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Summary record of the 1403rd meeting

Topic:
State responsibility

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mankind". If the Commission wished to formulate a text that would be applicable in the future, it could not ignore an idea of that nature. In connexion with the law of the sea, no Government, as far as he knew, had denied the validity of the internationally recognized notion of the common heritage of mankind.

80. Lastly, the commentary should reflect as fully as possible both the intentions of the Special Rapporteur and the latter's formulations, so that the General Assembly would be in a proper position to take a decision on the article.

The meeting rose at 6.15 p.m.

1403rd MEETING

Tuesday, 6 July 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*concluded*) (A/CN.4/291 and Add.1-2; A/CN.4/L.243 and Add.1)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 18 (International crimes and international delicts [wrongs]) [1] (*concluded*)

1. Mr. RAMANGASOAVINA said he was well satisfied with the new text of article 18 proposed by the Drafting Committee (A/CN.4/L.243/Add.1) which was a very clear improvement on the Special Rapporteur's original text. It was a complete recasting and rearrangement of the principles stated in the Special Rapporteur's text. It was, in fact, a transcription, in a more specific and, so to speak, innovative form, of the obligations embodied in the Charter of the United Nations. For the article stated the principle of a breach of an international obligation, but it also cited concrete cases, thereby contributing to the progressive development of international law. In that respect it brought to mind certain constitutions and organic laws which were not confined to the solemn proclamation of rights and duties, but also stated the means of attaining their objects by giving concrete examples. The new article 18 proceeded in the same way: instead of immediately proposing a definition, which was always very risky where international crime was concerned, it proceeded step by step, citing concrete but not exhaustive cases. He therefore fully endorsed the method adopted in the article.

2. In paragraph 3, the expression "international law in force", which had been criticized, seemed to him, on the contrary, to be meaningful and promising, since it took account of the development of international law and thus constituted a "breakthrough", as Mr. Reuter had very aptly said.[2] For the universal conscience had already evolved and was continuing to evolve in many spheres, particularly those of colonialism and racial discrimination, and the *jus cogens* of contemporary law was still capable of evolving. The text of article 18 permitted and promised that evolution: it was not static, but evolutive and dynamic.

3. He also welcomed the introduction, in paragraph 3 (*a*), of the term "aggression", which was a reference to the Definition of Aggression adopted by the General Assembly.[3] As some had pointed out, it was regrettable that the article did not refer to "serious and manifest economic aggression", but the concept of aggression had the advantage of having been established in the Definition adopted by the General Assembly, and its introduction contributed to the progressive development of international law.

4. With regard to the text of the draft article proposed by the Drafting Committee, paragraph 1 did not call for any particular comment, since the new text did not differ much from the original one; nevertheless, he preferred the new version. The methodological change in paragraph 2 seemed to him to be most felicitous: whereas, in the original text, there had been an immediate and somewhat abrupt reference to cases of breach—"resort to the threat or use of force against the territorial integrity or political independence of another State"—the new text began by giving the general definition, appealing to the universal conscience and referring to the protection of fundamental interests of the international community. Paragraph 2 should therefore be understood in the light of the Charter and the resolutions of the General Assembly. It might be criticized as tautological were it not supplemented and clarified by the specific examples given in paragraph 3.

5. He had no difficulty in accepting the term "by force" in paragraph 3 (*b*), which had been criticized by some speakers, for colonial domination was especially to be condemned when it was maintained by force. On the other hand, the term "on a widespread scale" in subparagraph (*c*) seemed much too restrictive. Mr. Bilge [4] had rightly said that, in the cases of slavery, genocide and *apartheid*, it was not the number of persons which made the crime, but the will of the State and the systematization of a policy contrary to human dignity. The expression "on a widespread scale" introduced an idea of size, which seemed to authorize the perpetration of crimes "on a small scale". He was therefore in favour of deleting that expression and simply referring, as in the

[1] For text, see 1402nd meeting, para. 3.

[2] See 1402nd meeting, para. 62.

[3] General Assembly resolution 3314 (XXIX).

[4] See 1402nd meeting, para. 58.

other subparagraphs, to a "serious breach of an international obligation". In his view, the words "safeguarding the human being" should be understood as meaning not merely the preservation of human life, but also maintenance of the dignity of the human person.

6. In subparagraph (*d*), he suggested that the words "safeguarding" and "preservation" should be separated, since they were two complementary notions and that the text should read "... for the safeguard and the preservation of the human environment ..." instead of "... for safeguarding the preservation...".[5]

7. In paragraph 4, the term "international delict" seemed rather vague. Some members of the Commission, in particular Mr. Sette Câmara,[6] had rightly emphasized that, in international law, the distinction between a crime and a delict was not very clear and sometimes did not even exist. In internal law, it was the penalty applicable that determined which court was competent: an act tried by a court of summary jurisdiction was a delict, whereas an act tried by an assize court was a crime. Thus theft, which was normally a delict, could become a crime in certain circumstances. Hence it was not possible to enumerate and especially, to provide for the different categories of international crimes and appropriate sanctions. The possibility of introducing new categoies of international crimes in the future must therefore be reserved, and it would be useful to retain the category of international delicts provided for in paragraph 4. Perhaps the notions of an international crime and an international delict would be amplified and made more specific in the future.

8. Mr. USHAKOV said he thought the text of article 18 proposed by the Drafting Committee was well balanced, prudent and lucid. He willingly accepted it, though with some reservations. First, as to the general tenor of the article, he agreed with Mr. Reuter[7] that in distinguishing two categories of internationally wrongful acts—international crimes and international delicts—without, for the time being, defining the régimes of responsibility applicable to them and without determining the consequences of the various breaches of international norms—the Commission was committing itself in advance in regard to its future work. He understood Mr. Reuter's concern in that regard but he wondered whether the Commission would not also be committing itself if it took the opposite course, that was to say, first defining the various forms of responsibility—sanctions, reparation, restitution, satisfaction, etc.—and then applying them to various internationally wrongful acts. In his view, the danger would be the same in both cases.

9. In paragraph 3 (*c*), he thought the expression "on a widespread scale" was justified, because the examples which followed—slavery, genocide and *apartheid*—were, by definition, breaches on a wide scale. If a breach was committed against a single person, that was a delict, not an international crime.

10. In paragraph 3 (*d*), the Drafting Committee seemed to have departed from the rule it had adopted for drafting paragraph 3: to refer only to existing concepts such as aggression, genocide or *apartheid*. The phrase "massive pollution of the atmosphere or of the seas" did not refer to an existing concept. What was meant by "massive pollution of the atmosphere or of the seas"? Was it nuclear pollution, oil pollution or bacteriological pollution? It was impossible to know without a definition of pollution. Moreover, the reference to "preservation of the human environment" suggested the biosphere in general, not merely the atmosphere or the seas. He therefore believed that it would be wiser to delete from subparagraph (*d*) the words "such as those prohibiting massive pollution of the atmosphere or of the seas".

11. Sir Francis VALLAT said that the great merit of the text originally submitted by the Special Rapporteur was that it had raised the important issue of international crimes and had drawn attention to the problems involved. The Special Rapporteur's formulation had, in many respects, appeared to be specific, but the use of language which referred to the purposes set out in the United Nations Charter had raised the question whether reference should also be made to the obligations specified in the Charter. Inevitably, the Drafting Committee had been compelled to decide whether it should embark on the extremely lengthy process of drawing up detailed definitions, or whether it should enunciate a general principle for determining the breach of an obligation that would constitute an international crime, and then proceed to give examples. From that standpoint, the text submitted by the Drafting Committee was a remarkable contribution to the work of the Commission.

12. In paragraph 2, the concept of international crimes was coupled with an indication of the main test for determining their existence. A different form of words might eventually be found to replace the expression "recognized as a crime by that community as a whole". It meant, in essence, however, that no single State could declare or assert, in opposition to the international community, that a particular kind of act constituted a crime; and conversely, that no single State could deny that a particular kind of act constituted an international crime. In accordance with article 53 of the Vienna Convention on the Law of Treaties,[8] it was the international community as a whole that acted as what might be termed the governing body—a fact that was made absolutely clear in paragraph 2 of draft article 18. Moreover, article 53 of the Vienna Convention gave no indication of the content of the concept of *jus cogens*, whereas paragraph 2 of draft article 18 was reinforced by the examples in paragraph 3. Nobody had raised any basic objection to the relevance of those examples, which did not in any sense constitute an exhaustive list. In addition, the opening proviso of paragraph 3: "Subject to paragraph 2" made it plain that, in every case, the examples listed would be

[5] Text subsequently circulated as document A/CN.4/L.243/Add.1/Corr.1 of 23 July 1976.

[6] See 1402nd meeting, para. 75.

[7] *Ibid.*, para. 63.

[8] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. 70.V.5), p. 289.

subject to the test specified in paragraph 2 for determining the existence of an international crime.

13. While he appreciated the reasoning behind Mr. Ushakov's comment regarding paragraph 3 (*d*), deletion of the phrase "such as those prohibiting massive pollution of the atmosphere or of the seas", or its replacement by another example, would require very careful consideration, which the Commission was not in a position to give to those questions at the present time.

14. Article 18, as now proposed, stated essentially that internationally wrongful acts fell either into the category of international crimes or into that of other kinds of breach of an obligation which did not constitute international crimes. As the Special Rapporteur had pointed out, such a categorization was necessary for the Commission's future work on régimes of responsibility. The present structure of the article should, he thought, be maintained, but there again, the question whether it should be split into separate articles could be considered at a later date.

15. The use of the term "delict" in the English version of paragraph 4 created very real difficulties: it would not be enough to speak of "other internationally wrongful acts", and the expression "international wrong" was not sufficiently precise.

16. At the present stage, proposed amendments to the draft could not be considered in full. The best course would be to approve the article provisionally, and to continue to examine it on first reading at the Commission's twenty-ninth session in the light of the comments that would be made in the Sixth Committee.

17. Mr. QUENTIN-BAXTER said he shared the view that article 18 was an achievement of the greatest importance. Initially, he, too, had had misgivings about some of the phraseology of the text of paragraphs 2 and 3 proposed by the Drafting Committee, but further reflection had revealed that it was difficult to find alternatives that were better than, or even as good as, the wording now proposed.

18. Paragraph 1 had the advantage of using a formulation that was more in keeping with the precedent articles, particularly article 16.

19. Paragraphs 2 and 3 involved the ideology, precepts and policy of the United Nations. The essential strength of those paragraphs was that they maintained a skilful balance between the criterion of *jus cogens*, in other words, obligations *erga omnes* to the international community, and the practice of the General Assembly (in other words, the notion of international crimes). International lawyers must always consider State practice, that was to say, the way in which the international community conducted itself. The two paragraphs endeavoured to imbue that practice with principle, by suggesting the scope and the true meaning of the action taken by the international community in particular cases. In an imperfect world, the law operated within parameters of power; perfection and total objectivity did not lie within the Commission's grasp. But the Commission was at all times concerned to extend the area in which political decision-making and the use of power were based on legal principles.

20. Paragraph 2 aknowledged the realities of the world as now organized: the test for determining the criminality of the act of a State was whether the breach of the obligation was of such essential importance that it had to be regarded by the international community as a crime. Paragraph 3 went on to suggest the manner in which the international community could come to such a judgment. When the paragraphs were considered in that way, his earlier doubts about certain wording were dispelled. For example, the merit of the phrase in paragraph 2 "recognized as a crime by that community as a whole", was that it followed closely article 53 of the Vienna Convention and served as a reminder that, in judging the criminality of a particular act, the international community applied the basic concept of *jus cogens*, which meant a rule from which no State could depart merely by exercising its will. The commentary should make it perfectly clear that, under that rule, no individual recalcitrant State would be allowed to claim that certain acts were legal when the international community had decided otherwise.

21. The introductory sentence of paragraph 3 rightly included the proviso "Subject to paragraph 2", for State practice was of paramount importance. The reference in the same sentence to the "rules of international law in force" indicated that it was not the function of the Commission to create a penal law or to define crimes. It was essential for that limitation to be acknowledged, not only by the Commission itself, but also by the General Assembly. In article 17, it had been possible to accept the notion of obligations "in force". Consequently, in article 18 it was possible to accept the notion of rules of international law in force, since the phrase indicated that the law was evolving and that new rules of positive law would emerge in the future.

22. Paragraphs 2 and 3 were appropriately linked to each other. They did not represent a compromise in which positions of principle had been abandoned: they embodied a concept to which all could subscribe. Fortunately, the references to crimes had been so rearranged that the article did not deal in one sense with the primary case of aggression and, in another sense, with other kinds of obligations enunciated in the Charter among the purposes and principles of the United Nations.

23. It was gratifying that paragraph 3 referred, without restriction or qualification, to the maintenance of international peace and security, in deference to the place held by that concept in the Charter. He had no difficulty in regard to the words "by force" in paragraph 3 (*b*), for the Commission should beware of seeking to contribute to positive penal law. If it failed to employ a reasonably qualified and cautious form of words, it might be exceeding the limits of its own competence.

24. Paragraph 3 (*c*) was concerned primarily with human rights. Neither the commentary nor the discussion had paid much attention to General Assembly practice in that field, and it might be advisable to recall certain key resolutions. For example, the Economic and Social Council, with the endorsement of the General Assembly, had referred in resolution 1235 (XLIII) to "gross violations of human rights and fundamental freedoms", in resolution 1503 (XLVIII) to "a consistent

pattern of gross and reliably attested violations of human rights", and in resolution 1919 (LVIII) to "situations that reveal a consistent pattern of gross violations of human rights". Such resolutions demonstrated the growth of a practice in the field of human rights that did much to validate the concepts enunciated in article 18, and it was to be hoped that they could be mentioned in the Commission's report. In his opinion, article 18 would impart a new dynamism to the work of the United Nations in human rights and similar fields.

25. He saw no immediate need for the inclusion of paragraph 4. It had already been pointed out that the term "international delict" might lead the Commission in the wrong direction. The purpose of article 18 was not to state that internationally wrongful acts were of two mutually exclusive kinds, but to indicate that some types of internationally wrongful act were of such importance that a special régime of responsibility was involved and that they had, in the lexicon of international law, become known as international crimes of the State. However, the underlying message of paragraphs 2 and 3 was one of great promise for the United Nations. Like Sir Francis Vallat, he believed that, in the light of the comments of the Sixth Committee, it would be possible to continue, at the Commission's twenty-ninth session, the consideration on first reading of something that was novel and seminal.

26. Mr. TSURUOKA said that he approved of article 18 as proposed by the Drafting Committee, but only provisionally, for the misgivings he had expressed during the earlier consideration of the original text had still not been dispelled. He drew attention to the summary record of his statement of 24 May 1976.[9] Although he had appreciated the reasoning which had led the Special Rapporteur to propose paragraphs 1 and 2, he had at that time questioned whether the rules contained in those provisions should be affirmed and had added that that question could only be answered when it was known how the two paragraphs would be applied and what instance "would establish that there had been a violation and decide on the measures to be taken to redress the wrong". Paragraphs 2 and 3 were on the borderline between politics and law and dealt with the same topics as the United Nations Charter; for instance, the maintenance of international peace and security, the right of peoples to self-determination and human rights. If it was formulating rules on matters already covered by rules established in the Charter, the Commission must ensure a balance between the political and legal factors; but such a balance was very difficult to maintain. Consequently, it might be wiser not to establish such rules, but simply to refer to the Charter. In any event, it seemed premature to attempt to evaluate fully the practical value of article 18 before knowing how it would be applied. The Special Rapporteur should therefore give some indication of the application procedure in his commentary. That would help Governments to assess article 18 properly.

27. Mr. CALLE Y CALLE said he shared the collective views of the Drafting Committee which had returned a text of article 18 that was perhaps more cautious and more moderate than the original one proposed by the Special Rapporteur.

28. As already pointed out by other speakers, the text formulated by the Special Rapporteur had the attraction of setting out in clear and direct terms the major categories of obligation which were so essential to the international community that their breach was considered highly wrongful; the international community considered such breaches so detrimental to its fundamental interests that it regarded them as crimes giving rise to very grave responsibility. They should thus be clearly distinguished from other breaches of international obligations which, although also constituting internationally wrongful acts, gave rise to a different degree of responsibility.

29. The Special Rapporteur was to be commended for thus giving the Commission an opportunity to declare, in the most explicit manner, that there were certain categories of behaviour or conduct which the international community had to condemn, prosecute and punish.

30. The text of article 18 now proposed by the Drafting Committee differed from the original text in that the international crime *par excellence*, constituted by breaches affecting the maintenance of peace and security, had been moved from paragraph 2 to paragraph 3 (*a*), but without the explicit reference to resort to the threat or use of force. The various categories of international crimes were thus placed on the same level in the new paragraph 3. He found that structure more logical and better balanced than that of the original text.

31. The new test of paragraph 2 specified that where an obligation was so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, the breach constituted an international crime. He believed that the statement in that paragraph was indisputable and that it was perfectly justified to regard the acts it described as international crimes.

32. The words "on the basis of the rules of international law in force", in paragraph 3, were particularly important. The use of the words "in force" meant that, apart from the case contemplated in paragraph 2, of breaches recognized as international crimes by the international community, probably under customary international law and by virtue of rules of *jus cogens*, there were international crimes defined as such by treaty law. The cases mentioned in paragraph 3 did not represent violations of the body of ethico-legal rules evolved by the international community, but breaches of rules of contemporary positive international law which were in force at a given time.

33. Because of the importance he attached to the opening clause of paragraph 3, he suggested that paragraph 4 should be reworded so as to refer explicitly not only to paragraph 2, but also to paragraph 3. It would thus state that any internationally wrongful act which was not an international crime in accordance with paragraph 2—customary rules of *jus cogens*—or paragraph 3—rules of positive international law—constituted an international delict or wrong.

[9] See 1375th meeting, paras. 1-4.

34. In conclusion, he supported the text proposed by the Drafting Committee for article 18, which had been described as well-balanced and prudent. The article was prudent, not because its provisions were timid, but because it was couched in lucid and wise terms. He was convinced that the text would be favourably received by the Sixth Committee, because it specified clearly the main categories of obligation which the international community regarded as essential and whose breach should logically be considered as highly wrongful and criminal.

35. Mr. AGO (Special Rapporteur) said he was glad to note that all the members of the Commission accepted article 18 as proposed by the Drafting Committee. The wording of the provision was probably not perfect—he was not 100 per cent satisfied with it himself—but the text was on the whole satisfactory and it could be improved later on second reading once the views of Governments were known.

36. Many members of the Commission who had expressed their views on the article at the 1402nd meeting had appeared to regret that the Drafting Committee had changed the wording which he had originally proposed. The text now under consideration had several times been described as a compromise text; but the members of the Commission were not spokesmen for a Government or a group of Governments: they sat on the Commission in a personal capacity. The members of the Commission should try to find formulae which satisfied their own legal conscience without attempting to seek a compromise between conflicting political interests as though they were participating in a conference of plenipotentiaries. Governments would be only too anxious to seek a compromise later. The text prepared by the Drafting Committee should therefore not be considered as a compromise text; it had been drafted in an effort to express in the best possible way the legal idea underlying the article he had proposed and it was for that reason that as Special Rapporteur he recommended that the Commission should adopt it.

37. In article 18, the Commission was dealing with the question whether the breach of certain obligations should be subject to a certain régime of responsibility. In his fifth report (A/CN.4/291 and Add.1-2), he had already mentioned in broad outline the problem of the different régimes of responsibility connected with the various categories of internationally wrongful acts. Despite the encouraging remarks made on that point, he felt that no effort should be made to explore the matter further in the commentary. The Commission had not yet had an opportunity of studying the consequences of internationally wrongful acts, the forms of responsibility and the modes of implementation. The future should not be mortgaged by taking a position on those questions forthwith in the commentary to article 18. Besides, as Mr. Quentin-Baxter had pointed out, the distinction between international crimes and other internationally wrongful acts would not always be very clear, and he wished to emphasize that it had never been his intention to propose one single régime applicable to all international crimes and another single régime applicable to all other internationally wrongful acts. When the time came, the Commission would probably have to provide for a variety of régimes of responsibility. Lastly, he recalled that the distinction made in article 18 between international crimes and international delicts was not really new—by endorsing it in its draft the Commission would really only be taking note of a distinction which had been gradually gaining recognition by the international community and which it could not ignore.

38. As to the text of article 18, he wished to emphasize, as Mr. Reuter had done,[10] that the adoption of that provision would not mean that the Commission intended to create international crimes itself. The Commission had no intention of drafting an international penal code; it was merely establishing, in accordance with international law in force, that a serious breach of certain international obligations must be regarded as an international crime.

39. In paragraph 2, the Commission gave a general definition of an "international crime" that was valid for the present and for the future. The international community could of course add crimes to the list in paragraph 3 or even remove them from it, but the criterion for determining whether an internationally wrongful act constituted an international crime would still be the one stated in paragraph 2. In paragraph 3, on the other hand, the Commission gave a number of examples, referring only to the rules of international law at present in force and it could not have done otherwise. That reference to international law covered both written instruments and the unwritten rules recognized by the international community.

40. Generally speaking, some members of the Commission had found that the idea underlying paragraph 2 was right, but that to state it was a truism. Article 53 of the Vienna Convention contained a definition of the expression "peremptory norm", which was just as much a truism as paragraph 2 of the article under consideration, if such a truism was indeed present. For a peremptory norm was stated to be a norm accepted and recognized as having a peremptory character by the international community of States as a whole. Nevertheless, article 53 of the Vienna Convention was generally considered to be satisfactory, for it served to specify that a claim by one or another group of States that a rule was peremptory was not enough to make it so; the international community as a whole had to recognize it as such.

41. The notion of the "international community as a whole" did not by any means imply unanimity of the members of the international community. As was clear from the debates at the United Nations Conference on the Law of Treaties, what was required was that the main groups of States making up the international community—namely the various essential components of that community—should recognize the peremptory nature of a norm, even though some individual States might hold a different opinion. On the other hand, a single group of States which formed the majority at a particular time must not be able to impose its views and by those views alone, frustrate the *pacta sunt servanda* rule. In the absence of such a safeguard, the introduction of the notions of a

[10] See 1402nd meeting, para. 61.

"peremptory norm" and an "international crime" would not be a genuine advance, but would tend to divide the international community. Some would regard such a guarantee as excessive caution; but he thought it was a matter of common sense, since it was only in that way that the international community could progress towards greater cohesion and unity. As the international community had no legislative institutions empowered to determine what internationally wrongful acts were international crimes, it was indispensable for all the essential components of the community to participate in that determination. While it was true that the wording of paragraph 2 could be improved as regards certain matters of form, it was very important not to change the substance of the rule which it stated.

42. The examples of international crimes given in paragraph 3 were all taken from international law in force. As already dated, the list could be extended if the international community as a whole came to include other crimes in that category in the future. The text of the article proposed by the Drafting Committee was no doubt more precise than the text he had originally submitted. In paragraph 3 (*a*), the Drafting Committee had referred directly to one of the purposes of the United Nations, as stated in Article 1 of the Charter. In that connexion, he observed that while the Commission could refer to the Charter, it was not obliged to confine itself exclusively to referring to the terms of the Charter. Stating the purposes of an international organization and drawing a distinction in general international law between international crimes and international delicts were two different things. It was for that reason that the Drafting Committee had considered that article 18 should not be too closely linked with the purposes of the United Nations. At the present time, the breach of obligations of essential importance for the maintenance of international peace and security, such as that prohibiting aggression, was in the forefront of international concern, but the breach of other international obligations could also constitute an international crime. Nor were the examples given in paragraph 3 exhaustive in that respect. That was why the introductory phrase in paragraph 3 contained the words "*inter alia*", while subparagraph (*a*) contained the words "such as". The Drafting Committee had moreover not attached any adjective to the term "aggression", since the Commission was not required to pronounce on the different forms that aggression might take. Personally, he believed that all acts which, even if they did not involve the use of armed force, constituted genuine attacks against the independence, freedom or existence of a State, should be characterized as acts of aggression; the Commission, however, was not called upon to give a definition of aggression. Referring to the reservation made by Mr. Tabibi,[11] he assured the Commission that the different views expressed by members would be objectively reflected in the commentary to the article.

43. For an internationally wrongful act to constitute an international crime, two conditions must be satisfied. There must be a breach of an international obligation considered by the international community as essential to the protection of its interests, and the breach must be serious. Hence, those two elements were repeated in each of the examples given in paragraph 3.

44. Only one comment had been made on paragraph 3 (*b*). One member of the Commission had been concerned about the phrase "the establishment or maintenance by force of colonial domination", and another had replied in terms that he (the Special Rapporteur) endorsed. It was the act of opposing by force the desire for liberation of a people under colonial domination which was today considered criminal. There could, however, be cases in which such a people might feel no need to separate from the mother country, so care should be taken not to make the notion of an international crime too broad. One might be opposed to colonization, but it could not be claimed that every vestige of colonization was an international crime even where it did not lead to any conflict. If every breach of an international obligation came to be regarded as an international crime, the distinction between international crimes and international delicts would be meaningless.

45. He agreed that the expression *à une large échelle* ("on a widespread scale"), in paragraph 3 (*c*), could seem unsatisfactory and that an expression equivalent to the English term "gross" might have to be found. The expression would have to indicate that the breach affected a substantial number of persons and not merely a few individuals. He had always been an ardent advocate of human rights and considered that the sovereignty of States should not prevent international law from imposing certain obligations on them regarding the treatment of their own nationals. He was in favour of the establishment of authorities such as the Commission on Human Rights or the European Court of Human Rights. The matters brought before such authorities were not generally international crimes, however, and there was an enormous difference between, for example, genocide and wrongfully preventing someone from exercising a particular profession. That was the difference between a simple breach of an international obligation and an international crime.

46. Only slavery, genocide and *apartheid* were mentioned in paragraph 3 (*c*), but there were, of course, other international crimes consisting in the breach of obligations relating to the safeguarding of the human being, such as the massacre of prisoners of war or the deportation of populations. The reason why the Drafting Committee had not included further examples was in order to avoid giving the impression that the list in subparagraph (*c*) had been intended to be exhaustive and to avoid mentioning the crimes referred to in conventions on humanitarian law—a sphere in which it might be very difficult to distinguish between international crimes and other internationally wrongful acts.

47. The expression "safeguarding the human being", in subparagraph (*c*), seemed to him satisfactory, since it covered not only the physical integrity of human beings, but also their equality in regard to dignity. In the case of *apartheid*, it was not so much the physical integrity of the individual that was threatened, as human dignity.

[11] See 1402nd meeting, para. 54.

48. Paragraph 3 (*d*) was, he thought, especially important. For the international crimes enumerated in the preceding subparagraphs, with the exception of aggression, should sooner or later become things of the past; colonialism and slavery, genocide and *apartheid* were destined—or so it was hoped, at least—to disappear. But the crimes referred to in subparagraph (*d*) could be the crimes of the future: depriving human beings of their environment, taking away their sources of supply, causing climatic changes, etc. Mr. Ushakov had pointed out that the example chosen for subparagraph (*d*) was not entirely satisfactory, but that could be remedied later.

49. As to paragraph 4, he hoped that a term could be found in English to render the French notion of *délit*. It would be regrettable to have to abandon that provision for lack of a suitable English term.

50. Draft article 18 was particularly important because it committed the Commission. It had enabled the Commission to throw light on one of the most important aspects of State responsibility, if not of all international law. Although the wording might be open to criticism, it was the result of the praiseworthy efforts of the Drafting Committee. He hoped, therefore, that the Commission would adopt the provision unanimously.

51. Mr. ŠAHOVIĆ speaking as a member of the Commission, said that in formulating the article under consideration, the Commission had done work of historic importance. He fully shared the views of the Special Rapporteur and approved of the draft article proposed by the Drafting Committee.

52. Speaking as Chairman of the Drafting Committee, he emphasized that the articles drafted by that Committee were in no way compromises. They had been prepared on the basis of the texts proposed by the Special Rapporteur, in the light of the Commission's discussions. Each member of the Drafting Committee had made his contribution, as a jurist, to the drafting of texts that were in conformity not only with the development of the rules on the international responsibility of States, but also with the development of the international legal order as a whole.

53. Article 18, as proposed by the Drafting Committee, respected the ideas of the Special Rapporteur. The wording had been improved to make it correspond more closely to the needs of the international community and of contemporary international law. The concept of international crime had been envisaged having regard to the present and to the future. The Drafting Committee had taken into account the views of all the members of the Commission, and the practice of States on which the Special Rapporteur had mainly based his work. Article 18 certainly involved taking a position which would have important repercussions on the future development of international law.

54. Mr. USHAKOV said he hoped that his reservations regarding the last phrase of paragraph 3 (*d*), "such as those prohibiting massive pollution of the atmosphere or of the seas", would be reflected in the commentary to article 18.

55. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed unanimously to approve article 18 as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 1.5 p.m.

1404th MEETING

Thursday, 8 July 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

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

Most-favoured-nation clause * (*concluded*) (A/CN.4/293 and Add.1; A/CN.4/L.244)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the draft articles on the most-favoured-nation clause proposed by the Drafting Committee.

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) drew attention to document A/CN.4/L.244, containing the set of draft articles on the most-favoured-nation clause adopted by the Drafting Committee at the present session. Before introducing the new texts, namely, articles 21, E, F, B, C, D, 21 *bis* and subparagraph (*e*) of article 2, he wished to make some preliminary comments. In the first place, as explained in the note at the beginning of the document, some drafting changes had been made to the texts of some of the articles already adopted by the Commission [1] in order to make the terminology consistent throughout the draft. As the note stated, those changes were indicated by underlined words and foot-notes. Most of them resulted from the Drafting Committee's decision to use systematically, throughout all the draft articles, the verbs "to accord" in English, *accorder* in French, *otorgar* in Spanish and *predostavlyat* in Russian when referring to the treatment applied by the granting State to the beneficiary States, and the verbs "to extend" in English, *conférer* in French, *conferir* in Spanish and *predostavit* in Russian when referring to the treatment applied by the granting State to a third State. With respect, in particular, to the text of article 5,

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* Resumed from the 1389th meeting.

[1] For the text of the articles adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 120, document A/10010/Rev.1, chap. IV, sect. B.