Document:-

A/CN.4/L.243 and Add.1 and Add.1/Corr.1

Draft articles on States responsibility: texts adopted by the Drafting Committee - title of chap. III and articles 15 bis and 16-18 - reproduced in A/CN.4/SR.1401, SR.1402 and SR.1403, para.6

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1976, vol. I

difficulty of sharing certain types of property.[29] On that point, he wished to explain that the notion of equitable apportionment in no way ruled out compensatory equalization payments of a financial or other character.

37. Several members of the Commission had spoken on article 17 as a whole and had compared it to other provisions of the draft articles. Mr. Quentin-Baxter, for instance, had observed that the notion of a contributory share expressed in paragraph (*b*) of article 15 did not appear in article 17.[30] In actual fact, it was not excluded by article 17. In the case contemplated in article 15, there was only one successor State, namely, the newly independent State. In the case covered by article 17, there were several successor States and the principle underlying the idea of contribution was replaced by the principle of equitable distribution among all the successor States in proportion to their respective contributions.

38. Comparisons made between article 17 and the previous articles had also led members to raise the problem of presumption and burden of proof. The application of the principle of self-determination could lead either to the situation provided for in articles 14 and 15 —namely, the creation of a newly independent State, or to the situation provided for in article 17—namely, that of the separation of one or more parts of a State. At the 1399th meeting, Mr. Kearney and Mr. Tammes had more or less explicitly declared themselves in favour of aligning article 17 on articles 14 and 15. In accordance with article 14, movable property passed to the newly independent State unless there was no direct link between that property and the territory of that State. The burden of proof thus fell on the predecessor State. In the case covered by article 17, it would be difficult to place the burden of proof on the shoulders of the predecessor State, since that might disappear. Besides, paragraph 2 of article 17 was a neutral provision: it did not specify the State on which the burden of proof rested. One member of the Commission had suggested a solution half way between that of articles 14 and 15 and that of article 17, in the form of a presumption in favour of the successor State based on the fact that the property was situated in its territory. In actual fact, that was exactly what paragraph 2 proposed. The test of the direct and necessary link would be decisive precisely because the property was situated in the territory of the successor State.

39. The comparisons between article 17 of the present draft and article 33, paragraph 3, of the 1974 draft articles on succession of States in respect of treaties had raised the problem of a separation which occurred in circumstances essentially the same as those existing in the case of the formation of a newly independent State. Several members of the Commission had suggested that it might be advisable to deal with that case separately. Mr. Ushakov had rightly pointed out that the case in question could not be dealt with in isolation because, where State property was concerned, the circumstances in which the separation had occurred were scarcely material.[31]

40. Several members of the Commission had also made comparisons between the various provisions of article 17 itself. They had suggested that a clearer distinction should be drawn between the cases of separation and dissolution and that slightly different treatment should be specified for each. In particular, Mr. Njenga had stressed that cases of separating invariably led to an unhappy situation.[32] In point of fact, it was not easy to deal in one and the same provision with the cases in which the predecessor State disappeared as a result of dissolution and the cases in which it survived after separation. In his own view, the Drafting Committee should endeavour to draw a distinction between those two categories of cases but should not treat them differently. The wording of article 17 would in any case depend on how article 16 was finally drafted.

41. Lastly, Mr. Ushakov had referred to property belonging to the various component States of a federation such as the United Arab Republic.[33] The question arose whether, in the event of the dissolution of a federation of that kind, works of art which had previously belonged to one of the component States but which had subsequently become the property of the federation should be shared among the successor States. Neither the principle of equity nor that of the direct and necessary link, or of the origin of the property, dictated such a result. If the point could not be clarified in the text of article 17, it should at least appear in the commentary to it. Whatever the position, there was no doubt that the principle of equity referred to in article 17 required the origin of the property to be taken into account.

42. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission decided to refer article 17 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[34]

The meeting rose at 11.05 a.m.

[29] *Ibid.*, para. 35.

[30] *Ibid.*, para. 50.

[31] *Ibid.*, para. 33.

[32] See para. 5 above.

[33] See 1399th meeting, para. 34.

[34] For consideration of the texts proposed by the Drafting Committee, see 1405th meeting, paras. 54-62.

1401st MEETING

Thursday, 1 July 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenda, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*) * (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

1. The CHAIRMAN invited the Commission to consider the title of chapter III and the titles and texts of articles 15*bis*, 16 and 17, proposed by the Drafting Committee (A/CN.4/L.243).

TITLE OF CHAPTER III

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) had noted that the title of chapter III proposed by the Special Rapporteur in his fifth report (A/CN.4/291 and Add.1-2) had met with the general approval of the members of the Commission. The Committee had therefore adopted that title, which read: "The breach of an international obligation". The definite article had been inserted in order to bring it into line with the title of chapter II of the draft, "The act of the State under international law".

3. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the title of chapter III proposed by the Drafting Committee.

It was so agreed.

ARTICLE 15*bis* (Existence of a breach of an international obligation)

4. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following new article 15*bis*:

Article 15bis. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

5. The members of the Commission would recall that, during the discussion of article 16, submitted by the Special Rapporteur in his fifth report, for reasons of logic and economy in the drafting of other articles, it had been suggested that a new article in the nature of a definition should be inserted at the beginning of the chapter, dealing with the notion of breach of an international obligation. The new article would specify the conditions under which the breach by a State of an international obligation incumbent upon it occurred or, more precisely, when there was a breach of an international obligation. The Drafting Committee and the Special Rapporteur had agreed that such a provision would be useful and the Committee had therefore adopted the new article 15*bis*, entitled "Existence of a breach of an international obligation", which provided that there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. The phrase "is not in conformity with" had been preferred to other wordings such as "conflicts with" or "is contrary to" in order to indicate that a breach might still exist, even if a State claimed that its act conflicted only partially with an international obligation incumbent upon it. Hence, for a breach to exist, it was not necessary for the act of the State to be completely and totally in conflict with what was required of it by an international obligation; a breach of an international obligation existed when the act of a State was not in conformity with what was required of it by that obligation.

6. Mr. YASSEEN said that article 15*bis* was not really necessary, but he would not oppose its adoption.

7. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 15*bis*, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 16 [1] (Irrelevance of the origin of the international obligation breached)

8. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following wording for article 16:

Article 16. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

9. Article 16, as originally submitted by the Special Rapporteur in his fifth report, had been entitled "Source of the international obligation breached". The members of the Commission would note that, both in the title and in the text of article 16, as adopted by the Drafting Committee, the word "origin" was used instead of the word "source". Although some members of the Committee had believed that the word "source" was appropriate, the Committee had decided that the word "origin", qualified by the phrase "whether customary, conventional or other", conveyed the intended meaning better and was not liable to cause the confusion or concern to which the use of a term such as "source" might give rise.

10. The provision contained in the article centred on the obligation breached, rather than on the international legal rule which established that obligation. Besides, in international legal theory, the term "source" was commonly used to denote not only "formal sources", but also "material sources" of law. Furthermore, the article was not intended to deal with the general theory of the sources of international law or to identify such sources, but simply to draw the necessary inferences for the purposes of the responsibility of States. As the title indicated, the

* Resumed from the 1376th meeting.

[1] For consideration of the text originally submitted by the Special Rapporteur, see 1364th-1366th meetings.

purpose of the article was simply to affirm the irrelevance of the origin of the international obligation breached, whether customary, conventional or other, so far as it related to the international wrongfulness of an act of a State which constituted a breach of an international obligation. As suggested in the Commission, the title of the article followed, with the necessary changes, the wording originally suggested in the Commission's report on its twenty-seventh session.[2]

11. Paragraphs 1 and 2 of the article had been redrafted in the light of the text of the new article 15*bis* adopted by the Drafting Committee, in order to achieve greater precision and clarity. For example, in paragraph 2, the expression "régime of responsibility" had been replaced by a reference to "international responsibility".

12. Mr. YASSEEN said that article 16 was well drafted, except for the use of the word "origin", which had no precise technical meaning in international law. In his opinion, the word "source" would be much more precise and much more correct. The article did not refer to the source of a rule of law, but to the source of an obligation deriving from a rule of law. There was no danger of confusion with the material sources of international law, for the reference to a "customary, conventional or other" source, made it clear that only the formal sources were involved. He therefore considered that the Drafting Committee had not improved article 16 by replacing the word "source" by the word "origin".

13. Mr. CALLE Y CALLE said that the Drafting Committee sought to reflect in its texts the view expressed by the majority of the Commission. Like Mr. Yasseen, he had considered "source" to be the appropriate legal term. The word "origin" was not imprecise, however, for it referred to the time and place at which something came into being—in the present case, the international obligation. Moreover, the qualifying phrase "whether customary, conventional or other" would make the rule clearer for foreign ministries, which, as had already been pointed out on a number of occasions, were not necessarily staffed by lawyers. Consequently, although he had initially favoured the word "source", he none the less believed that the use of the term "origin", both in the title and in the body of the article, fulfilled the purposes of the draft.

14. The CHAIRMAN, speaking as a member of the Commission, thanked the Drafting Committee for its endeavours. He had been among those who had called for the use of the word "Irrelevance" in the title of the article and it was gratifying to note that that change had been made.

15. Mr. AGO (Special Rapporteur) said he was grateful to Mr. Yasseen for defending a term which he (Mr. Ago) had adopted from the outset, but he also wished to thank Mr. Calle y Calle for endorsing the term "origin". The real purpose of the article was to indicate that the provenance of the obligation breached was irrelevant. Whether the word used was "source" or "origin", no doubts could arise once the qualification "customary, conventional or other" was added. He therefore willingly accepted the word "origin".

16. Mr. QUENTIN-BAXTER said he entirely agreed with Mr. Yasseen. The term "source" was readily understood and a great deal could be said in favour of retaining it, particularly in the context of paragraph 2, which emphasized that the source of an international obligation was immaterial and that it did not affect the responsibility arising from the internationally wrongful act. However, the Drafting Committee had, as always, striven to accommodate the view of the majority of the members of the Commission, who had appeared to favour the use of the word "origin".

17. Mr. KEARNEY said that he too would have preferred the traditional term, which was "source".

18. Mr. TSURUOKA said he shared the reservations expressed regarding the word "origin", and preferred the term "source".

19. Mr. REUTER said that, apart from the question of the term "origin", he was not certain that the statement in paragraph 2 was correct. He therefore reserved his position on it.

20. Mr. USHAKOV observed that the Commission was adopting the draft articles on State responsibility on a provisional basis; he thought that formal reservations could be entered when the final text was adopted.

21. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 16 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 17[3] (Requirement that the international obligation be in force for the State)

22. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following wording for article 17:

Article 17. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory rule of international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

[2] See *Yearbook... 1975*, vol. II, p. 57, document A/10010/Rev.1, para. 45.

[3] For consideration of the text originally submitted by the Special Rapporteur, see 1367th to 1371st meetings.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

23. Article 17, as adopted by the Drafting Committee, had been redrafted to some extent, to make it conform with the language and structure adopted for the previous articles. For example, the Drafting Committee had used the phrase "not in conformity with" rather than "contrary to", as in article 15*bis*. The article originally submitted by the Special Rapporteur had consisted of three paragraphs, with the final paragraph subdivided into three subparagraphs. The Drafting Committee had decided to make the three subparagraphs of paragraph 3 into three full paragraphs, so as to make a clearer distinction between the three kinds of wrongful act covered.

24. As the new title indicated, the purpose of the article was to establish the requirement that the international obligation must have been in force for the State at the time of commission of the act of the State which was not in conformity with what was required of it by that obligation. Paragraphs 1 and 2 stated that general rule in precise terms: an act of the State which was not in conformity with what was required of it by an international obligation constituted a breach of that obligation only if the act was performed at a time when the obligation was in force for that State. However, if subsequently such an act became compulsory by virtue of a peremptory norm of international law, it ceased to be considered an internationally wrongful act. In that connexion, he drew the attention of the Commission to the fact that, in the English and French versions of paragraph 2, the word "rule" should be replaced by "norm" (*norme*), the term used in article 53 of the Vienna Convention on the Law of Treaties.[4]

25. Paragraphs 3 to 5 of article 17 stated the general rule for three particular kinds of wrongful act which necessarily extended over a period of time. Paragraph 3 concerned an act of the State having "a continuing character", paragraph 4 dealt with an act of the State "composed of a series of actions or omissions in respect of separate cases", and paragraph 5 related to an act of the State which was "a complex act constituted by actions or omissions by the same or different organs of the States in respect of the same case".

26. Mr. AGO (Special Rapporteur) said that article 17 was very important. He thanked the Commission and, in particular, the members of the Drafting Committee for having adhered to his views in paragraph 2, which was a step forward in the progressive development of international law, by introducing an element of flexibility into a rule that would have been too rigid if it had been applied even to the case in question.

27. Paragraphs 3, 4 and 5 of the new text proposed by the Drafting Committee were an improvement on the text he had originally submitted, since the three kinds of act of the State, a continuing act, a composite act and a complex act—were clearly identified in each instance. The wording of paragraph 5 had been worked out, in particular, in the light of the comments made by Mr. Yasseen and Sir Francis Vallat. It was the first time those three categories of act of the State had appeared in the draft articles, but it would not be the last, because the Commission would still have to take their specific aspects into account when it came to establish the notion of *tempus commissi delicti*, which was very important in determining the responsibility of the State.

28. Mr. USHAKOV said that he readily accepted article 17 as proposed by the Drafting Committee.

29. Mr. USTOR said that, if the word "rule" in paragraph 2 was to be replaced by "norm", in order to bring the wording into line with article 53 of the Vienna Convention on the Law of Treaties, it would be advisable to refer, as did that Convention, to "a peremptory norm of general international law".

30. He could accept paragraph 2 as it stood, although it could well have been drafted in a different way. Nevertheless, the commentary should explain why the new norm, which required a certain attitude on the part of the State to be compulsory, must necessarily be a peremptory norm of general international law.

31. Mr. AGO agreed that the text should follow the wording of the Vienna Convention, for a peremptory norm could only be a peremptory norm of general international law. The commentary would, of course, take Mr. Ustor's comment into account in connexion with paragraph 2.

32. Mr. YASSEEN said that he could agree to article 17, as proposed by the Drafting Committee, for he found the new text better than the one discussed by the Commission. However, the criterion adopted in paragraph 2 was perhaps not sufficiently clear and the paragraph might well have been brought into line with article 71, paragraph 2 (*b*) of the Vienna Convention. It would be better to say that, if a peremptory rule of general international law supervened, a State which had committed an act conflicting with an earlier rule could be relieved of its responsibility only if the very fact of holding it responsible conflicted with the new peremptory rule. The Special Rapporteur had chosen a different criterion, but the provision in article 71 of the Vienna Convention would perhaps be more comprehensive and more subtle. He was, however, quite willing to respond to the Special Rapporteur's appeal.

33. Mr. RAMANGASOAVINA said he gladly supported the text proposed by the Drafting Committee, which was an improvement on the former text. The

[4] 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. E.70.V.5), p. 289.

meaning of paragraph 2 seemed very clear, but he wondered the drafting could not be improved by replacing the words "*devenu dû*", in the French text, by a more euphonious expression.

34. Mr. AGO (Special Rapporteur) thanked Mr. Yasseen for his comment which he had already made during the Commission's consideration of article 17. The Drafting Committee had borne it in mind, but had finally taken the view that to use the language of article 71 of the Vienna Convention, would produce a looser rule and that, since the Commission accepted the principle stated in paragraph 2 of article 17 only if it was formulated in the strictest fashion, it would be better to keep to the initial text. The aim was not to go so far as to affirm that the mere fact that an act had become lawful by virtue of a later peremptory rule meant that an act which had been wrongful when it was committed ceased to be considered wrongful. For an internationally wrongful act no longer to be considered as such, it must become not only lawful, but also compulsory, by virtue of a peremptory norm of international law. That was a much more restrictive rule.

35. Mr. KEARNEY said that, as he interpreted it, paragraph 2 did not conflict with, or differ from, the principles embodied in article 71 of the Vienna Convention, which dealt with the same problem in a somewhat different manner. Indeed, he would not be able to accept paragraph 2 if he thought that it would affect or overrule article 71 of the Vienna Convention.

36. Mr. QUENTIN-BAXTER observed that paragraph 4 was concerned with situations in which a wrongful act was not an isolated occurrence, but one of a series of incidents which proved the existence of a wrongful policy. Such situations were familiar to the members of, for example, the Committee on the Elimination of Racial Discrimination or the Commission on Human Rights and subsidiary organs thereof, which investigated complaints in the field of human rights. From 1967 to 1975, the Economic and Social Council had adopted a number of resolutions, for instance resolution 1919 (LVIII), on the study of situations that revealed a consistent pattern of gross violations of human rights. The language of paragraph 4 might seem abstract until it was related to a particular situation. Consequently, the Special Rapporteur might consider the advisability of including in his report a reference to the form of language consistently used by the Economic and Social Council and approved, in general terms, by the General Assembly.

37. Mr. CASTAÑEDA said that it was difficult to grasp the meaning of the phrase *un tel fait est devenu dû* in the French version of paragraph 2. In the English version, the phrase "such an act has become compulsory" presented no difficulties. Surely, the object of the paragraph was to refer to a particular conduct or behaviour. It might be preferable, in French, to use a phrase such as: *l'accomplissement d'un tel fait*.

38. Again, he had some misgivings about the restricted scope of the rule in paragraph 2. The assistance that could be given, and was given, to national liberation movements which sought to liberate peoples by force, constituted the most pertinent example, at the present time, of a change in thinking whereby action previously considered wrongful was subsequently regarded as lawful. For instance, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[5] recognized the right to render such assistance. However, paragraph 2 spoke of something that was compulsory, in other words, an obligation and not simply a right. Presumably, the right he had mentioned would not be covered by the rule embodied in that paragraph. The Special Rapporteur had pointed out, however, that, generally speaking, the Commission would prefer to restrict the scope of the rule and ascertain the views of the General Assembly on the matter.

39. Mr. AGO (Special Rapporteur) said that, if an act like the granting of military aid to peoples struggling for their independence became lawful, it did not follow that military intervention by a State on behalf of an oppressed people, which was wrongful when it took place, would automatically cease to be wrongful. An international court hearing a case of that kind would necessarily judge it in the light of the law in force when the military intervention took place. On the other hand, if a State had undertaken to supply arms to a particular country and, in the end, had refused to do so because for example, it knew they would be used to apply by force a policy of *apartheid*—and had refused even before that policy had been condemned and all military aid to that country had been prohibited—the wrongful act it had committed by refusing to deliver the promised weapons could no longer be considered an internationally wrongful act, since it became not only lawful, but also compulsory by virtue of a peremptory rule of international law. It was then obvious that that State could no longer be held responsible.

40. As to the terminology employed in article 17, he pointed out that the Commission had decided to use the expression "act of the State". He proposed that the question should not be reopened, since it had already been sufficiently discussed. In his opinion, the expression was clear enough, and there was no need to amend the text.

41. Mr. REUTER said that if some members found the expression *devenu dû* clumsy, the word *dû* could be replaced by the word *exigible*.

42. Mr. RAMANGASOAVINA said that he would prefer that solution.

43. Mr. AGO (Special Rapporteur) said that there was a whole theory about the *acte dû*. Nevertheless, he was quite willing to have the word *dû* replaced, but he would prefer the word *obligatoire*.

44. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) and Mr. USHAKOV said they could agree to the word *obligatoire*, which was a better rendering of the English word "compulsory".

45. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed

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[5] General Assembly resolution 2625 (XXV), annex.

to approve article 17 as proposed by the Drafting Committee, with the following amendments to paragraph 2: the word "rule" to be replaced by the word "norm", as proposed by the Chairman of the Drafting Committee; the word "general" to be added before the words "international law", as proposed by Mr. Ustor; and, in the French text, the word *dû* to be replaced by the word *obligatoire*.

It was so agreed.

The meeting rose at 11.30 a.m.

1402nd MEETING

Monday, 5 July 1976, at 3.05 p.m.

Chairman: Mr. Abdullah EL-ERIAN

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

State responsibility (*continued*) (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

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

1. The CHAIRMAN said that, before inviting the Chairman of the Drafting Committee to introduce the title and text of article 18 as adopted by the Drafting Committee (A/CN.4/L.243/Add.1), he wished to congratulate Mr. Kearney on behalf of all the members of the Commission, on the bicentenary of the signing of the Declaration of Independence of the United States of America. He had recently been reading a work on the Declaration of Independence in which he had been struck by two illustrations of the perennial problems of drafting. The first concerned the reference to the unalienable rights to "life, liberty and the pursuit of happiness", words which Thomas Jefferson had borrowed from John Locke, but with the expression "pursuit of happiness" substituted for the word "property"; Locke, however, when speaking of "property", had intended to refer to the whole estate of man and not just to his material possessions.

2. The second point was that Thomas Jefferson had accepted no less than 86 proposals for changes in his draft but had remained adamant with regard to the use of the term "unalienable". He himself had been reminded of that when thinking of the effort which the Drafting Committee had devoted to the preparation of the new version of article 18. He wished to congratulate the Committee and the Special Rapporteur for their labours and for the mutual co-operation and understanding which they had displayed.

3. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following wording for article 18:

Article 18. International crimes and international delicts [wrongs]

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(*a*) a serious breach of an international obligation of essential importance for maintenance of international peace and security, such as that prohibiting aggression;

(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(*c*) a serious breach on widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*;

(*d*) a serious breach of an international obligation of essential importance for safeguarding the preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict [wrong].

4. The article embodied the basic principle enunciated in the text originally proposed by the Special Rapporteur in his fifth report (A/CN.4/291 and Add.1-2), namely that the subject-matter of the international obligation breached was irrelevant in characterizing as internationally wrongful an act of a State which constituted a breach of an international obligation. The structure and wording of the article had nevertheless been altered in the light of the observations and suggestions made in the Commission's debate, with a view to giving greater clarity and precision to the categorization of internationally wrongful acts of the State as international crimes and international delicts.

5. The present text of article 18, like the original text, consisted of four paragraphs. The first and the fourth paragraphs remained essentially the same, with the first paragraph setting forth the general principle which he had mentioned and the fourth paragraph defining an international delict as any internationally wrongful act which was not an international crime in accordance with paragraph 2. In paragraph 1, the word "content" had been replaced by "subject-matter", which was clearer from the juridical point of view.

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[1] For the consideration of the text originally submitted by the Special Rapporteur, see 1371st to 1376th meetings.

6. The contents of paragraphs 2 and 3 were basically those of the corresponding paragraphs of the text originally submitted by the Special Rapporteur. All the major fields or categories in which international crimes might occur had been retained in the new draft.

7. The Drafting Committee had taken up a suggestion to combine paragraphs 2 and 3 which had been made during the Commission's consideration of the initial draft. The new paragraph 2 stated the general rule as to what constituted an international crime. It was in fact the key to the whole article. It laid down the basic rule that an internationally wrongful act which resulted from the breach by a State of an international obligation 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, constituted an international crime. Paragraph 3 should be understood exclusively in the light of paragraph 2 and within the limits which paragraph 2 defined. That was clearly emphasized by the introductory words of paragraph 3: "Subject of paragraph 2...".

8. Paragraph 3 listed, by way of example, the major fields in which international crimes might occur. The non-exhaustive character of the list was indicated by the words "*inter alia*". Also, it was plain from the words "on the basis of the rules of international law in force" that the examples of the categories or fields enumerated were based strictly on the rules of international law as they existed today. Needless to say, it had not been the intention of the Drafting Committee to draft a code of international crimes or to indicate definitively and exhaustively what acts were and what acts were not international crimes, or to pronounce on their legal nature. It left the door open for any future developments "on the basis of the rules of international law", an approach reflected in the wording of the subparagraphs of paragraph 3.

9. The new text of paragraph 3 not only indicated general fields or categories but also contained specific examples of what might be regarded as international crimes on the basis of the generally recognized and accepted rules of present-day international law, whether conventional or customary. The Drafting Committee had considered the suggestion made by one member of the Commission, in connexion with subparagraph (*a*), concerning what might be called "economic aggression". The Committee had decided to employ the term "aggression" in subparagraph (*a*) on the understanding that it had the meaning given it by the international community in the Definition of Aggression adopted by consensus by the General Assembly on 14 December 1974.[2] The commentary to the article would explain that, in the view of some members of the Commission, the notion of "aggression" might have a broader meaning than that indicated in the Definition of Aggression.

10. There were two purely drafting points to mention. First, the Drafting Committee had felt it advisable, in the French version of paragraph 3, to use the words *d'après les règles du droit international*, whereas in English the phrase "on the basis of the rules of international law" had been thought best. The Drafting Committee wished to emphasise that the meaning of the two phrases was none the less the same. Secondly, the French version of paragraph 4 spoke of *un délit international*. The Drafting Committee, and more particularly its English-speaking members, had considered that the English translation of that, "an international delict", could be improved and needed further thought. Accordingly in the English version of paragraph 4 and the title, the word "wrong" had been placed in square brackets after the word "delict"; the Commission would thus be in a good position to decide whether the phrase "international delict" was appropriate in English.

11. Lastly, following a suggestion made in the Commission, the Drafting Committee had decided to entitle the article quite simply "International crimes and international delicts [wrongs]".

12. Mr. CASTAÑEDA said that he wished to associate himself with the Chairman's congratulations to Mr. Kearney. He was reminded of a remark by the late Adlai Stevenson that the Declaration of Independence signed at Philadelphia in 1776 had marked the beginning of the process of decolonization. That Declaration had had a great influence in Latin America and in particular in his own country.

13. Having been absent during the Commission's discussion of article 18 as proposed by the Special Rapporteur,[3] he wished to take the present opportunity to express his gratitude to the Special Rapporteur, and his agreement with the philosophical and legal conception underlying article 18. The article exemplified in every way the progressive development of the law of State responsibility. The rules embodied in it were a basic response to the needs of the international community as the Commission understood them, rather than a codification of precedents from case-law. Article 18, as now proposed, reflected modern developments in State responsibility and met the present requirements of the world community. He felt that the Commission's work on the article would be highly appreciated by the General Assembly.

14. The first merit of the Commission's endeavours was a question of method. As the Special Rapporteur had pointed out, the various types of internationally wrongful acts had been distinguished for normative and not for scientific reasons. The distinction between them would affect the régime or form of responsibility which would be applied in due course to each type of internationally wrongful act.

15. In his fifth report, the Special Rapporteur had given a remarkable review of the historical development of State practice, judicial opinion and legal writings in the matter of State responsibility. His account showed that a slow but sure process had led to the recognition of two categories of internationally wrongful act. It revealed just how much the publicists had foreseen and influenced

[2] General Assembly resolution 3314 (XXIX), annex.

[3] See 1371st meeting, para. 9.

the course of international practice, but it also demonstrated the opposite process at work.

16. Three important factors had contributed to the division of internationally wrongful acts into two categories. The first was the emergence of the notion of *jus cogens*. The second was the new idea of acceptance of the possibility of applying penal sanctions against individuals. In that connexion, it was important to draw a clear distinction between the responsibility of individuals and the responsibility of the State itself for an international crime attributable to it. The punishment of an individual should not constitute the only expression of responsibility for an international crime. That point should be stressed, in order to avoid any confusion in the General Assembly between State responsibility for international crimes and the punishment of individuals for international crimes.

17. The third factor was the practice which had developed in the United Nations with regard to colonial situations. A long series of General Assembly resolutions reflected the growing conviction that the colonial status as understood at the time of the drafting of the Charter had undergone a profound change. In particular, the Declaration on the Granting of Independence to Colonial Countries and Peoples [4] had had not only a political but also a legal influence; it had radically modified international law on the colonial issue. He therefore strongly supported the inclusion of a reference to colonial situations in paragraph 3 (*b*) of article 18.

18. As far as the commentary was concerned, he believed that it would have gained from references to two important United Nations texts which had emerged from the work of the International Law Commission. The first was the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[5] Those principles had previously been affirmed by the General Assembly in resolution 95 (I), as an expression of international law in force. The second was the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954.[6] It was true that the Nürnberg Principles and the Code of Offences both referred to crimes committed by individuals, but a fuller discussion of them would have been of advantage even if it had not affected the conclusions reached by the Special Rapporteur.

19. It would have been also useful to dwell at greater length on measures taken by the United Nations, in particular pursuant to General Assembly resolution 377 (V) entitled "Uniting for peace", which involved the use of armed force but not any coercive action on the part of the Security Council or the General Assembly. He was thinking of such cases as the Suez and Congo operations.

20. The Special Rapporteur had aptly drawn attention to the recognition by the International Court of Justice, in the *Case concerning the Barcelona Traction, Light and Power Company, Limited* that the distinction between different types of internationally wrongful acts could have an influence on the determination of the subjects which had a legal interest in claiming the performance of an international obligation.[7]

21. In the Special Rapporteur's very thorough account of the writings on the subject, he (Mr. Castañeda) had been interested to note the reference to the views expressed in the United States of America by Root in 1915 and Peaslee in 1916.[8] Those two writers had drawn a distinction between breaches of international law which affected only the injured State and those which affected the community of nations as a whole. With regard to the second kind of internationally wrongful act, Peaslee had recommended the establishment of international machinery for its punishment, but Root had considered that any State should be authorized to punish acts of that kind. That doctrine had been propounded by Root when he had been Secretary of State, and it had had a great influence on United States's policy. It had led to an impressive series of unwarrantable interventions in Latin America. His own country, Mexico, had suffered from interventions of that kind undertaken with a view to obtaining reparation for injuries done to aliens during civil strife.

22. The Special Rapporteur had shown that many writers, whose views he himself shared, had accepted the idea that sanctions could be applied to a State. That subject would be taken up later in the draft, but since the Special Rapporteur had already given some indication of his views, it would be useful to discuss it at the present stage.

23. Before the establishment of the United Nations, the international community had no institutions or machinery to maintain the international legal order; at that times, it was only natural to admit the possibility of individual action by States to restore the legal order which had been violated. Article 16 of the Covenant of the League of Nations was faulty in that it allowed for that possibility.

24. The adoption of the Charter of the United Nations had completely changed the situation. The system of collective security embodied in the Charter was intended to be complete; the Charter had taken away from individual States the right to resort to force and, above all, the power to take a unilateral decision to evaluate a situation and determine whether the injury sustained permitted the use of force. Under the Charter, there were only two exceptions to the prohibition of the use of force: the first was the case of participation in collective action by the United Nations and the second was that of individual or collective self-defence against armed attack in accordance with Article 51 of the Charter. In his view, the expression *agression armée* used in the French version was more appropriate in that context than the words "armed attack".

25. The system of collective security provided for in the Charter had not functioned as such in practice. The

[4] General Assembly resolution 1514 (XV).

[5] *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, para. 97.

[6] *Yearbook... 1954*, vol. II, pp. 151-152, document A/2693, para. 54.

[7] See A/CN.4/291 and Add.1-2, para. 89.

[8] *Ibid.*, para. 131.

Security Council had never taken any action to impose the sanctions specified in Article 42 of the Charter, and no agreement had been concluded to give effect to Article 43, which made provision for contributions of armed forces and other forms of assistance by Member States to enable the Security Council to impose such sanctions. States had, however, made arrangements for collective action in self-defence against armed attack as provided in article 51 of the Charter, under the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947, the North Atlantic Treaty signed at Washington on 4 April 1949, and the Treaty of Friendship, Co-operation and Mutual Assistance signed at Warsaw in 14 May 1955. But States were not entitled, except in the case of self-defence, to decide individually that sanctions should be applied against a State. That right had been withdrawn from Member States by the Charter and was the monopoly of the United Nations.

26. Another legitimate question, and one which had been discussed at length by many leading writers, including Kelsen, was whether coercive action ordered by the Security Council constituted a penalty in the strictly technical sense of the term, or a political or military measure to stop a breach of the peace or an aggression. Kelsen was inclined to take the latter view, on the basis of the preparatory work done in 1945 by the United Nations Conference on International Organization at San Francisco, on the drafting of Articles 5, 39, 41, 42, 43 and Article 25, provisions which dealt with the residual powers of the Security Council. Above all, Kelsen's conclusion was based on the whole philosophy of collective security exemplified by the Charter.

27. The United Nations system of collective security was deliberately political in purpose: its essential aim was to maintain peace without taking into account the letter of the law. An act which was not unlawful, such as certain economic measures, could lead to coercive action because it constituted a threat to the peace. On the other hand, in a case of grave and flagrant violation of international law, the Security Council might well feel that the best manner of safeguarding the peace was to refrain from ordering any coercive action. It was significant that the Security Council would in that case be acting perfectly legally. It should be noted that, unlike the Covenant of the League of Nations, the Charter of the United Nations did not guarantee the territorial integrity of its members. In Article 2, paragraph 4, it prohibited the threat or use of force against the territorial integrity or political independence of any State, but it did not impose on the States Members of the United Nations any obligation to guarantee that territorial integrity or political independence.

28. In view of the foregoing, Kelsen had arrived at the conclusion that the purpose of the United Nations system of collective security, and of any coercive action ordered under that system, was not to restore the legal order which had been violated but simply to restore peace, and the two could very well not be synonymous. That was perhaps why a number of writers had considered that the only genuine sanction for which provision was made in the Charter was the expulsion of a Member State under Article 6.

29. In view of the monopoly of the use of force conferred on the United Nations by the Charter, it was also clear that reprisals were no longer permissible, except in the case of self-defence. To be considered as an act of self-defence, reprisals had to be immediate and proportional to the act to which they constituted a response. The Security Council had had occasion to recall that principle in its resolution 188 (1964) in connexion with an attack on a fort in Yemen by United Kingdom forces; it had stated in that case that the armed reprisals were incompatible with the Charter. Armed reprisals had also been banned by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[9] All those matters would be discussed at a later stage of the work on State responsibility. There were clearly cases of the use of force which had previously been lawful and now constituted internationally wrongful acts. In that connexion, he drew attention to the issues discussed in paragraph 159 of the Special Rapporteur's fifth report, where the Special Rapporteur had been particularly cautious in admitting only three forms of retaliation against a State guilty of an act of aggression: first, a State that was the victim of aggression had the faculty to take, against the aggressor State, measures infringing the latter's rights, and that faculty, exceptionally, was not subject to the general obligation first to seek reparation for the injury suffered; second, the victim of an act of aggression might use armed force in self-defence; third, a third State might assist, even with armed force, a State that was the victim of an act of aggression.

30. The legal consequences of an international crime should of course be much more severe than those of an international wrong of lesser gravity. He felt it necessary, however, to express his concern that, in the absence of sufficient limitations and safeguards, the principle of sanctions against individual States might be applied too widely. As far as international crimes were concerned, he did not deny that, quite apart from any action by the United Nations, it might be open to States to adopt sanctions individually. The extent, scope and nature of those sanctions, however, would have to be examined in future with the utmost care.

31 He was in broad agreement with the text of article 18 as proposed by the Drafting Committee, but on some points he would have preferred the language originally proposed by the Special Rapporteur. In paragraph 2, the repetition of the word "crime" in the concluding portion rendered the text rather heavy.

32. A more important point was that the Special Rapporteur's original text had the advantage of particularizing resort to the threat or use of force against the territorial integrity or political independence of another State, thus characterizing it as the most serious international crime of all. In the new formulation, paragraph 3 (*a*) did not express that idea.

33. However, he preferred paragraph 3 (*b*) of the new version to the corresponding provision, namely, paragraph 3 (*a*), of the Special Rapporteur's text, since it

[9] General Assembly resolution 2625 (XXV), annex.

made a useful reference to the prohibition of the establishment or maintenance by force of colonial domination.

34. He noted that, in paragraph 3 (*c*) the reference in the corresponding provision of the original text to "human rights and fundamental freedoms" had been replaced by the words "safeguarding the human being".

35. Finally, paragraph 3 (*d*) was particularly interesting in that it referred to the preservation of the human environment, which had acquired great prominence in international relations. Serious breaches of the international obligation to safeguard the human environment could injure humanity as a whole. However, he would have preferred the text originally proposed by the Special Rapporteur in his paragraph 3 (*c*); the mention of the examples given in the new text could have its drawbacks. If there was to be a list, it should, for example, mention deliberate action to alter the climate, which would undoubtedly constitute an international crime. That question was being at present discussed in the Committee on Disarmament.

36. One of the purposes of the United Nations was to achieve international co-operation in economic matters. Perhaps in the not too distant future—possibly within a generation—the international community might recognize that the breach of an obligation to carry out that essential purpose of the United Nations constituted an internationally wrongful act.

37. In conclusion, he stressed that, as a result of the new formula proposed for paragraph 3 (*a*), the article had lost much of its ideological content. The new text referred to the prohibition of aggression, but might with advantage have mentioned resort to the use or threat of force as the leading example of an international crime. It was important to remember that, with a single exception, there was only one example of a clear decision by the Security Council that an act of aggression had been committed, and that decision had been taken in the absence of one of its permanent members. There were, however, a great many decisions of the Security Council dealing with cases of the use or threat of force.

38. Mr. YASSEEN said that article 18 was a key article, for the future work of the Commission on the various categories of responsibility would hinge on it. The Commission had, in principle, agreed to the distinction between international crimes and international delicts and, as a result of the laudable efforts of the Drafting Committee, it had been possible to formulate a text which should be generally acceptable. From the standpoint of legal technique, the new draft was better than the one proposed by the Special Rapporteur, which had been based cautiously on present times and had not allowed for future developments in the category of international crimes. The technique used in drafting the new article, namely the non-exhaustive enumeration of international crimes, would make it possible for new crimes to be included in that category.

39. He personally would have liked article 18 to contain a stricter definition of an international crime. The definition started satisfactorily, but after that it seemed to fall into a vicious circle. If an international crime was defined as an internationally wrongful act which resulted from the breach by a State "of an international obligation... essential for the protection of fundamental interests of the international community", it seemed unnecessary to add that the breach of that obligation should be "recognized as a crime by that community as a whole". The breach of an international obligation essential to the protection of fundamental interests of the international community was bound to be recognized as a crime by that community as a whole. However, such excessive caution was perhaps useful; the provision was a draft article and, to begin with, its acceptance would be no more than a question of provisional adoption by the Commission.

40. An advantage of the article under consideration was that it gave examples. In such a new field as that of international crimes and delicts, the examples would give shape to somewhat abstract ideas. Moreover, the Drafting Committee's examples had been well chosen and would not hamper the evolution of the notion of an international crime.

41. The text proposed by the Drafting Committee might be criticized generally as being too circumspect. For example, the expression "serious breach on a widespread scale" in paragraph 3 (*c*) was perhaps evidence of excessive caution.

42. The CHAIRMAN, speaking as a member of the Commission, joined the previous speakers in expressing great appreciation of the work of the Drafting Committee. The text proposed by the Committee was a compromise which was bound to leave some members of the Commission unsatisfied. He himself had expressed his views on the Special Rapporteur's article 18 during the earlier discussion and would not revert to that text. He would concentrate his remarks on the new text proposed by the Drafting Committee.

43. In general, he agreed with Mr. Yasseen that the text proposed by the Drafting Committee was marked by excessive caution which might well dilute some of the basic concepts embodied in the Special Rapporteur's original article. He also agreed with Mr. Castañeda that it would have been preferable to make a special place in article 18 for the breach of those fundamental norms of the Charter prohibiting the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.

44. He had doubts regarding the use of the adjective "serious" as a qualification of a breach of an international obligation of essential importance in the various subparagraphs of paragraph 3. Such a breach was bound to be "serious"; the adjective was therefore totally unnecessary and, ultimately, detrimental to the meaning of the expression which it qualified. Article 39 of the United Nations Charter referred to a "breach of the peace" without unnecessarily qualifying it as "serious".

45. Similarly, he saw little point in the words "in force" which appeared after the words "the rules of international law" in the opening words of paragraph 3. He appreciated that they had been used for psychological reasons, so as to exclude trends which had not yet evolved into rules of law. However, any mention of "rules of international

law" necessarily implied that the rules referred to were in force.

46. It was significant in that connexion that article 53 of the 1969 Vienna Convention on the Law of Treaties [10] referred to a peremptory norm of "general international law" without adding the words "in force". The same was true of treaties; there was no reference to a treaty "in force" anywhere in the Vienna Convention, not even in Article 30 (Application of successive treaties relating to the same subject-matter), where there might have been a reasonable case for using the expression "treaty in force". There too, the draftsmen of the 1969 Vienna Convention had taken it for granted that the term "treaty" implied a treaty in force.

47. In paragraph 3 (*c*), he found the reference to "safeguarding the human being" somewhat vague. The United Nations Charter referred to "human rights and fundamental freedoms", the expression originally used by the Special Rapporteur. Article 1 of the Universal Declaration of Human Rights declared all human beings to be "equal in dignity".

48. He had misgivings about the replacement of the notion of a "resource common to all mankind", which was in the original text of paragraph 3 (*c*), by the notion of "human environment" contained in the text of paragraph 3 (*d*) prepared by the Drafting Committee.

49. The comments he had made did not in any way affect his general position regarding article 18; he did not oppose the acceptance of the compromise formula which the article contained.

50. Mr. TABIBI commended the Drafting Committee on the excellent compromise text which it had submitted. Article 18 was a very important article and it was difficult to produce a generally acceptable text for it. The wording now proposed was a genuine compromise because it was flexible and because the enumeration in paragraph 3 was not exhaustive.

51. He accepted the language proposed by the drafting Committee because, although in principle he believed that the terminology of the Charter should be adhered to, he also felt that the experience of the past 30 years should be taken into account. The terms used in the proposed text allowed for the developments which had taken place in United Nations law since the adoption of the Charter.

52. With regard to paragraph 3 (*a*), he preferred the term "aggression" to the original reference to "the threat or use of force". The use of the term "aggression" would cover cases of economic and political aggression, which was much more dangerous for third world countries than the use of force itself.

53. With regard to paragraph 3 (*c*), he agreed with Mr. El-Erian's comment on the words "safeguarding the human being", which constituted a new notion. He felt it would do no harm to reintroduce into subparagraph (*c*) a reference to "human rights and fundamental freedoms", which was the basic notion in the United Nations Charter. However, since the text was a compromise, he was prepared to accept it as it stood.

54. Having said that, he wished to make it clear that he could not accept article 18 finally until he had seen the commentary. The Chairman of the Drafting Committee, in speaking about economic aggression, had said that the term "aggression" was used in paragraph 3 (*a*) in the meaning given it in the Definition of Aggression adopted by the General Assembly. In fact, the weakest point of that Definition was precisely its silence on the question of economic aggression. He therefore felt that great care should be taken not to refer in the commentary to a text which remained silent on such an important subject.

55. He wished to remind the Commission that when it had adopted its draft articles on the law of treaties in 1966, there had been a discussion on the question of the commentary, and the Special Rapporteur on that topic, Sir Humphrey Waldock, had said that it should be left to the practice of States and of United Nations organs to interpret the meaning of a notion.

56. Mr. BILGE said that the new title of article 18, "International crimes and international delicts [wrongs]", gave the impression that the Commission was seeking to establish primary rules. He preferred the earlier title, "Content of the international obligation breached", which to his mind was a better reflection of the idea underlying the article, namely, that the subject-matter of the obligation breached might affect the régime of responsibility.

57. The Drafting Committee had been right, in paragraph 2, to give a composite definition of international crime, following the method successfully adopted for the Definition of Aggression. However, he failed to see why the definition should be accompanied by the requirement that the breach of the obligation must be recognized as a crime by the international community as a whole. It was difficult to understand the purpose of that requirement, which in his opinion detracted from the strength which a general definition could have. If the aim was to be cautious, as some had pointed out, caution seemed to him unnecessary, since the examples listed in paragraph 3 clearly showed which types of breach constituted international crimes. The requirement should therefore be removed from paragraph 2 and, as a precaution, the word "serious" should be inserted before the word "breach". In that way, the paragraph would indicate that not all breaches of an international obligation were international crimes, and its wording would be brought into line with that of paragraph 3, which spoke of "a serious breach of an international obligation".

58. As a whole, paragraph 3 was well formulated, but he wondered whether, in subparagraph (*c*), the expression "for safeguarding the human being" covered human rights and fundamental freedoms. In his view, that wording could be improved. Nor did he find the expression "on a widespread scale" felicitous, since what mattered was primarily the will of the State and its policy. He therefore proposed that the expression should be replaced by the adjective "systematic".

[10] 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. E.70.V.5), p. 289.

59. He preferred the earlier version of paragraph 4, but if the Commission decided in favour of the new wording, there should be a reference to paragraph 3 as well as to paragraph 2.

60. Lastly, he felt that States should be warned of the extremely important consequences that article 18 might have.

61. Mr. REUTER said that, in the main, he could accept article 18 in its present form. He did not believe it to be a compromise article. In his opinion, its importance lay in the methodology used. The Special Rapporteur had deemed it necessary, at the present stage in his work, to state the principle that there were two categories of internationally wrongful act: international crimes and international delicts. It could therefore be asserted that article 18 was normative in effect. However, he felt that it was an article full of promise and commitment; it gave a fairly general definition of international crimes, but without saying what the general régime for such crimes was. The Special Rapporteur's report had listed examples of genocide which indicated the régime of responsibility applicable to that crime, but it did not state what general rules would apply to international crimes as a whole. True, it was possible to envisage the direction that such rules would take: a right to prosecute, a régime of prescriptibility and, above all, a right to impose certain penalties, for the notion of crime was bound up with that of punishment. What then were the penalties involved? For instance, in the case of aggression, the major international crime, the aggressor State could be deprived of some of its fundamental rights, especially the right to dispose of its territory. However, the notion of punishment of a State still had to be defined. In article 18, the Commission was committing itself to the establishment of a régime of different responsibilities based on the distinction drawn between international crimes and international delicts. However, article 18 simply held out that promise, for it could not establish such a régime.

62. Nor could the Commission claim that in article 18 it was stating any kind of rule concerning an international crime. The Commission would require a considerable amount of time to define the crime of aggression and other international crimes from the penal standpoint. Juridically, therefore, it had confined itself, in paragraph 3, to referring to what had already been done or, in the case of the example given in subparagraph (*c*), to what was being done at the international level, i.e. to the work of the General Assembly and to the many conventions either adopted or in preparation. The examples given in paragraph 3 did indeed constitute a political choice, but they were also the most important international crimes, which the Commission was seeking to draw to the attention of the General Assembly. It was for the General Assembly to instruct the competent organs to define, in penal terms, the various international crimes, including economic crimes. He therefore regarded article 18 methodologically, as a pointer which would dominate the work of the Commission but did not commit it to drawing up either a general régime of international crimes or, still less, a penal definition of a particular crime. In his opinion, it was very difficult to establish general rules for international crimes, and the Commission should not embark on that task without an express mandate from the General Assembly.

63. In analysing the examples from the past, the Special Rapporteur had pointed to the emergence, in international delicts as a whole, of elements which called for more than mere reparation. Consequently, it would seem necessary to abandon the somewhat over-simplified distinction between two categories of breach: crimes, which fell exclusively under penal law, and delicts, which fell under the traditional law of reparation pure and simple. In fact, the truth was much more complex, for there was a penal nuance to some delicts. The Commission's task was therefore extremely difficult, to say nothing of the frequent confusion, pointed out by Mr. Castañeda, between coercion, which was an expression of executive power, and sanction, which was an expression of repressive power; the Security Council itself did not act identically in its capacities as an organ of repression and an organ of coercion. Hence, in article 18, the Commission was making a commitment, but nothing more; it was proposing neither a régime of international crimes nor a definition of a particular crime.

64. With regard to the wording of article 18, he readily agreed, with regard to paragraph 3 (*c*), that mention should no longer be made of human rights, and that was from conviction, not caution.

65. Mr. PINTO said that international lawyers of future generations would be grateful to the Special Rapporteur for his rare courage in formulating an article such as the one under consideration.

66. He agreed with Mr. Reuter that article 18 was full of promise, but a great deal might still remain to be done if the Commission moved in the direction in which the article seemed to point. Like Mr. Yasseen, he thought that the Drafting Committee had been too cautious; he would have preferred wording that was more forceful and more precise.

67. The text appeared to state two equations: first, a breach of an international obligation equalled an internationally wrongful act; and second an internationally wrongful act minus an international crime equalled an international delict. Paragraphs 2 and 3, taken together, seemed to indicate that the criterion for distinguishing an international crime within the broad category of internationally wrongful acts was the seriousness of the breach. Consequently, as Mr. Bilge had observed, paragraph 2 should draw attention to that criterion immediately, by specifying: "An internationally wrongful act which results from a serious breach by a State...". In that way, paragraph 2 would form a logical introduction to the serious breaches enumerated in paragraph 3.

68. Moreover, the proviso that paragraph 3 was "subject to paragraph 2" seemed to have no precise meaning, unless it signified that paragraph 3 did not restrict the generality of paragraph 2. If that was so, the fact should perhaps be put in a different way. Also, paragraph 3 specified that "an international crime may result"; a more positive and more precise form of language might have been used, at least with regard to paragraph 3 (*a*), which was concerned with the maintenance of international peace and security. Again, in his capacity as a member

of the Commission, the Chairman had spoken of the difficulty he found in the qualification of the words "rules of international law" by the words "in force", which implied the existence of a time element in respect of international crimes. He wondered whether the words "in force" were intended to exclude breaches that had occurred in the past. In any event, the time element posed a troublesome problem.

69. Lastly, he wondered why the Drafting Committee had decided to use in paragraph 4 the term "delict"; he doubted whether, in the present context, its employment necessarily exhausted the category of internationally wrongful acts. It was by no means certain that all wrongful acts other than crimes were delicts. For example, a country in breach of a treaty obligation to repay a debt would be a delinquent State, but its delictual liability might not be involved. By asserting that all internationally wrongful acts were either crimes or delicts, the Commission might be omitting certain classes of such acts or incorrectly including some such acts under the heading of delicts. The Commission appeared to be moving towards the concepts of "crime-punishment" and "delict-compensation", and he was not sure that it was the right course to take. The word "delict" carried unnecessary overtones of internal law and its use might lead to an area of needless uncertainty.

70. Mr. SETTE CÂMARA said that the new wording proposed by the Drafting Committee appeared to be much more suited than the original text to the handling of problems which were far from clearly defined. At an earlier stage, he had suggested[11] that paragraph 1 should form an article by itself and that the remaining paragraphs, which called for care, should constitute a separate article.

71. From the drafting angle, he had some misgivings about the phrase "recognized as a crime by that community as a whole" in paragraph 2. Obviously, at least one State, i.e. the State accused of the internationally wrongful act, would not be included among the international community "as a whole".

72. The insertion of the phrase "on the basis of the rules of international law in force" in paragraph 3 was undoubtedly an improvement, but it had been pointed out that the words "in force" might not be necessary. Similarly, in paragraph 3 (*b*), the words "such as that prohibiting the establishment or maintenance by force of colonial domination" were open to question, since they could imply that colonial domination not exercised "by force" was permissible and did not constitute an international crime.

73. He agreed with Mr. Castañeda that the words "on a widespread scale" should be deleted from paragraph 3 (*c*). Clearly, nobody should think that to practice slavery, genocide or *apartheid* on a small scale was not an international crime.

74. Paragraph 3 (*d*) concerned the biosphere, and its examples should not be limited to the atmosphere and the seas. Massive pollution could occur in rivers, lakes, canals or even whole areas of the territory of States.

75. In conclusion, in the English version, the term "wrong" was preferable to the term "delict". In many legal systems and languages, the terms "crime" and "delict" were synonymous.

76. Mr. NJENGA said that the text submitted by the Drafting Committee had greatly watered down the important ideas which had been set forth so clearly in the report of the Special Rapporteur and reflected in his formulation of the article. It would be extremely difficult for anybody who had not participated in the Commission's discussion of the article to understand the reasons for the changes made by the Drafting Committee.

77. He questioned whether the words "an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole" in paragraph 2 of the Drafting Committee's text, conveyed the same idea as what the Special Rapporteur had had in mind in referring in paragraph 3 of the original text to "an international obligation established by a norm of general international law accepted by the international community as a whole". The language employed by the Special Rapporteur reflected what was generally understood by *jus cogens*, as defined, for example, in the Vienna Convention on the Law of Treaties. The difficulty was compounded by the fact that paragraph 2 of the new text did not specify who was to determine whether an international obligation was of such an essential character.

78. Like earlier speakers, he felt that the words "in force" in paragraph 3 were unnecessary. They merely increased the difficulty of interpreting what was in any case a complicated provision. Paragraph 3 (*a*) dealt with a concept of the utmost importance, namely the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State; the Drafting Committee should have used the language employed in paragraph 2 of the Special Rapporteur's text, which drew on the phraseology of the Charter. Paragraph 3 (*b*) of the new text, concerning the right of self-determination of peoples, was again no improvement on paragraph 3 (*a*) of the original text. The present version could even be construed as meaning that the establishment or maintenance of colonial domination was not an international crime unless force was used, something that was clearly untrue. With regard to paragraph 3 (*c*), previous speakers had already observed that the qualification "on a widespread scale" was quite unnecessary. Furthermore, it was essential to explain why reference was made to "safeguarding the human being". The Special Rapporteur had rightly spoken in paragraph 3 (*b*) of the original text of "respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion", which was the very phraseology of Article 1, paragraph 3 of the Charter.

79. He failed to see why the present draft article omitted a most important aspect of the Special Rapporteur's text, namely, the concept of "the conservation and the free enjoyment for everyone of a resource common to all

[11] See 1373rd meeting, para. 9.

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.