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Summary record of the 1367th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1976, vol. I

Charter of OAS. Sir Francis Vallat had rightly said at the present meeting that there was a difference between the source of the obligation, which was the point at issue, and the source of the rule of law from which the obligation arose. It was correct to say that the source of a treaty obligation was a "convention" (or if preferred, a "treaty" or "agreement"). But the terms "agreement" or "treaty" were understood to mean both the procedures for establishing certain rules and the instrument containing those rules. Both were referred to as the "source", but the meaning of the term was not the same in both cases. In speaking of the "source" of an international obligation, it was evident that the source of a treaty obligation was a rule established by treaty procedure and that the source of a customary obligation was a customary rule. In that connexion, the importance of what were called "secondary" sources might have been exaggerated. Article 38 of the Statute of the International Court of Justice did not even mention the word "source". It was the writers who had introduced the notion of "secondary sources". The draftsmen of the Statute had envisaged the case in which the Court might fall back on doctrine and judicial decisions as auxiliairy means of establishing the existence of a rule, which remained none the less a customary rule. Consequently, doctrine and jurisprudence seemed to be means of ascertaining the existence of obligations, not separate sources of international obligations. Some members of the Commission had emphasized the ambiguity of the word "source" and had cited in that connexion the fact that the term was sometimes used to designate material rather than formal sources. Nevertheless, even though it was ambiguous, the term "source" was the one which he had considered the most appropriate. Etymologically, it designated the place where water emerged from the ground, and that was the image which jurists employed to indicate how an obligation arose. Mr. Ushakov had suggested the term "character",[12] but that had the disadvantage of being vague and applicable to other notions, such as that of the fundamental or non-fundamental character of the obligation. The term "origin", which he had occasionally used in introducing article 16, was also rather unsatisfactory, because it might be said that some obligations had their origin in common law or in Roman law, and that was obviously unconnected with the formal source of an obligation. Whatever the term chosen, it would perhaps be best for the Commission to say in the commentary what it meant by "source" or in the body of article 16 itself, to describe the source as "customary, contractual or of any other kind".

39. As far as the expression "régime of responsibility", in paragraph 2, was concerned, it denoted generally the consequences of an internationally wrongful act, for the State which committed it. In addition to being obliged to make reparation, it might be required to give a particular kind of satisfaction; it might also incur sanctions, which might vary widely in character. The régime of responsibility therefore also included the determination of the subject of international law entitled to set those consequences in motion—the subject directly injured, other States, the international community as a whole, or international organizations. The Commission might either define the expression "régime of responsibility" or use the expression "legal consequences" proposed by Mr. Ushakov,[13] but the commentary should make it clear that the expression applied also to the determination of the subject of international law authorized to set those consequences in motion.

40. The CHAIRMAN suggested that draft article 16 should be referred to the Drafting Committee for consideration in the light of the comments and suggestions made in the discussion.

It was so decided.

The meeting rose at 1.05 p.m.

[12] *Ibid.*, para. 3.

[13] *Ibid.*, para. 4.

1367th MEETING

Wednesday, 12 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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

Organization of work (*continued*)*

1. The CHAIRMAN suggested that item 1 of the agenda, "Filling of casual vacancies in the Commission (article 11 of the Statute)" should be considered on Thursday, 20 May 1976. Meanwhile the secretariat would immediately inform members who had not yet been able to attend the session, including, of course, the two African members, so that they could make any arrangements they thought necessary.

2. If there were no objections he would take it that the Commission agreed to that course.

It was so agreed.

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

[Item 2 of the agenda]

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

ARTICLE 17 (Force of an international obligation)

3. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 17 which read:

* Resumed from the 1361st meeting.

Article 17. Force of an international obligation

1. An act of the State contrary to what is required by a specific international obligation constitutes a breach of that obligation if the act was performed when the obligation was in force for the State implicated.

2. However, an act of the State which, at the time it was performed, was contrary to what was required by an international obligation in force for that State, is not considered to be a breach of an international obligation of the State and hence does not engage its international responsibility if, subsequently, an act of the same nature has become proper conduct by virtue of a peremptory rule of international law.

3. If an act of the State contrary to what is required by a specific international obligation

(*a*) is an act of a continuing nature, it constitutes a breach of the obligation in question if the obligation was in force for at least part of the duration of the continuing act and so long as the obligation remains in force;

(*b*) is an act considering of a series of separate conducts relating to separate situations, it constitutes a breach of the obligation in question if that obligation was in force while at least some of the conducts making up the act were taking place and those conducts were sufficient by themselves to constitute the breach;

(*c*) is a complex act comprising the initial act or omission of a given organ and the subsequent confirmation of such act or omission by other organs of the State, it constitutes a breach of the obligation in question if that obligation was in force when the process of carrying out the act of the State not in conformity with such obligation began.

4. Mr. AGO (Special Rapporteur) said that the source of the international obligation breached was not the only formal aspect that might have to be considered for the purposes with which the Commission was concerned in the context of State responsibility. The question also arose whether the fact that the obligation had been in force at the time when the State had adopted conduct in conflict with the requirements of that obligation was or was not an essential condition for establishing the existence of a breach of that obligation. The difficulty was that the international legal order was not static and that there were many possible manifestations of conduct which could constitute a breach of an international obligation. In order to establish whether the conduct of a State at a particular moment was or was not in conformity with the requirements of an international obligation, several possible cases might have to be considered, according to the time at which the obligation had been in force in relation to that State. For international obligations were not permanent; like obligations under internal law they arose and came to an end.

5. There was a general principle, set out in 1928 by Max Huber, the arbitrator in the *Island of Palmas* case, that a juridical fact must be appreciated in the light of the law contemporary with that fact, and not of the law in force at the time when a dispute in regard to it arose, or fell to be settled.[1] That opinion had related to a lawful act, but it was obvious that it also applied to wrongful acts. Moreover, the principle had also been confirmed in cases relating to wrongful acts, such as the *Pelletier* case, in which it had been provided, in 1884, that the arbitrator should apply the rules of international law existing at the time of the transactions complained of.[2] There could therefore be no question of taking into consideration an obligation which had existed at the time of the award but had not been in force at the time of commission of the act which was not in conformity with that obligation. In another case, submitted to arbitration in 1900, the Imperial Russian Government had been accused by the Government of the United States of America of having seized American vessels engaged in seal-hunting outside Russian territorial waters. At the time of the seizures, the States concerned had not been bound by any convention on the subject, but subsequently, and before the award had been made, they had concluded a convention under which it was permissible to seize vessels outside territorial waters. In the arbitration agreement, the general principle had once more been confirmed: the arbitrator was to apply the general principles of the law of nations and the international agreements in force and binding upon the parties at the time of the seizure of the vessels.[3]

6. There were three possible cases, according to the time when the obligation was in force for the State. In the first case, the obligation had arisen but had ceased to exist for the State concerned before the act was committed. In that case, there could be no doubt that no breach of the obligation had taken place. Nothing in the practice of States or in international jurisprudence could justify a different conclusion.

7. In the second case, the obligation had existed at the time when the act was committed, but subsequently had ceased to exist. It was tempting to conclude that the conduct of the State constituted an undoubted breach of the international obligation then incumbent on it and, consequently, an internationally wrongful act on its part. Doubts arose, however, if one made an excursion into internal law, in particular civil and criminal law. In civil cases, most systems of law allowed a claim for reparation for damage caused by an act committed in breach of an obligation incumbent at the time on its author, even if the obligation had been extinguished when judgment was given. In criminal cases, however, a person could not generally be held responsible for an act committed in breach of an obligation incumbent upon him at the time of its commission, but which had ceased to exist at the time of the judgment; it was usually the law most favourable to the accused which was then applied. He was nevertheless convinced that the application of that principle would not be justified in international law. In internal law, criminal liability set the author of the wrongful act against society as a whole, whereas in international law the State committing a breach was normally set against another State, the victim of the breach. To apply to the former State the law most favourable to it would amount to applying on principle,

[1] United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 845.

[2] See G. F. De Martens, *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1887), 2nd series, vol. XI, pp. 800 and 801. For a full account of the case, see J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. II, p. 1749.

[3] United Nations, *Reports of International Arbitral Awards*, vol. IX (United Nations publication, Sales No. 59.V.5), p. 58.

to the State injured by the breach, the law most unfavourable to it. The necessary conclusion, therefore, was that, in that case, it was enough for the obligation to have existed at the time when the act was committed for the act to be wrongful and for responsibility to be incurred. That conclusion was confirmed by international jurisprudence.

8. For instance, in the middle of the nineteenth century, the umpire of the United States-Great Britain Mixed Commission, set up under the Convention of 8 February 1853, had had to hear a number of cases relating to the slave trade. Bad weather had obliged American vessels carrying African slaves to take shelter in a port in Bermuda, where the British authorities had freed the slaves and seized the vessels. At the time, the slave trade had not been prohibited and the umpire held that Great Britain was therefore required to respect foreign property, in that instance consisting of the African slaves. The umpire, who subsequently had to settle a number of similar cases, stated that it was necessary to examine, in those further cases, whether the slave trade had become contrary to the "law of nations" at the time the acts complained of had been committed. It should be noted that by the "law of nations" he did not mean international law, but the internal law of the nations concerned. It was only when the "law of nations" had not prohibited the slave trade that Great Britain had violated an international obligation incumbent upon it. But the more recent cases had occurred when the slave trade was prohibited by the law both of the United States and of Great Britain, and the umpire had decided that, in such cases, the freeing of the slaves and the seizure of the ships was lawful. Roughly speaking, that amounted to saying that if the obligation existed at the time when the act was committed, the act was wrongful, whereas if the obligation had ceased to exist at that time, the act was lawful and the responsibility of the State was not entailed.

9. In the *James Hamilton Lewis* case, the arbitrator had decided, in 1902, that the determining factor was the time at which the act had been committed: if the act had been wrongful at that time, it was of no consequence that it had subsequently become lawful.[4] The same principle had been confirmed in 1937 in the *Lisman* case.[5] Finally, the International Court of Justice had recognized the principle in 1963, in the *Northern Cameroons* case.[6] It had stated, in substance, that if the Administering Authority had committed an act contrary to obligations under the Trusteeship Agreement, while that Agreement was in force, the act would remain contrary to those obligations even if the Agreement terminated. As he had pointed out in his report (A/CN.4/291 and Add.1-2, para. 48), the Commission itself had referred to that judgment in its commentary to article 56, paragraph 3 of the draft convention on the law of treaties, adopted on first reading at its sixteenth session.

10. Although the rule was thus well established in international practice and jurisprudence, it was nevertheless open to question whether it was absolute and whether it should not be open to exceptions, for humanitarian reasons, for example. It would have been noted that, in the cases he had previously mentioned relating to the slave trade, the umpire had taken the view that the freeing of the slaves and seizure of the vessels were to be regarded as unlawful acts if slavery had not been prohibited at the time of those acts, and as lawful acts if slavery was prohibited at the time in question. But since then such acts were not merely lawful: they had become obligatory and "due" conduct under a peremptory humanitarian rule of international law. In our time, if a State seized a vessel being used for the slave trade and freed the slaves, it would be doing more than performing a lawful act: it would be complying with an obligation imposed upon it by international law. Now that there was a rule of *jus cogens* requiring such conduct from a State, would a State be condemned by a court to pay compensation to another State because in the past it had committed an act which might have been wrongful at the time of its commission but had now become due conduct under a peremptory rule according to modern ideas on international law? The same would apply in the case of a neutral State which had undertaken by treaty to deliver arms to another State, but had refused to fulfil its obligation, knowing that the arms were to be used for genocide or aggression, and had done so before the rules of *jus cogens* prohibiting genocide and aggression had been adopted. If the case were brought to trial after the entry into force of those rules, would an international tribunal condemn the neutral country for what it had done in the past when its refusal to assist a State about to commit an act of genocide or aggression had become required conduct at the present time under a peremptory rule of international law? Although cases of that kind were unlikely, they could not be excluded, and he therefore proposed to provide for an exception to the general rule—an exception relating particularly to the case where the international obligation breached when the act in question had been committed had not only ceased to exist subsequently but had been replaced by another obligation requiring that State to do exactly the opposite.

11. In the third possible case, the State adopted a certain conduct at a time when it was not contrary to any existing international obligation incumbent upon it, but a new obligation was subsequently imposed on the State. If the retroactivity of that obligation was accepted, the conduct would be wrongful. But the principle of non-retroactivity seemed to be well-established in international law. There were no exceptions to that principle, although certain treaties provided that the obligations they imposed on the parties also related to periods preceding the date on which the treaty had been concluded. In reality, such provisions did not in any way mean that the parties had agreed to consider as wrongful the conduct adopted by one of them before the treaty had come into force. To illustrate that point, he had referred in his report to the Convention of 17 October 1951 between Switzerland and Italy concerning social insurance (A/CN.4/291 and Add.1-2, para. 58). Writers

[4] *Ibid.*, pp. 69 *et seq.*

[5] *Ibid.*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1789.

[6] *I.C.J. Reports 1963*, p. 15.

had considered the case to which he was referring, and the conclusions they had reached corresponded to those which he had mentioned. From a more general point of view, the Institute of International Law had adopted in 1975 a resolution on "The Intertemporal Problem in Public International Law" in which it recognized, as an exception to the general rule, that States and other subjects of international law had the power to determine by common consent the temporal sphere of application of norms, subject to any peremptory norm of international law which might restrict that power.

12. The situation was sometimes complicated by the fact that the conduct of States was not always instantaneous; it might be extended over a period of time and constitute what writers called "*faits continus*" (continuing acts). Thus when an international convention required a State to adopt a law having a certain content, or to abrogate a law, and it did not do so, the act of the State continued over a period of time. The same applied to the unwarranted occupation of the territory of another State, the blockade of a coast or a law or practice obstructing innocent passage of ships through a strait. In all such cases there was a breach of an international obligation with which the conduct of the State was in conflict, in so far as for a certain period of time, at least, the act of the State coincided with the existence of the obligation incumbent upon it.

13. The act of the State might also be constituted not by a single and continuing conduct but by a succession of more or less identical conducts adopted in a series of separate situations. For instance, a State might be free to adopt any rules it considered appropriate regarding the residence of aliens and the exercise of a gainful occupation or a particular profession by an alien, but it might be under an international obligation where such matters were concerned to abstain from discriminatory practices in regard to aliens of a certain nationality. The wrongful act was then represented by the practice itself. For there to be a breach of an international obligation of that kind, there must have been a certain number of conducts which as a whole constituted a practice. Those conducts necessarily related to different actual situations. But the international obligation in question could arise before, during or after the adoption of a practice. In such cases it seemed clear that there was no internationally wrongful act unless a series of conducts sufficient in themselves to constitute a "practice" had taken place while the obligation was in force for the State.

14. Lastly, the act of the State might be a "complex" act. That was understandable when it was considered that there were obligations known as "obligations of result" whereby a State were required, not to adopt a specified conduct, but to achieve a certain result by means of its own choice. There was therefore a breach of its obligation if that result was not obtained. Supposing that a government had undertaken to permit nationals of another State to exercise a certain profession in its territory: if one of them were refused the necessary permit by a local authority, that would only be the beginning of a breach of the obligation in question, because the person concerned could apply to the central authorities, who might annul the local decision. If the central administrative authorities did not grant his application, he could still apply to the courts. It was only if the court of final instance dismissed his claim that the breach of the international obligation would be complete. But, there again, it was possible that the obligation might come into being while the conduct constituting the complex act complained of was taking place or, on the contrary, that it might cease to exist during that time—as was the case, for example, when the State denounced the treaty imposing the obligation before the court of final instance had given its judgment.

15. When therefore the act of the State was a complex act in which several organs of the State might take part, it was the time when the breach began which might be said to be decisive. If the obligation was not in force at the time when the local authority refused to grant a permit to an alien to exercise a profession, that refusal was lawful. If the alien subsequently applied to a central authority when the obligation had entered into force, that authority was not required to annul a decision which had originally been lawful; but if that authority also refused a further application addressed to it, the breach began at that moment. On the other hand. if the initial act or omission of an organ of the State had been in conflict with an international obligation deriving from a subsequently denounced treaty, the State could not refuse to restore the situation which ought to have existed at the time when the process of carrying out the act of the State had begun; the complex unlawful act could be completed even after the obligation had ceased to exist.

16. The distinctions he had made had led him to propose an article divided into three paragraphs. Paragraph 1 set out the general principle, paragraph 2 stated the exception and paragraph 3 referred to the three separate cases in which the act of the State extended over a period of time.

17. Mr. USHAKOV said he fully accepted the principle stated in paragraph 1 of article 17, that there was a breach of an international obligation only if the obligation was in force at the time when the act in conflict with it was committed. But he was not entirely satisfied with the way the principle was stated. The repetition, in the three paragraphs, of the circumlocution "an act of the State contrary to what is required by a specific international obligation" was due, in his opinion, to the lack of a definition of the term "breach". If that term were defined in the draft, the circumlocution could be avoided by referring simply to a "breach of an international obligation". He had already proposed that the notion of a breach of an international obligation should be defined in article 16 or in a separate article.[7] His own view was that there was a breach of an international obligation by a State when it was established that the act of the State was contrary to the obligation in question. And it was precisely the term "established" that was lacking in article 17, paragraph 1. If the notion of a breach were defined in that way, the paragraph could be worded to read:

[7] 1365th meeting, para. 2.

The breach of an international obligation by a State is established only when it relates to an obligation in force for that State at the time when the wrongful act was committed.

18. In affirming that were was no breach of an international obligation by a State if the obligation was subsequently voided by a new peremptory rule of international law, paragraph 2 raised the question of the retroactivity of the nullity of an international obligation of the State. For in the case contemplated in that paragraph, the conduct of the State was no longer considered to be a breach of an international obligation, because the rule imposing the obligation on the State had been superseded by a new rule of international law and the obligation had become void retroactively through the effect of that new peremptory rule of general international law.

19. Was that provision always valid? It was undoubtedly justified in the slave-trading ships case quoted by the Special Rapporteur. But there were cases in which the nullity of the obligation was not retroactive. For example, if a State unilaterally established an economic zone and seized foreign fishing vessels in that zone, it was breaching an international rule. If, subsequently, the Conference on the Law of the Sea adopted a rule providing for the establishment of economic zones, could the State in question plead that peremptory rule of international law to maintain that its conduct was not wrongful and, therefore, that it could not be required to make reparation for the damage caused? In that case the nullity of the obligation was not retroactive. Consequently, the provision in paragraph 2 could not be stated as a general rule since it was valid only in certain cases.

20. On the whole, he agreed with paragraph 3, but he was not convinced of the need for the principle stated in subparagraph (*a*), which seemed to be already contained in the principle stated in paragraph 1. For if it was accepted that a breach of an international obligation was established only when it related to an obligation in force at the time when the wrongful act was committed, it was obvious, in the case contemplated in subparagraph (*a*), that a continuing act only constituted a breach of an international obligation if the obligation had been in force for at least part of the duration of the continuing act, since the breach no longer existed once the obligation had ceased to be in force. Thus subparagraph (*a*) of paragraph 3 added nothing to what was already stated in paragraph 1. On the other hand, the principles in subparagraphs (*b*) and (*c*) were very valuable.

21. With regard to article 16, it must be remembered that an international obligation always had as its source a rule of international law. It was the origin of the rule that varied, not the source of the obligation. It was therefore incorrect to speak of an obligation deriving from a treaty or some other source of international law, for in fact the obligation always derived from a rule, which itself derived from a treaty or other source of international law.

22. The wrongfulness of the international act and its legal consequences did not depend on the origin of the rule from which the obligation derived. In contemporary international life there were identical obligations with different sources. For example, if a State party to the 1958 Geneva Conventions on the Law of the Sea violated a rule relating to freedom of navigation on the high seas, it was violating a conventional rule, whereas if a State which was not a party to those Conventions committed the same internationally wrongful act, it was violating a customary rule. In both cases, the breach and its legal consequences were the same, but in the former case it was a conventional rule that was violated and in the latter, a customary rule. The obligation imposed on the States was the same, but the source differed; for States parties it was a conventional rule, while for States not parties it was a customary rule, since the Geneva Conventions on the Law of the Sea had codified rules of customary law. Thus the responsibility of the State did not depend on the source of the obligation breached. All the members of the international community were subject to the same obligations: some under codification conventions to which they were parties, others under customary rules of international law. But their responsibility in the event of a breach of those obligations was the same.

23. The same applied to the Charter of the United Nations, some of the basic principles of which were valid both for Member States, and for other States, in the latter case by virtue of customary law which imposed on them the same obligations as the Charter—for the Charter stated established rules of contemporary international life. Similarly, with regard to diplomatic law, the States parties to the 1961 Convention on Diplomatic Relations were subject to the same rules as States which were not parties to that Convention, though the former were bound by conventional rules and the latter by rules of customary law.

24. Mr. YASSEEN said that with article 17, the Commission was taking up a very important problem which it was essential to solve in order to establish the rules of responsibility. Max Huber had given a very clear opinion on that problem in the award he had rendered on 4 April 1928 in the *Island of Palmas* case, when he had affirmed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arose or had to be settled.[8] That was a general principle of international law which was not contested. It was not, however, a principle of *jus cogens*, and States could derogate from it by agreement. In its resolution on "The Intertemporal Problem in Public International Law", already mentioned by the Special Rapporteur, the Institute of International Law had recognized that States and other subjects of international law had the power to determine by common consent the temporal sphere of application of norms, notwithstanding that principle, subject to any norm of *jus cogens* which might restrict that power. It was nevertheless in the light of that principle that the problems raised by the three possible cases put forward by the Special Rapporteur in paragraph 38 of his report (A/CN.4/291 and Add.1-2) must be solved.

25. It was obvious that, in the first case, the State had not breached an international obligation, because the obligation had already terminated when the act had been committed. The second case, on the other hand, could

[8] See foot-note 1 above.

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

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

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

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

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

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

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

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

The meeting rose at 1.5 p.m.

1368th MEETING

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

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

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

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

[Item 2 of the agenda]

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

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

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

[9] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

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