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Summary record of the 1480th meeting

Topic:
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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)[1] (*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[2] 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

[1] For text, see 1497th meeting, para. 1.

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

the duration but on the gravity of the internationally wrongful act.

4. The question of the jurisdiction *ratione temporis* of the international tribunal that might be dealing with the case was likewise not germane, for that tribunal's jurisdiction and the point in time when the breach had been committed were entirely separate issues. The State might well be responsible in the absence of any judicial or arbitral body having jurisdiction to deal with the particular case. After all, it was not enough that an internationally wrongful act should have been committed for jurisdiction to be vested in an international judicial or arbitral body: its jurisdiction must in addition have been accepted by the parties to the dispute.

5. The issue of the national character of the claim was likewise wholly extraneous to the issue of the State's responsibility, for that responsibility might well exist even where no nationality link authorized another State to intervene for the purpose of giving diplomatic protection to a private individual.

6. Thus the factor to be taken into account for the purpose of determining the *tempus commissi delicti* was the time of the breach, not its duration. It was arguable that the moment of the breach had already been determined in earlier articles. For example, article 20 (Breach of an international obligation requiring the adoption of a particular course of conduct) contained the word "when", which had a twofold meaning, namely, both "if" and "at the time when". In the passage "when the conduct of that State is not in conformity with that required of it by that obligation", the word "conduct" was an unfortunate choice, for it was only in the light of the situation resulting from the State's conduct that it was possible to determine whether or not a breach of the obligation had occurred.

7. Nor was it possible to draw a sharp distinction between the obligation of conduct and th obligation of result, for the two obligations were closely linked and neither could exist without the other—an obligation of conduct necessarily implied an obligation of result. It was obviously the purpose of any obligation either to prevent or to produce a certain situation or event. For example, the duty of the State to enact legislation prohibiting racial discrimination was not merely an obligation of conduct but also an obligation of result, for its object was to eliminate racial discrimination. A State which had entered into an obligation of that kind by treaty and failed to enact anti-discriminatory legislation committed a breach even if in practice no case of discrimination occurred. But if the State had enacted the required legislation and cases of discrimination occurred, was it arguable that the State was not responsible? In his opinion, the State's responsibility would be involved in such a case, for the duty to enact anti-discriminatory legislation was aimed at eliminating discrimination, a result that had not been achieved. The State would have complied with the obligation of conduct but have failed to fulfil the obligation of result implicit in the obligation of conduct. Accordingly, he considered that article 20 should be amended to read:

> "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct in cases where a situation exists that is not in conformity with the situation required by the obligation or where the State by its conduct prevents the attainment of the result required by that obligation."

8. In the case of a composite or complex event, the responsibility existed for all the specific events, from first to last, that constituted the composite or complex event. The actual breach, however, did not occur until the time when the composite or complex event fully materialized, in other words, at the time when the last specific act occurred that determined the existence of the composite or complex event. As the Italian Government had stated in its written observations in the *Phosphates in Morocco* case,

> It is only when there is, as a final result, a failure to fulfil [these] obligations that the breach of international law is complete and that, consequently, there is a wrongful act capable of giving rise to an international dispute.[3]

9. In his opinion, the only material moment was that at which the breach occurred, and for the purpose of determining the origin of responsibility the duration of the breach should be disregarded. The question of the jurisdiction of the international body was a separate issue that the Commission should not touch upon for the time being.

10. Mr. FRANCIS did not disagree with the substance of article 24, since it followed logically from the preceding articles, more especially article 18, paragraphs 3, 4 and 5, and article 23. It indicated very clearly and precisely the application of the *tempus commissi delicti* rule in five specific situations.

11. One difficulty, however, was that the article did not—and indeed could not be expected to—define the circumstances in which an act was of a continuing character, as distinct from an instantaneous act that produced continuing effects. As the Special Rapporteur pointed out in paragraph 21 of his report, the problem was to determine whether the *tempus* of an internationally wrongful act having a continuing character should be defined as the time when that act began, or as the whole period during which it continued. That was a problem of interpretation, and in respect of interpretation it should be remembered that the draft articles never stood alone but must always be viewed against the background of the commentaries. Such an approach was regularly followed by the Commission itself, by the Sixth Committee of the General Assembly and by some institutions outside the United Nations system.

12. With regard to the judgment of the Permanent Court of International Justice in the *Phosphates in Morocco* case, the crux of the matter was whether the act of the respondent government, namely, the Government of France, had been completed in 1925

[3] *P.C.I.J.*, Series C, No. 84, p. 850.

or whether, in legal terms, it had continued beyond 25 April 1931, the date when France accepted the compulsory jurisdiction of the Court with respect to disputes arising out of acts subsequent to its ratification. The Special Rapporteur's report recognized that the 1925 decision of the Department of Mines on Mr. Tassara's claim had been an instantaneous act producing continuing effects rather than an act having a continuing character. The Special Rapporteur also stated that he very much doubted whether the same could be said of the situation invoked in the main complaint, namely, the monopoly of Moroccan phosphates established by the dahirs of 27 January and 21 August 1920, and that it was rather, a typical example of a "continuing act". That conclusion had been drawn on the basis of the fact that the dahirs in question were said to constitute "a legislative situation regarded as contrary to the international obligations of the country which created it" (A/CN.4/307 and Add.1, para. 30).

13. Nevertheless, at the previous session the Commission had discussed the question of the effect of legislation with regard to certain obligations and had concluded that, in certain circumstances, it was not the legislation in itself but the actual application of the legislation that gave rise to a breach. It seemed that, in the case in question, it had been the effect of the dahirs of 27 January and 21 August 1920, rather than their mere existence, that had occasioned the breach. The question arose as to whether determination of the *tempus commissi delicti* in specific situations should be made by reference to the characterization of the act or to the characterization of the obligation, or by reference to both those factors. In his opinion, by examining the nature of the obligation, it should be possible to determine whether a wrongful act could be characterized as an instantaneous act, as an instantaneous act producing continuing effects, as an act having a continuing character, and so on. On the other hand, it was not possible, solely by reference to legislation purporting to cover a treaty obligation, to determine whether the obligation was an obligation of conduct or an obligation of result involving a choice of means. An important distinction had to be drawn in that respect, at least as far as legislation was concerned. Naturally, he was not suggesting that legislation or treaties constituted the exclusive source of such obligations, for an obligation might derive from a peremptory norm—for instance, the obligation not to occupy unlawfully the territory of another State.

14. In the *Phosphates in Morocco* case, it appeared that France had not been under an obligation to adopt a particular course of conduct, such as to enact or to repeal legislation. Consequently it must have been under an obligation of result, involving a choice of means. Precisely because the means had been optional, France had not been under any obligation to establish regulatory machinery of higher standing than the Department of Mines, to which the matter could have been referred for final settlement. Therefore any act alleged to have been committed in breach of France's obligation would have been completed by 1925.

15. The Special Rapporteur stated in paragraph 30 of his report that the Court could also have added that the only injury actually caused to an Italian citizen by the legislative régime of the monopolization of the Moroccan phosphates had been that suffered by Mr. Tassara as a result of the 1925 decision of the Department of Mines, and the Commission necessarily returned to that decision and to its date, which antedated the acceptance of compulsory jurisdiction. The Court could indeed have taken a decision in keeping with that argument suggested by the Special Rapporteur. Personally, he would have been happier if, to support his position and the formulation of his draft article 24, the Special Rapporteur had invoked the principle that a wrong should not go unredressed. After all, there was no great interest in resurrecting the Court's judgment from the judicial grave so to speak. In codifying international law, the Commission must adopt a progressive attitude.

16. In the part of his report devoted to article 24, the Special Rapporteur also drew heavily on the practice of the European Commission of Human Rights and referred in particular to the United Kingdom's acceptance of the Commission's jurisdiction, which had been accompanied by a reservation *ratione temporis* in much the same way as France's acceptance of the jurisdiction of the Permanent Court of International Justice in the *Phosphates in Morocco* case. The report stated, *inter alia:* "the United Kingdom recognized the competence of the Commission with regard to individual applications alleging incompatibility with the United Kingdom's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms of any act or decision or any fact or event occurring after 13 January 1966" (A/CN.4/307 and Add.1, para.33). He emphasized the words "any fact", which could certainly be considered to apply to the continued imprisonment of an individual after 13 January 1966, as in the *De Courcy v. the United Kingdom* case. Under United Kingdom law, therefore, such imprisonment might have been justified before that date, but certainly not, under the Convention, after that date.

17. He had studied the Convention for the Protection of Human Rights and Fundamental Freedoms[4] and had not been able to find any provisions that expressly required the adoption of a specified course of conduct, such as the enactment of legislation. However, article 64, paragraph 1, of that Convention provided that:

> Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision...

The question arose, therefore, whether a country which had ratified the Convention subject to a res-

[4] United Nations, *Treaty Series*, vol. 213, p. 221.

ervation under article 64, paragraph 1, was not thereby bound by its own domestic law to adopt a specified course of conduct. In the case involving the United Kingdom, supposing the law in question had remained in force after 13 January 1966, the fact that the individual in prison had been imprisoned before 13 January 1966 was immaterial. The situation was somewhat different from that in the *Phosphates in Morocco* case, where property rights had been granted and then withdrawn. The Special Rapporteur's argument might have been more conclusive had he taken as examples cases involving the unlawful detention of aliens in circumstances amounting to a breach of an international obligation.

18. With regard to the wording of article 24, the words "although prevention would have been possible", in paragraph 3, seemed to him superfluous, since the idea was already covered by the words "prevent an event from occurring". It might be necessary for the Drafting Committee to redraft paragraph 5, which referred to "a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case", so as to bring it into line with article 18, paragraph 5, which referred to "a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case".

19. Mr. PINTO considered that article 24 provided guidelines for the interpretation and classification of certain events. It led to a conclusion concerning the time of the breach of an international obligation and made it possible to determine when responsibility arose.

20. He was quite satisfied that the article fitted well into the Commission's work on State responsibility. Indeed, as the Special Rapporteur had said, it was relevant to the determination of the amount of reparation payable by the State which had committed an internationally wrongful act, to the determination of the jurisdiction of an international tribunal with regard to a dispute arising out of the breach of an international obligation and to the question of the nationality of claims for the exercise of diplomatic protection.

21. However, he was not entirely sure about the practical application of article 24, which, as it now stood, was likely to create more problems than it resolved. For example, paragraph 1 referred to "an instantaneous act", while paragraph 4 referred to "an aggregate act composed of a series of similar individual acts, committed in a plurality of separate cases". The use of the word "series" might give rise to problems, for a series usually meant three or more. Accordingly it might be difficult to determine whether a particular act came under paragraph 1 or under paragraph 4 of the article. If there were more than one act, it might fall within the scope of either paragraph. Similarly, in interpreting paragraph 2, which referred to "an act having a continuing character", paragraph 4, which referred to "a series of similar individual acts" and paragraph 5, which referred to "a complex act consisting of a succession of actions or omissions by different organs of the State in respect of the same case", there could be different interpretations as to the time when responsibility arose.

22. Mr. Ushakov had referred to another source of possible difficulties in paragraph 5. In Mr. Ushakov's opinion, the time of the last in a succession of actions or omissions constituting a complex act would determine the time when the responsibility of the State arose. In the case of a denial of justice, he could agree with Mr. Ushakov that it would be the last act that would, in fact, complete the complex act, but he wondered whether there might not be circumstances in which the last act completing the complex act had to have some kind of retroactive effect on the first act for justice to be done. For example, in cases of "creeping nationalization", account must be taken of the fact that, when the final act—expropriation—occurred, a great deal of damage had already been caused over a certain period of time.

23. Another problem that gave him concern and might be considered by the Drafting Committee was the difficulty of determining the time of an omission. Paragraph 1 of article 24 referred only to "an instantaneous act". He wondered whether it might not also be possible to refer explicitly in the same paragraph to an omission.

24. With regard to the point raised by Mr. Frances concerning the use, in paragraph 3, of the words "although prevention would have been possible", his own reaction had been to suggest that, for the sake of clarity, those words should also have been included in article 23.

25. Lastly, he noted that the Special Rapporteur had used the word "concessions" more than once in paragraph 39 of his seventh report. Since the word "concessions" might have some unfortunate connotations, he thought the use of a synonym might be advisable.

26. Mr. VEROSTA pointed out that the last few articles of chapter III, from article 20 onwards, concerned the breach of international obligations in the light of the nature of those obligations. Articles 20 and 21 dealt respectively with obligations of conduct and obligations of result. The enumeration was broken by article 22, which dealt with the exhaustion of local remedies, and was resumed in article 23, which dealt with obligations requiring the State to prevent a given event. Accordingly, he considered that the order of articles 22 and 23 should be reversed.

27. With regard to article 24, paragraph 3 should logically become paragraph 2. In the final analysis, paragraph 1 dealt with the breach of an obligation of conduct. If the issue of the *tempus commissi delicti* was to be clarified, an appropriate provision should appear in article 20. Similarly, the provision in paragraph 3 concerning the obligation to prevent a certain event might be transferred to article 23. If those suggestions were followed, all that would be left of article 24 would be its paragraphs 2, 4 and 5, which dealt respectively with the breach of an international obligation by a continuing act, a breach by an aggre-

gate or composite act and a breach by a complex act. The common characteristic of those three classes of breach was the duration of the act in question. It might not, therefore, be necessary to devote a separate article to the *tempus commissi delicti*. It would be enough to supplement the enumeration begun in article 20 by one or two articles dealing with the breach of international obligations by a continuing, composite or complex act. In that way it would be possible to avoid some of the drawbacks, noted by Mr. Reuter (1419th meeting), Mr. Ushakov and Mr. Pinto, that would be inherent in an article dealing specifically with the time of the breach of an international obligation.

28. In conclusion, he thought that the expression "succession of actions or omissions" in the English version of paragraph 5 was a mistranslation of the French "une succession de comportements".

29. Mr. SCHWEBEL fully agreed with the Special Rapporteur that the time of the breach of an international obligation was of particular importance in deciding the amount of reparation to be paid, determining the jurisdiction of an international tribunal with regard to a dispute arising out of such a breach and dealing with questions of the continuity of nationality in the maintenance of international claims. Indeed, he hoped that, later in the draft, an article would be devoted to the rule of continuity in the nationality of claims, which was frequently applied in an unpalatable and inequitable manner and might therefore be an appropriate subject for the progressive development of international law.

30. In paragraph 23 of his report, the Special Rapporteur had referred to the breach of an international obligation resulting not from a single act, but from a "practice" consisting of similar individual acts committed in a number of separate cases. Examples of such acts could, of course, be found, particularly now that the United Nations was concerned about situations revealing a pattern of constant and flagrant violations of human rights and fundamental freedoms. On the whole, however, he thought that treaty prohibitions of a practice rather than of an act were exceptional. For example, the rights embodied in treaties of establishment, friendship, commerce and navigation usually provided guarantees for individuals, and there did not have to be a pattern of violations for the individuals concerned to claim that their rights under the treaty in question had been infringed.

31. Although he had no difficulties with paragraphs 1, 2 and 3 of the article under consideration, he could see the advantage of reversing the order of paragraphs 2 and 3. With regard to paragraph 4, he noted that Mr. Ushakov had said that a breach of an international obligation occurred only at the time of the last of the individual acts constituting the series in conflict with the international obligation, if the discrete acts themselves were not in conflict with that obligation. His own opinion was that, in most cases, the discrete acts would also be in conflict with the international obligation. If, however, in exceptional cases, they were not and only the aggregate act constituted the breach of the international obligation, would it be correct to say that the time of the breach extended over the entire period between the first and the last of the individual acts constituting the series in conflict with the international obligation? He would be grateful to the Special Rapporteur for a clarification of that point.

32. He confessed to a certain amount of confusion with regard to paragraph 5, for he was not sure that it was consistent with article 22. Paragraph 5 stated that the time of the breach of an international obligation 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 extended over the entire period between the action or omission which initiated the breach and that which completed it. If that reasoning were transposed to the context of article 22, the logical conclusion would be that the time of the breach was not the time of the exhaustion of local remedies, but rather the entire period between the action or omission which initiated the breach and that which completed it. To take the example of a breach of a treaty obligation, supposing a national of State A claimed that State B had breached an international treaty obligation of which he was the beneficiary and carried his claim to the courts of State B, it could be said that he had exhausted local remedies only when the courts of State B rejected his claim; yet he would probably maintain that the time of the breach of the international obligation that he could invoke, and thus the amount of damages payable to him should be calculated not from the time of the exhaustion of local remedies but from the time of the act or omission by State B constituting the breach. It seemed to him that paragraph 5 in fact supported such a sensible conclusion; but if it did, it might not be consistent with article 22. He would be grateful to the Special Rapporteur for a clarification of that point also.

Gilbert Amado Memorial Lecture

33. The CHAIRMAN announced that the 1978 Gilberto Amado Memorial Lecture would be given by Judge T.O. Elias of the International Court of Justice on 7 June, at 5.30 p.m.

The meeting rose at 1 p.m.

1481st MEETING

Thursday, 18 May 1978, at 10.10 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. Jagota, Mr. Pinto, Mr. Quentin-