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**Summary record of the 1479th meeting**

Topic:  
**State responsibility**

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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.*<sup>8</sup>

*The meeting rose at 12.50 p.m.*

<sup>8</sup> 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

that kind only the moment when it began, or the whole period during which it continued to exist?

3. A similar question arose with regard to composite and complex acts. A "composite" State act consisted of an aggregate of individual State acts whose combined effect alone entailed the breach of a specific international obligation. Assuming for example the existence of a customary rule of international law under which a State might not expropriate the property of aliens without compensation, and assuming further the existence of an establishment treaty between two States under which State A must guarantee nationals of State B a share in the exploitation of certain resources, two cases might arise: if State A had granted a number of concessions of exploitation to nationals of State B and had then expropriated one of them without compensation, the said customary international obligation would be breached, but not the treaty obligation, because the number of other nationals of State B who continued to enjoy concessions of exploitation remained sufficient for that second obligation to be regarded as respected. For the latter obligation to be breached too, a whole series of expropriations would have to take place that virtually reduced the participation of nationals of State B in the exploitation of the given resources to nil. The series of individual acts of expropriation was thus a composite act—a different act that breached an obligation different from that which was breached by each of the individual acts of which it was composed! To cite another example, a whole series of individual acts of discrimination would have to take place to constitute that typical composite act, "discriminatory practice", which was expressly forbidden under certain recent treaty obligations. What, in such cases, was the "time of perpetration" of the breach of the obligation? Was it the time of the first act in the series, or of the last, that concretized the existence of the series, or was it the whole period from the first act to the last? Was it not necessary, in such a case, to distinguish the duration of the breach from the moment when it could be established that it had taken place? A "complex" State act, on the other hand, was an act made up of a succession of distinct State actions, combining to prevent the achievement by the State of the result required by an international obligation. There again the act was one whose perpetration extended over a period of time and presented the same problems with the regard to the determination of the *tempus commissi delicti*.

4. The question of the determination of the time during which a breach was perpetrated was of practical importance in several respects. In determining the amount of damages, for example, the basis taken was normally the injury caused. However, an act whose performance continued over a period of time could cause injury not only at the beginning of that performance but also at the end and throughout its duration, so that the calculation of the damages would depend on what was regarded as the time of the perpetration of the breach. Mr. Reuter had said, in connexion with "complex" acts, that, even if only

the final moment were considered as the time of the performance of an act of that kind, it would still be the aggregate loss that would have to be made good, on the principle of full reparation for damages (see A/CN.4/307 and Add.1, foot-note 28). For his own part, however, he thought that the application of the principle cited by Mr. Reuter was warranted only if the damages to be made good in their entirety had been caused in their entirety by the breach of an international obligation. There would indeed be no reason for the author of an internationally wrongful act to be called upon to make reparation for damages which, at the time they had occurred, had not been caused in breach of an international obligation. The principle of full reparation for damages thus indirectly confirmed the position that the duration of the breach of an international obligation created by a complex act corresponded to the entire period during which the various elements constituting that complex act succeeded each other, and was not confined to the moment when that breach was completed. The position was the same in the case of a "continuing" or "composite" act. In the case of a wrongful military occupation, it was not the damages caused at the beginning or end of the occupation for which reparation had to be made, but the whole of the damages caused during the occupation.

5. The question he had raised was also of great importance from the point of view of the jurisdiction of international tribunals. It was not uncommon for a State, when it accepted the jurisdiction of an international tribunal, to restrict its acceptance *ratione temporis*, for example to disputes relating to acts or situations subsequent to a given date. It was from that angle that the Permanent Court of International Justice had had to consider the question of its jurisdiction in the *Phosphates in Morocco* case,<sup>1</sup> and the International Court of Justice in the *Barcelona Traction* case.<sup>2</sup> Indeed, the great majority of the declarations accepting the compulsory jurisdiction of the International Court of Justice restricted such acceptance to disputes arising in connexion with situations or acts subsequent to the date of ratification of the acceptance. It even happened that a State restricted its recognition of the jurisdiction of an international court to acts and situations prior to a given date. For instance, New Zealand, which in 1930 had accepted the compulsory jurisdiction of the Permanent Court of International Justice for disputes subsequent to that year, had later excluded from such acceptance disputes subsequent to 1940, the year in which it entered the war. As to the jurisdiction of the European Commission of Human Rights, the United Kingdom and Italy had accepted it only for acts or events subsequent to the date of their acceptance.

6. It was therefore very important to determine the time of the perpetration of the breach of an obligation in order to determine whether or not an inter-

<sup>1</sup> P.C.I.J., Series A/B, No. 74, p. 10.

<sup>2</sup> *Barcelona Traction, Light and Power Company, Limited (Preliminary objections)*, Judgment: I.C.J. Reports 1964, p. 6.

national tribunal had competence to rule thereon. Some had maintained that, to do so, it was sufficient to interpret the clauses of acceptance of competence that were accompanied by a limitation *ratione temporis*. Such an interpretation, however, did not always provide a satisfactory answer to the question. Of all the declarations of acceptance of the jurisdiction of the International Court of Justice, it seemed that only that of India expressly excluded “any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which” had existed prior to the date of that declaration (A/CN.4/307 and Add.1, foot-note 6). In most declarations, however, States confined themselves to mentioning situations and acts subsequent to a particular date, a clause that could be interpreted only once the question had been settled as to when, and for what duration, the breach of the obligation had occurred.

7. Determination of the “tempus” of the breach of an international obligation was also of importance in connexion with diplomatic protection. For a State to be able to exercise its diplomatic protection on behalf of a private individual, a link of nationality had in principle to exist between them from the time of the perpetration of the internationally wrongful act until the presentation of the international claim. Obviously, when the breach of an international obligation extended over a period of time, the national link between the victim of the breach and the State exercising diplomatic protection must have existed uninterruptedly from the initiation of the breach. It had frequently happened, after the Second World War, that a person who had been a national of a State that had had no arbitration or jurisdiction treaty with the State he accused of having committed an internationally wrongful act to his prejudice during the hostilities, acquired the nationality of a State that could espouse his cause. In order to establish whether the latter State was qualified to intervene on behalf of a person complaining of an act whose performance had begun at a time when he had not yet possessed the nationality of that State, but which had extended after the acquisition of that nationality, it was essential to settle the question of the time of the perpetration of the breach of the international obligation.

8. The Commission had already encountered those problems when formulating paragraphs 3, 4 and 5 of article 18.<sup>3</sup> It had then dealt separately, in respect of each type of act considered, with the question of the simultaneity required between the existence of the international obligation for a State and the performance by that State of an act not in conformity with that obligation for the act to constitute a breach of that obligation. If the act not in conformity with the obligation was of a continuing character (a case covered by paragraph 3), there was breach of the obligation if the “continuing” act had taken place, at least in part, while the obligation had been in force

for the State. If the act not in conformity with the obligation was a “composite” act (a case covered by paragraph 4), there was breach of the obligation if the act could be regarded as constituted by individual acts performed during the period when the obligation had been in force for the State. If the act not in conformity with the obligation was a “complex” act (a case covered by paragraph 5), there was breach of the obligation if the act had been initiated by an action or omission occurring in the period during which the obligation had been in force for the State, even if the act had been completed after the end of that period. In all those cases the question envisaged had been that of the existence of a breach of an international obligation. Having considered the cases in which a breach of an international obligation occurred, the Commission must now ask itself at what moment that breach took place and during what “time” it must be deemed to have been perpetrated.

9. Although separate, the two questions of the existence of a breach and of the *tempus commissi delicti* required coherent solutions. With regard to the continuing act, it had been decided that it was sufficient if some part of its duration lay within the period when the obligation had been in force for a breach of that obligation to have taken place, which meant that logically the time of the perpetration of the breach had to be considered as corresponding to the whole period of the occurrence of that act, from beginning to end. Logic also required that the time of the perpetration of a composite act should be regarded as corresponding to the whole period during which the act had taken place in breach of the obligation. Finally, with regard to a complex act, it would be contrary to paragraph 5 of article 18, for example, to assert that the time of the perpetration of the breach corresponded only to the final moment and did not include the initial moment.

10. In article 21, paragraph 2, and in article 22, the Commission had dealt with the case where a State to which an obligation of result was addressed failed initially to create a situation in conformity with the result required. The Commission had taken the view that in such a case there was no breach of the obligation unless the State also failed, by its subsequent conduct, to achieve that result. It would therefore be difficult to reconcile those articles with a solution that amounted to excluding such subsequent conduct from the time of the perpetration of that complex wrongful act.

11. In the case of an “instantaneous” act, dealt with in article 24, paragraph 1, determination of the *tempus commissi delicti* should not in principle raise any problems of verification. The breach in such a case was characterized by the instantaneous nature of the conduct constituting the breach. Examples were the murder of the representative of another State, or the sinking of a neutral ship on the high seas. There was no difficulty in determining the time of the perpetration of such acts, since they lasted no longer than the instant of their performance. Obviously the duration of a breach of that kind covered only the

<sup>3</sup> See 1476th meeting, foot-note 1. For the Commission’s commentary to article 18, see *Yearbook... 1976*, vol. II (Part Two), pp. 87 *et seq.*, doc. A/31/10, chap. III, sect. B, 2.

time of its performance in the strict sense of the term, to the exclusion of possible preparations or more or less long-term effects.

12. There were instantaneous acts with continuing effects where only the effects were continuing, and which did not lose their instantaneous character whatever the duration of such effects. In its commentary to article 18, the Commission had already had occasion to touch on that question. Thus, in the *Phosphates in Morocco* case, it could be considered that the Permanent Court of International Justice had been right in treating the decision taken in 1925 by the Mines Department of Morocco—at that time a French protectorate—under which an Italian national was to have been deprived of his acquired rights contrary to France's international undertakings, as an instantaneous act, even if its effects continued long after, and that consequently the Court had had no jurisdiction, since France had accepted its jurisdiction only as from 1932. The Court's reasoning on the subject had not always been very clear, but Judge Cheng Tien-Hai had summed up the situation very accurately in noting that the decision in question had done no new mischief after the time of its adoption, and had given rise to no new situation.<sup>4</sup>

13. It was in the cases dealt with in paragraphs 2, 3, 4 and 5 of article 24 that the question of the determination of the *tempus commissi delicti* really arose. It arose first where there was a continuing act strictly so-called (illegal detention of a foreign official personage, maintenance in force of legal provisions conflicting with a treaty, unlawful occupation of a territory, etc.). In the *Phosphates in Morocco* case, the Italian Government, in addition to formulating several complaints, had also argued that the régime instituted by the dahirs in 1920, establishing a monopoly for the working of the phosphates in Morocco for the benefit of French nationals, amounted to a continuing act. The Italian Government had contended that a State that failed to bring its internal laws into line with its treaty obligations committed a "permanent international delict".<sup>5</sup> The Court had contested the applicability of the Italian Government's argument to that specific case but had not thereby contested the merits of the concept of the existence of internationally wrongful acts that were continuing acts, the time of whose perpetration, as the Italian Government had noted, consisted of "the whole of the period comprised between its beginning and its completion".<sup>6</sup>

14. In dismissing *in toto* the two contentions of the Italian Government, namely, that concerning the 1925 decision of the Mines Department (which could be considered as an instantaneous act with continuing effect) and that concerning the contradiction between the obligations contracted by France under the General Act of Algeciras (1906) and the 1920 legislation establishing the phosphates monopoly in Mor-

occo for the benefit of French nationals, the Court had tended to confuse the two complaints, treating the second act invoked by the Italian Government as also an instantaneous act with continuing effects. It was not on that basis alone, however, that it had rejected the Italian Government's claim; it had also referred to France's declaration, in 1932, of acceptance of the Court's jurisdiction, in which it had detected a reservation nor merely with regard to acts subsequent to a particular date but also with regard to acts of which all the constituent elements might be subsequent to that date. Without wishing to express an opinion on the merits of that interpretation at that juncture, he thought it relevant to note that the Court had in no way denied the existence of internationally wrongful acts of a continuing character. On the contrary, everything suggested that, had the Court regarded the act alleged by the Italian Government as a continuing act, its decision would have been different.

15. In a separate opinion, cited by the Special Rapporteur,<sup>7</sup> Judge Cheng Tien-Hsi had emphasized the distinction to be drawn between the two complaints made by the applicant Government, showing that, in the case of the 1925 decision of the Mines Department, what had been at issue was "merely the consequences of an illicit act... completed once for all at a given moment", whereas, in the case of the monopoly, what had been at issue was a "continuing and permanent state of things" incompatible with the French Government's international obligations. However that might be, and in conclusion, in the whole decision on the *Phosphates in Morocco* case no argument was to be found contesting the existence of two categories of internationally wrongful acts: instantaneous acts and continuing acts.

16. The European Commission of Human Rights had raised the question several times, notably in the *de Courcy v. the United Kingdom* and the *Roy and Alice Fletcher v. the United Kingdom* cases, which he had cited in his report.<sup>8</sup> With respect to a continuing act that had begun before and continued after acceptance of its jurisdiction, the European Commission of Human Rights had considered itself competent for the part of the act that continued after acceptance of its jurisdiction.

17. In the case dealt with in article 23, where the international obligation was to prevent a given event, and where the internationally wrongful act resulted from the conjunction of two elements, namely, occurrence of the event to be prevented and failure to prevent it on the part of State organs that had rendered such occurrence possible, the question arose whether or not the *tempus commissi delicti* included the period prior to the occurrence of the event and during which the State had apparently shown negligence in prevention. His view was that the period preceding the event should not be taken into consid-

<sup>4</sup> See A/CN.4/307 and Add.1, para. 27.

<sup>5</sup> *Ibid.*, foot-note 46.

<sup>6</sup> *Ibid.*, para. 29.

<sup>7</sup> *Ibid.*, para. 30.

<sup>8</sup> *Ibid.*, para. 33.

eration in determining the *tempus commissi delicti*, since, as provided in article 23, the breach came into being only when the event occurred. It was the occurrence of the event that determined the breach. If the event was instantaneous, the internationally wrongful act was also, therefore, instantaneous.

18. It was true that the event itself might have a certain duration, as in the case of the occupation of an embassy by rebels. The question then arising was whether or not the duration of the event should be taken into account in determining the time of the perpetration of the breach of the obligation to prevent the occurrence of the event. The State might be required to bring to an end the event whose occurrence it had not prevented; the question remained whether that obligation was always an obligation to prevent the occurrence of the event, or a different obligation.

19. The question of the *tempus commissi delicti* also arose in the case dealt with in article 18, paragraph 4, namely, that of an act composed of a series of similar individual acts, committed in a plurality of separate cases but only the totality of which produced the conditions for a breach of a specific obligation. In the case already referred to of a State A having undertaken, by a treaty of establishment and economic cooperation, to permit nationals of a State B to participate in the exploitation of its mineral or other resources, and having granted a number of concessions to nationals of State B, it was obvious, as had been pointed out, that, if State A expropriated one of those concessions, that act of expropriation would not in itself constitute a breach of the obligation entered into by the State under the treaty; for such a breach to occur, the first expropriation would have to be followed by a series of others, the total effect of which would be to reduce the participation of State B's nationals in the exploitation of the mineral or other resources of State A to nil. That would be a composite act, consisting of a plurality of separate acts, but linked by the same intention, namely, to nullify the execution of the international obligation under the treaty. State A could of course bring about the same result by an instantaneous act, by adopting legislative measures cancelling at one blow all concessions granted to nationals of State B. Clearly, in the case envisaged, it was neither the first nor the last expropriation alone that constituted the breach of the international obligation; the duration of the breach extended over the totality of the expropriations. It was thus the whole period during which the expropriations took place that constituted the *tempus commissi delicti*—the time of the perpetration of the breach.

20. Similarly, in the case of a treaty prohibiting certain discriminatory practices, one specific act of discrimination would not be sufficient to establish the breach; there had to be a series of acts of such a kind to justify the conclusion that a discriminatory practice existed, and that consequently there was a breach of the obligation under the treaty. There again, then, the *tempus commissi delicti* would be the entire period during which the discriminatory practice was carried out, from the first act of discrimination

committed after the entry into force of the treaty for the State in question up to the last. There must be no confusion, in that connexion, between the moment when the internationally wrongful character of the practice became apparent and the moment when the practice began, since it was only when the existence of the practice was established that the breach could be alleged and that the said practice could be seen retrospectively as having taken place from the time of the act with which it had begun.

21. Lastly, the question might arise as to the *tempus commissi delicti* in the case of a complex act within the meaning of paragraph 5 of article 18, in other words, an act constituted by a series of actions or omissions by the same or different organs of the State in respect of the same case. In such a case there was a breach of an obligation of result and of an obligation under which, if the first action by a State organ was not in conformity with the result required by the obligation, such action could be corrected later by a further action of the same or some other organ of the State. The complex internationally wrongful act was thus the global outcome of all the actions or omissions of State organs at successive stages in a particular case. For example, to take the case of an attempt on the life of a foreign Head of State, if the guilty parties were successively acquitted by the various courts of the State until no further possibility of recourse remained, the breach of the obligation to punish the criminals, which had begun with the decision of the court of first instance, would be completed by the decision of the court of final instance. Obviously, it was that last decision that definitively established the existence of a breach, but it was clear that, once established, the breach included all the decisions at all levels by the different courts, from the decision of the court of first instance to the decision of the court from which there was no appeal.

22. The question of the *tempus commissi delicti* of a complex internationally wrongful act had arisen again in the *Phosphates in Morocco* case, in the third complaint formulated by the applicant Government, relating to a complex act—the “monopolization of the Moroccan phosphates”<sup>9</sup>—involving, over and above the 1925 decision of the Mines Department, denials of justice in 1931 and 1933. The Italian Department, had contended that the breach had been initiated in 1925 by the decision of the Mines Department and completed by the denial of justice in 1933. Had the Court accepted that contention, it would have been competent to hear the case, since its jurisdiction had been accepted by France in 1932. The agent of the French Government had disputed that contention by arguing that the 1933 rejection of the application for extraordinary leave to appeal had not been a denial of justice but merely a refusal to settle, in a certain manner, a dispute arising from a lack of jurisdiction, a fact which, if it might in itself be a denial of jus-

<sup>9</sup> *Ibid.*, para.30.

tice, had nevertheless antedated France's acceptance of the Court's jurisdiction. Thus the denial of justice—if such denial had occurred—had itself taken place prior to the crucial date and was not a sufficient basis for the competence of the Court. That being said, the French agent had nevertheless agreed to argue on the basis of the existence of breaches occurring "at several moments" and therefore constituting "complex" acts, the time of whose perpetration included all those different moments.

23. In the matter of determining the *tempus commissi delicti* of a complex internationally wrongful act, the European Commission of Human Rights had adopted a position in conformity with the same line of argument: it had considered that the material date for determining whether an act was prior or subsequent to the date of acceptance of its jurisdiction was not the date of the initial action or omission by the State but the date of the decision whereby the breach became definitive. Thus the conclusions to be drawn from both practice and case law confirmed those dictated by juridical logic, namely, that the time of the perpetration of the breach of an international obligation constituted by a complex act was the whole period extending from the conduct initiating the breach to that which completed it.

24. Mr. REUTER noted that the Special Rapporteur had determined the *tempus commissi delicti* in terms of a clause defining the competence of a court of law. It might be asked, however, whether there were not other cases in which the *tempus commissi delicti* had to be determined, and whether the answer to the question raised in article 24 did not vary according to the nature of the problem to be resolved. For example, in the case of prescription of an international crime constituted by a series of violations of human rights, a date would have to be fixed that would not necessarily correspond to the provisions set out in article 24. Similarly, in a case of succession of States resulting from a merger of several States, the question might arise as to the manner in which the *tempus commissi delicti* would be determined.

25. He wondered, therefore, whether in article 24 the Special Rapporteur had intended to propose a general rule for all cases, a general rule with exceptions, or a rule applicable only in the cases mentioned.

*The meeting rose at 6 p.m.*

## 1480th MEETING

*Wednesday, 17 May 1978, at 10.5 a.m.*

*Chairman:* Mr. José SETTE CÂMARA

*Members present:* Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. 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)<sup>1</sup> (*continued*)

1. Mr. USHAKOV said that, for the purpose of determining the *tempus commissi delicti*, what mattered was not the duration of the breach of an international obligation but the time at which the breach occurred, which was also the time when the responsibility of the State originated. In chapter III of the draft articles, the Commission was dealing with the origin of the internationally wrongful act. Accordingly, for the time being, its task was to determine in what circumstances and at what time the breach of an international obligation occurred—in other words, in what circumstances and at what time the internationally wrongful act occurred which entailed the responsibility of the State. The duration of the breach should be disregarded for the purpose of determining the origin of the State's responsibility, for under article 1<sup>2</sup> it was the internationally wrongful act that gave rise to the State's international responsibility.

2. In paragraph 24 of his report (A/CN.4/307 and Add.1), the Special Rapporteur cited three issues that might be affected by the duration of the internationally wrongful act, namely, the determination of the amount of reparation due by the perpetrator of an internationally wrongful act, the determination of the jurisdiction *ratione temporis* of the international judicial or arbitral tribunal that might eventually have to deal with the case, and the requirement of the "national character of a claim", according to which a State was authorized to intervene for the purpose of the diplomatic protection of an individual only if there was a link of nationality between the State and the individual concerned. For the moment, none of those three issues was of concern to the Commission; its sole function was to determine in what circumstances and at what time the international responsibility of the State came into being.

3. The issue of the determination of the amount of reparation payable by the perpetrator of an internationally wrongful act was irrelevant to the question of the determination of the breach. Besides, for the purpose of determining the amount of the reparation for such an act, what mattered was not the duration of the event but its seriousness. Under article 19, for example, the distinction between an international crime and an international delict was based not on

<sup>1</sup> For text, see 1497th meeting, para. 1.

<sup>2</sup> See 1476th meeting, foot-note 1.