obligation, there was no need to go beyond what the treaty in question stipulated in respect of the exhaustion of local remedies.

15. Personally, he had nothing against the idea of recasting article 26 bis in more general terms in the light of the debate. But as it was a saving clause rather than a substantive provision, the Commission should keep any expansion within bounds.

16. Mr. ROSENSTOCK said that, while he had no objection to the suggested expansion of the provision concerning the application of the rule of the exhaustion of local remedies, he wondered whether it was really necessary in the context of the draft articles, given the sensitive nature of the human rights field.

17. That having been said, he joined Mr. Lukashuk in endorsing the Special Rapporteur's views on articles 18, paragraphs 3 to 5, 24 and 26. He did not believe that either the future instrument or the legal community would be impoverished if the Commission deleted all reference to the question of when a wrongful act began and whether and for how long it continued, on the grounds that it was a matter for interpretation of the primary rules and the application of logic and common sense.

18. He had no great problem with the proposed wording of article 18, but all it said was that an act by a State was not a breach if it was not prohibited. Articles 24 and 25 proposed by the Special Rapporteur added nothing useful. He wondered whether paragraphs 109 and 121 to 124 of the second report demonstrated that the temporal issues they referred to were to be resolved by careful analysis of the primary rules and not by fitting the facts into fancy boxes. Was the Commission producing a complex, multifaceted, sophisticated variation on the theme that "it ain't over till it's over"? Or was it providing the rationale for a result-oriented jurisprudence, such as that contained in paragraph 109? Still, if others found statements of the obvious useful and if the ambiguous provisions adopted on first reading were clarified, as the Special Rapporteur seemed to have done, he would go along with what the majority wanted. He would be happier, however, if the Special Rapporteur explained why the articles were needed. And if his arguments were not convincing, he hoped other members of the Commission would join him in calling for their deletion pure and simple.

19. As far as article 22 was concerned, the Special Rapporteur seemed to be right in stating that the mistreatment constituted the breach and the exhaustion of local remedies a standard procedural condition for establishing the admissibility of a claim and that, where the failure to provide an adequate local remedy was itself the wrongful act, it reflected the primary rule or obligation, not the location of the rule of the exhaustion of local remedies in an overarching taxonomy. He could go along with the wording of new article 26 bis and had no preconception as to whether it belonged more properly in part one or part two of the draft articles. He just wondered whether the text would really be impoverished if the article were simply deleted.

20. He concurred unreservedly with the Special Rapporteur's conclusions on the spatial effect of international obligations and the distinction between breaches by reference to their gravity.

21. Mr. ECONOMIDES, referring to article 24 proposed by the Special Rapporteur in his second report, said he preferred the title "Occurrence and duration of the breach of an international obligation", which closely resembled that of former article 24. The object of the exercise was not to define, on the one hand, a wrongful act not extending in time and, on the other, a continuing wrongful act, but to determine, where a wrongful act had been committed, when the breach had occurred and how long it had continued. With regard to paragraph 1, the phrase "not extending in time" in the former wording was more elegant and precise than the new phrase "not having a continuing character"; the Drafting Committee should perhaps also discuss whether the Special Rapporteur had been right to replace the words "at the moment when" by the word "when". In paragraph 2, the phrase "Subject to article 18" should be deleted. The question of the breach of an international obligation should be settled once and for all and for every case in a single article, which could only be article 18, since it explicitly established the condition for the activation of an international obligation. Otherwise, the phrase would have to be used for every breach of an international obligation having a continuing character, adding to the wordiness of the draft articles. Again, the Drafting Committee could examine whether it was really necessary to replace the words "at the moment when" by the words "from the time". It could also assess the appropriateness of fleshing out, in the interests of preciseness, the verbs *commencer* ("is first accomplished") and *continuer* ("continues"), which seemed to refer to a completed act whose wrongful effects extended in time. Article 24, paragraph 3, was subordinate to the provision in article 20, paragraph 2, concerning the obligation to prevent a particular event. The two clauses should therefore be handled in the same way, and that meant placing paragraph 3 between square brackets for the time being. As to the substance, he considered that the hypothesis aimed at in paragraph 3 was already covered by paragraph 2 and questioned whether paragraph 3 should be deleted.

22. The wording of the two paragraphs of article 25 gave rise to problems, at least in the French version. In paragraph 1, the brackets should be deleted and the repetition of the word "occurs" should be avoided. In

paragraph 2, the phrase "Subject to article 18" should be deleted, as in article 24, paragraph 2. The two paragraphs of article 25 could, in fact, be combined and incorporated in article 24 as a final paragraph. Lastly, he endorsed the Special Rapporteur's proposal that the concept of "complex acts" should be deleted, as it seemed to serve no practical purpose. Needless to say, a corresponding reference should be included in the commentary.

23. With regard to article 26 bis, he concurred with the approach proposed by the Special Rapporteur, while agreeing with Mr. Lukashuk that the article should be couched in far more general terms instead of dealing solely with the case of a breach of the right to diplomatic protection. He proposed the following wording: "These articles are without prejudice to any question relating to the exhaustion of local remedies where such a condition is imposed by international law". That would cover diplomatic protection, human rights or even a bilateral agreement that explicitly provided for the exhaustion of local remedies as a prerequisite for any international petition.

24. Mr. CRAWFORD (Special Rapporteur) thanked Mr. Economides for his constructive comments. He apologized for having been unable to check the French version of the articles.

25. He had no difficulty in accepting the wording proposed by Mr. Economides for article 26 bis, which could likewise meet Mr. Rosenstock's concern. He was not, however, amenable to the suggested amalgamation of paragraphs 2 and 3 of article 24. An obligation of prevention might quite conceivably be breached by the single act of a State and not by an act that was itself of a continuing nature. The breach could consist in the continuation of the result and not in the continuation of the act by the State that had produced the result. That was why the article occupied a separate place in chapter III (Breach of an international obligation). However, should the Commission decide that it was superfluous or that it was enough to mention it in the commentary, he would have no objection. He could go along with the suggestion that paragraph 3 should be placed in square brackets pending a more thorough examination.

26. Mr. HAFNER said that the articles under consideration, relating to three categories of wrongful acts that were sometimes difficult to differentiate in practice, namely, continuing, composite and complex acts, gave rise to extremely complicated problems. He would therefore base his analysis on a somewhat simplistic, but radical conception: that a wrongful act was completed if and as long as one and the same subject of responsibility presented all the elements constituting its definition or if and as long as the elements prescribed in the rule were not present.

27. With regard to continuing acts, European practice provided sufficient proof of how difficult it was to establish them clearly. In particular, it was difficult to distinguish clearly between such acts and instantaneous acts with a lasting effect, as borne out by the reasoning of the European Court of Human Rights in the case of *Papamichalopoulos and Others* v. *Greece* [see page 69]. Contrary to the traditional view that deprivations were instantaneous acts, the Court had ruled that a continuing breach had occurred because it was obviously impossible to identify precisely the act that had led to the deprivation. Recent European history had turned the issue into a highly political one, the question having arisen whether certain acts committed by different States after the Second World War and resulting in the deprivation of property were still contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) by which those States were currently bound. The absence of compensation for the deprivations, which had not been contrary to international law at the time they had occurred, could then nevertheless still count as a wrongful act today.

28. The Special Rapporteur himself justified the distinction by referring to article 41 (Cessation of wrongful conduct) of the draft articles. He found the article somewhat peculiar in that it stated that the consequence of an internationally wrongful act was the obligation to comply with international law. In his view, the opposite was the case. Hence, the article was not really necessary in the context. But, if it was deleted, the distinction between continuing and instantaneous acts could also be deleted, and that would be possible only if it entailed no other legal consequences. The distinction was, of course, widely acknowledged, but its maintenance unduly complicated the Commission's work.

29. The matter seemed still more confused in the case of composite and complex acts. The examples given for composite acts were not very convincing. The issue of composite acts had a different character in relation to the application or non-application of the rule of the exhaustion of local remedies. Supposing, for example, that State A was under an obligation to give free access to its universities to foreign students: if the State denied that right to a foreign student, it could be argued that local remedies had to be exhausted before State B, of which the student in question was a national, could invoke the responsibility of State A. But, if access was denied to all the students of a given State, then that State itself was affected: it could invoke responsibility without a student of its nationality being required to exhaust local remedies. In that case, should the composite nature of the act be the decisive element that changed the primary injured subject? If so, a distinction would have to be drawn in the application of the rule of the exhaustion of local remedies to the effect that it did not apply in the case of a composite wrongful act. But the question remained as to when the wrongful act began to become a composite act. The problem was difficult to solve.

30. The other problem resulted from the difficulty of deriving the distinction between composite and complex acts by reference to the primary rule. The example of genocide given by the Special Rapporteur showed that the primary rule was not very helpful in that regard. The Commission should therefore incorporate a definition in the draft articles if it wished to maintain that distinction and determine the different legal consequences within the framework of the law of State responsibility. For that reason, he acknowledged that some distinctive categories of primary rules should be retained.

31. With regard to the exhaustion of local remedies, the Special Rapporteur proposed a drastic change insofar as

he wanted to drop the idea of the substantial concept in favour of the procedural concept, maintaining, on the basis of the *Phosphates in Morocco* case, that responsibility was triggered at the time of the breach and not at the time when local remedies were exhausted. He acknowledged that reasoning, although it was not easy to reconcile it with the idea that the rule of the exhaustion of local remedies should give the State the opportunity of remedying its wrongful act. That objective was clearly stated in paragraph (29) of the commentary to article 22 adopted on first reading[5] and undoubtedly reflected the doctrine and practice. If the Commission accepted that new concept, it should not lose sight of other problems which it entailed. If an individual harmed by a wrongful act decided not to resort to local remedies, the State of which he was a national would immediately be entitled to take measures within the framework of the law of State responsibility, regardless of the fact that the State at fault offered the possibility of obtaining reparation. The only consequence would be that the latter State had an ex officio obligation to remedy its wrongful act. But in most legal systems it was up to the victim to take the initiative, except in criminal matters. Hence, if the idea of the existence of a material consequence of the rule of the exhaustion of local remedies was dropped, the Commission would have to regard that rule as an obstacle not only to the exercise of jurisdiction, but also to the adoption of other measures under the law of State responsibility or, in other words, to the implementation of State responsibility. In that regard, the wording of article 26 bis was not sufficient, since it did not state either the origin of the requirement of exhaustion or the effect of that requirement. Certainly, the need to meet the requirement depended on the particular character of the infringed primary rule, but primary rules could not contain such a provision. That condition would therefore have to be spelled out in the draft articles. That was all the more necessary since the effect of the condition was a matter of secondary rules and intrinsically linked to State responsibility and to its implementation. If the Commission considered the condition to be an obstacle to the implementation of State responsibility, there would be no problem in dealing with it in the relevant draft articles.

32. The question of the legal basis of the rule and of its effects could easily be resolved in article 26 bis or in part two. The part two solution would have the advantage of giving States the possibility of excluding the application of that condition by treaty, as provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. He would have no difficulty in retaining the 1930 formulation for the draft article, which could be found in paragraph (19) of the commentary to article 22 adopted on first reading.[6] That language was clear and simple and left open the question of the concept underlying the provision. It would have to be adapted to the draft articles in their present form, but its basic structure could be retained.

33. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Hafner that the Commission would have to examine the text adopted in 1930 to see whether it was more simply worded. He himself thought that it would not help very much to settle the question whether the rule of the exhaustion of local remedies was a matter of substance or of procedure. It depended on the context. However, the Commission must indicate clearly that, in some situations, responsibility could not be implemented before the exhaustion of local remedies. It was necessary to make that point even if the Commission did not need to go into the details, as Mr. Economides had wisely pointed out.

34. When the breach of an international obligation harmed only one person and if that person deliberately decided not to take any action, even if the State concerned might have an interest in protesting against the treatment of its national, it did indeed seem that the more specific elements associated with part two of the draft articles could not be applied. At issue was the whole question of preclusion and not a simple procedural rule in the narrow meaning of the term.

35. He also agreed with Mr. Hafner that the problem could be solved in the framework of part two or part three. He tended to think that article 26 bis should be moved, for that would solve some of the problems. It was also comforting that the comments made on the cluster of articles, even if not of a drafting nature, reflected concerns which could be met by making drafting changes.

36. Mr. PAMBOU-TCHIVOUNDA said that he too thought that the provision on the exhaustion of local remedies should be moved. It would be better placed in chapter III.

37. He would prefer to retain the titles of articles 24 and 25 as adopted on first reading. The point was to determine in time when wrongfulness began. The Special Rapporteur proposed, for example, that article 24 should be entitled "Completed and continuing wrongful acts", but he did not define those concepts with the necessary precision and it was difficult to see the linkage between the title of each article and its wording.

38. With regard to paragraph 2 of article 24 proposed by the Special Rapporteur, he was also in favour of deleting the words "Subject to article 18". Furthermore, the words "and remains not in conformity with the international obligation" seemed at least superfluous and could even give rise to problems. How could the act which was deemed to constitute the violation of an international obligation become in conformity with that obligation? The act in question would be a different one. That comment also applied to paragraph 3.

39. The repetition of the word "occurs" should be avoided in paragraph 1 of article 25 proposed by the Special Rapporteur. And he could not see why, in that paragraph, the moment when a given action or omission occurred was established by reference to preceding actions or omissions. Such an approach might be understandable if the composite act ceased exactly at that moment, but there was nothing that said that it did. In the circumstances, it might be possible to reverse the approach and talk about the moment when the first action or omission constituting the composite act occurred and then refer to the actions and omissions which occurred subsequently. That was where the effect of the moment at

[5] *Yearbook ... 1977*, vol. II (Part Two), p. 40.

[6] Ibid., p. 36.

which the unlawful act was deemed to have started took on its full significance. The words "Subject to article 18" should also be deleted from paragraph 2.

40. Mr. CRAWFORD (Special Rapporteur) said that most of the comments made by Mr. Pambou-Tchivounda could be considered in the Drafting Committee. With regard to a problem of the composite act which Mr. Pambou-Tchivounda had raised in connection with article 25, it should not be forgotten that it would take some time for the act to occur since it was composed, by definition, of a series of actions or omissions which occurred over time and were defined collectively as wrongful. Genocide was one example of a composite act. The first murder of a person belonging to a given race was not sufficient to establish that genocide had been committed, but, if it was followed by other similar murders and those murders became systematic, the genocide constituted by that series of murders would be deemed to have begun at the moment of the first murder. Consequently, the perpetrators of the first murders could not claim not to be guilty of genocide on the pretext that, at the moment when they had committed their acts, the reality of the genocide had not yet been established. The idea of taking into account the first past actions or omissions whose whole series constituted the composite act was not a new one. It had already appeared in article 25 adopted on first reading.

41. Mr. PAMBOU-TCHIVOUNDA thanked the Special Rapporteur for his clarification, which the Drafting Committee would no doubt take into consideration.

42. The CHAIRMAN, speaking as a member of the Commission, said that he too thought that the words "Subject to article 18" could be deleted from articles 24 and 25 proposed by the Special Rapporteur because article 18 stated a principle which was always kept in mind. Moreover, the use of those words in some paragraphs and not in others might give the impression that a distinction was being made between the various provisions of articles 24 and 25.

43. However, if the words were kept, it would then be necessary to amend and develop note 2 to article 25, contained in paragraph 156 of the second report, the first sentence of which read: "The proviso 'Subject to article 18' is intended to cover the case where the relevant obligation was not in force at the beginning of the course of conduct involved in the composite act, but came into force thereafter." That was in fact an excessively narrow interpretation of article 18, which also covered the reverse case in which the relevant obligation was in force at the beginning of the course of conduct involved in the composite act, but ceased to be in force thereafter. It would however be preferable to delete those words.

44. Mr. CRAWFORD (Special Rapporteur) said that it would be perfectly possible to delete the words "Subject to article 18", but the necessary explanation would have to be given in the commentary.

45. Mr. ECONOMIDES said that, if the words "Subject to article 18" were deleted, as all members of the Commission seemed to think they should be, it would then be necessary to revise the wording of article 18. New article 18 covered instantaneous acts or acts not extending in time, but dealt with continuing acts only partially and totally ignored composite acts. When it considered that article, the Drafting Committee would therefore have to include those three cases in it in as simple a manner as possible. There would then no longer be any need to use the awkward term "Subject to article 18".

46. Mr. CRAWFORD (Special Rapporteur), summarizing the debate on the third cluster of draft articles, said that the Commission clearly favoured simplifying those provisions, even if there were differences of opinion as to the extent of that simplification. He had carefully noted the very useful suggestions aimed at improving the drafting of the articles.

47. The only issue of principle he had not addressed was whether the notion of a continuing wrongful act should be retained. At the very least, the Commission should leave article 24 in square brackets pending consideration of article 41, which it had certainly not yet decided to delete.

48. Mr. Hafner had asked whether continuing wrongful acts could have other consequences within the framework of responsibility. It was not impossible that the question of extinctive prescription might be affected by whether a wrongful act was or was not continuing. For his own part, he thought that an article dealing with loss of the right to invoke responsibility should be included in part three, by analogy with the similar article 45 in the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidity or termination of a treaty. That issue had its place in the framework of the draft articles. Whether a fuller formulation of the principle of extinctive prescription or delay was necessary was another matter. His own view was that, although its incidence could be affected by whether the wrongful act was continuing or not, the principle of extinctive prescription remained the same, whether in respect of a continuing wrongful act or other acts. The Commission would have to return to that question.

49. He accepted one part of what Mr. Hafner had said on article 41, in the sense that the obligation of cessation was not a separate secondary obligation existing by reason of a breach of the primary obligation. But that idea, even if expressed differently therein, was implicated in chapter II (The "act of the State" under international law) in the sense that it was deeply concerned with the choice between restitution and compensation, a choice that the injured State would normally make. It was true that there was a presumption in favour of restitution and, in some cases, especially those involving peremptory norms, restitution would be the only possibility. But in many situations there was a de facto choice and the question of the identification of the injured State arose in that context. In other words, it might be that the injured State could call on the wrongdoing State for cessation of the wrongful act, but others could not. It might also be the case that there were more non-injured States with an interest in the cessation of the wrongful act than States actually injured by the breach. That was the case, for example, with breaches of the rules relating to diplomatic immunity. That question would be examined in greater detail when the Commission turned to the consideration of article 40 (Meaning of injured State). In that connection, it was not impossible that it might need to draw a distinction between cessation, on the one hand, and compensation, on the other, in which

case there might be significant consequences for the rest of the draft articles.

50. He remained convinced that a distinction must be drawn between completed and continuing wrongful acts. There was a difference between the effects of a completed internationally wrongful act and the continuation of the wrongful act. He was fully aware of the complexity of the political issues raised by situations that had occurred some time previously and which continued to produce effects. The Commission clearly could not express an opinion on whether expropriation was a continuing or a completed wrongful act. That depended on the situation. What it could do was to emphasize the primacy of article 18, so that acts that had been complete at a time when they had been lawful did not subsequently become the subject of contention because the law had changed. That was a fundamental principle which explained why article 18 was so important. He fully subscribed to the idea that all possible permutations must be considered within article 18; and he thought that, for the moment, the Commission must retain the concept of a continuing wrongful act in chapter III. The precise formulation should be left to the Drafting Committee. The Commission would be able to return to the issue once it had a clearer view of the overall scheme of the draft articles. It thus seemed reasonable to refer the third cluster of draft articles to the Drafting Committee.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the third cluster of draft articles (arts. 18, paras. 3 to 5, 22 and 24 to 26), together with the remarks and suggestions made during the debate, to the Drafting Committee.

*It was so agreed.*

52. The CHAIRMAN invited the Special Rapporteur to introduce chapter IV (Implication of a State in the internationally wrongful act of another State) of the draft articles.

ARTICLES 27 AND 28

53. Mr. CRAWFORD (Special Rapporteur) said that chapter IV of the draft articles dealt essentially with the question whether a State that had induced another State to commit an internationally wrongful act was itself also responsible for the commission of a wrongful act. Chapter I, section B, of the second report contained an introduction on the scope of chapter IV and an analysis of articles 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) and 28 (Responsibility of a State for an internationally wrongful act of another State) and the annex to the second report presented a brief comparative analysis of the practice of certain national legal systems with regard to interference in contractual rights, in other words, the question whether inducing others to breach contractual obligations constituted a wrongful act. The comparative analysis showed that legal practice in that field was very diverse, but also that chapter IV of the draft articles seemed to have been strongly influenced by the principle of liability applicable to interference in contractual rights under French law. According to that principle, anyone who assisted others in committing an act that was wrongful for that person was himself responsible. In practice, however, that principle was often nuanced. German law adopted a restrictive position on that question, whereas English law adopted an intermediate position, whereby anyone who knowingly induced another person to breach a contractual obligation could be held liable for a wrongful act, but there might be grounds justifying his conduct. The analogies had their limitations, but it had been interesting to note that chapter IV transposed a general assumption of responsibility from a national legal system and that that had proved a source of difficulties.

54. International law based itself on the general rule that a treaty created neither obligations nor rights for a third State without its consent (article 34 of the 1969 Vienna Convention), a principle also expressed in the Latin tag *pacta tertiis nec nocent nec prosunt*. Yet, article 27 as adopted on first reading seemed to violate that principle, for it raised the problem of the responsibility of a third State not bound by the obligation in question if it had deliberately caused a breach of that obligation. That provision seemed, first, to be a substantive rule and not a secondary rule; and secondly, to be unjustified. Its scope was much too broad, for, while there might well be situations in which a State that induced another State to breach a bilateral treaty ought to be considered as having committed a wrongful act, such cases were rare. By reconceptualizing chapter IV slightly, it was possible to bring it into the framework of secondary rules. Chapter IV was essentially concerned with situations in which a State induced another State to breach a rule of international law by which the inducing State was itself bound. A State could not escape responsibility for committing, through another State, an act for which it would be held responsible if it had itself committed that act. Some legal systems might resolve that problem by applying doctrines of agency. But that approach was not reflected exactly in chapter II. In any event, it seemed appropriate, in the context of chapter IV, to stress the condition that, in order for the responsibility of a State to arise, that State must itself be bound by the relevant obligation. It was that idea, and the desire not to trespass into the field of primary rules, that had inspired the new text of article 27 proposed in the second report.

55. Furthermore, there was an extremely wide range of situations in which States acted jointly in producing an internationally wrongful act. It had been pointed out that article 27 did not address all those cases, particularly the situation in which States acted collectively through an international organization, where the conduct producing the internationally wrongful act was that of the organs of the organization and was not as such attributable to the States. The question was to what extent the States which, collectively, procured or tolerated the conduct in question could be held responsible for doing so. It had been decided at the fiftieth session that that question raised the issue of the responsibility of international organizations and should not be dealt with in the framework of the draft articles, as it went beyond the realm of State responsibility.[7] However, there were other situations in which States acted collectively without acting through separate legal

[7] See *Yearbook ... 1998*, vol. II (Part Two), p. 87, para. 446.

persons and the Commission would have to return to that question in the context of part two, when dealing with the questions of restitution and compensation.

56. The draft articles were based on the proposition that each State was responsible for its own conduct, even if it acted in collaboration with other States. The underlying principle was thus that each State was responsible for its own wrongful conduct, in other words, for conduct attributable to it under the articles of chapter II or for conduct in which it was implicated under the articles of chapter IV. In his view, there was no need to go beyond that proposition. That approach might be spelled out more explicitly in the commentary, in the introduction to chapter IV or even in the introduction to chapter II.

57. He reminded members that he proposed replacing the current title of chapter IV by the title "Responsibility of a State for the acts of another State" because he did not think it possible to assume that the act committed by the other State would be internationally wrongful, as the act might be held not to be wrongful under the provisions of chapter V (Circumstances precluding wrongfulness). Moreover, because, as he had explained, he did not think that, in the framework of secondary rules, at least in the context of article 27, it should be considered that States incurred responsibility in case of breaches of obligations other than those by which they were bound, he proposed that article 27 as adopted on first reading should be amended to establish that State responsibility arose on two conditions: first, that the implicated State had acted with knowledge of the circumstances of the internationally wrongful act and, secondly, that the act in question would be internationally wrongful if it had been committed by that State. The original wording of article 27 was too vague. Furthermore, the words "rendered for the commission of an internationally wrongful act" that appeared therein were ambiguous, particularly if account was taken of aid programmes, for it might be that the aid provided was used for the commission of an internationally wrongful act in circumstances where the State giving the aid ought not to be held responsible. Moreover, in order to respect the *pacta tertiis nec nocent nec prosunt* principle, it was also important to make it clear that a State that had assisted another State incurred responsibility only if the act performed would have been wrongful if it had committed it itself. Thus, the new text proposed in the second report considerably limited the scope of article 27 and set forth what could properly be regarded as a secondary principle of responsibility.

58. He also proposed a new article 28 in his second report. In his view, the wording of article 28 as adopted on first reading had raised several problems. To begin with, as several Governments had pointed out, the term "coercion" as used in paragraph 2 was too imprecise. He took the term in the strong sense, as something more than persuasion, encouragement or inducement, but without the sense of unlawful use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. It could be argued that the same approach should be adopted for article 28 as was now adopted in the case of article 27, namely, that the coercing State should be regarded as responsible only for an act which would have been internationally wrongful if it had committed it itself. However, adopting a strong notion of coercion, that would lead to difficulties because, in certain circumstances provided for in chapter V, the acting State could be excused from responsibility by reason of force majeure. One could acknowledge that coercion itself was not unlawful, but that it was unlawful for a State to coerce another State to commit an unlawful act. The coercing State must also have acted with knowledge of the circumstances. He thus proposed that article 28, paragraph 2, should be amended to make it clearer and also that it should be the subject of a separate article.

59. As paragraph 1 of article 28 was too broad in scope, but had points in common with article 27, it would be deleted and some of its components taken up in article 27 proposed in the second report. The mere fact that a State could have prevented another State from committing an internationally wrongful act by reason of some abstract power of direction or control did not seem to be a sufficient basis for saying that the passive State was internationally responsible. Of course, matters were quite different when a primary obligation imposed on a State, as it did in the case of humanitarian law, a positive obligation of conduct.

60. Article 28, paragraph 3, was a "without prejudice" clause that must be applied to the whole of chapter IV. As the scope of articles 27 and 28 was limited, it nevertheless seemed necessary to retain the structure of chapter IV so as to cover the relatively frequent situations in which States coerced other States to commit certain breaches. It was also significant that no Government had argued for the complete deletion of that chapter. The task at the current time was to make chapter IV coherent with the framework of the text.

*The meeting rose at 1.10 p.m.*

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## 2575th MEETING

*Friday, 21 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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