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Summary record of the 1371st meeting

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two kinds of situation could arise. If, before the refusal by the local authorities, the State had undertaken to permit persons of the applicant's nationality to exercise the profession in question, the central authority would have to annul the local decision, grant the permission requested, and possibly indemnify the applicant. If, on the other hand, the obligation had arisen after the refusal by the local authorities, no exception could be taken to the refusal, but the central authorities themselves would have to grant the permission if the applicant addressed a further request for it to them. If they did not grant it, the wrongful act began from that moment and would continue, unless a court restored the situation to what it should have been. Subparagraph (c) would have to be slightly reworded so that such consequences were quite clear.

Mr. Calle y Calle, second Vice-Chairman, took the Chair.

24. Mr. MARTÍNEZ-MORENO, referring to the problem of the so-called *rebus sic stantibus* clause, said that an obligation deriving from a treaty could be modified by a fundamental change of circumstances. But the Vienna Convention on the Law of Treaties stated in article 62 that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty, if it was "the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty".¹⁶ He wondered whether it might not be advisable to deal with that intertemporal problem in article 17, in order to bring the draft into line with that Convention.

25. Mr. AGO (Special Rapporteur) said it was true that the rule of the Vienna Convention was that a treaty could be terminated as a result of a fundamental change of circumstances, but the actual breach of an obligation could not be interpreted as a fundamental change of circumstances. Thus, in the case of a breach of an obligation, it was not possible to say that, for that reason, the treaty had ceased to be valid because of a fundamental change of circumstances. On the other hand, if a fundamental change of circumstances had occurred and had caused the treaty to cease to be valid, it was not possible to speak of "breach", because the breach no longer existed. The question needed further thought, but he doubted whether a matter of that kind should be dealt with in article 17.

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

*It was so agreed.*¹⁷

The meeting rose at 5.20 p.m.

¹⁶ *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. 297.

¹⁷ For the consideration of the text proposed by the Drafting Committee, see 1401st meeting, paras. 22-45.

1371st MEETING

Tuesday, 18 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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

Organization of work

1. The CHAIRMAN said that, on 17 May, the enlarged Bureau had decided to recommend to the Commission that, at the conclusion of its consideration of article 18 of the draft articles on State responsibility (item 2 of the agenda), the Commission should take up the question of the most-favoured-nation clause (item 4 of the agenda) for one week and a half. Next, for another week and a half, the Commission should consider the topic of succession of States in respect of matters other than treaties (item 3 of the agenda). The Commission should then revert to its consideration of the most-favoured-nation clause until it had completed the first reading of its draft articles on that topic. The Commission should then devote a further one week and a half to the topic of succession of States in respect of matters other than treaties. The Commission should allocate one or two meetings to consideration of the first report by the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses (item 6 of the agenda). The Commission should also devote a number of meetings to consideration of the fourth and fifth reports by the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations (item 5 of the agenda).

2. It had also been deemed advisable that the Commission, depending upon the information to be obtained by the Secretariat, should insert in its report on the work of the present session a paragraph concerning the desirability and usefulness of reissuing the publication entitled *The Work of the International Law Commission*.¹ However, the Secretariat should be requested to include additional paragraphs on the Commission's activities, together with the text of the conventions that had been adopted on the basis of its work since the issue of that publication in 1972.

3. Lastly, it had been suggested that, in considering the complex draft articles on State responsibility, it would expedite the work of the Commission if the Special Rapporteur were not required to wait until the close of the discussion before answering questions, but were to reply to points as they arose. In that way, the Special Rapporteur's summing-up would be confined to a general

¹ United Nations publication, Sales No. E.72.I.17.

appraisal of the Commission's attitude towards each article as a whole.

4. Mr. AGO (Special Rapporteur for the topic of State responsibility) said that he would certainly follow that course if it proved necessary.

5. Mr. HAMBRO said that it would be of great assistance to members if the Secretariat issued a conference room paper setting out the time-table for the programme of work.

6. The CHAIRMAN said that the Secretariat would note that suggestion.

7. If he heard no objection, he would take it that the Commission agreed to the recommendations of the enlarged Bureau.

It was so agreed.

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

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

ARTICLE 17 (Force of an international obligation)²
(*concluded*)

8. Mr. AGO (Special Rapporteur) said he wished to amplify the statement he had made at the previous meeting in replying to two questions put by Mr. Tsuruoka.³ In reality, the first of those questions, which related to the field of application of paragraph 2, he had already answered indirectly when he had stressed the limited scope of the provision. The second question related to paragraph 3 (c). Mr Tsuruoka had asked whether there was not already a complete wrongful act when an organ of first instance adopted conduct which was not in conformity with the international obligation incumbent upon it. In his (the Special Rapporteur's) view, that question must be answered in the negative if the obligation was one of result. On the other hand, if the obligation was a genuine obligation of conduct which specifically required a certain conduct by the organ in question, and if that organ had adopted conduct which was not in conformity with the obligation, there was immediately a breach of the obligation and an internationally wrongful act. But if there was an obligation of result, the decision taken by the first organ only constituted the beginning of a breach, which might become complete if another organ did not restore the situation *ab initio*, but confirmed the first decision. It was only in the case of confirmation that the internationally wrongful act became complete, and it then clearly went back to the conduct of the first organ.

² See 1367th meeting, para. 3.

³ See 1369th meeting, paras. 29 and 30.

ARTICLE 18 (Content of the international obligation breached)

9. The CHAIRMAN invited the Special Rapporteur to introduce his draft article 18, which read:

Article 18. Content of the international obligation breached

1. The breach by a State of an existing international obligation incumbent upon it is an internationally wrongful act, regardless of the content of the obligation breached.

2. The breach by a State of an international obligation established for the purpose of maintaining international peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an "international crime".

3. The serious breach by a State of an international obligation established by a norm of general international law accepted and recognized to be essential by the international community as a whole and having as its purpose:

(a) Respect for the principle of the equal rights of all peoples and of their right of self-determination; or

(b) Respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or

(c) The conservation and the free enjoyment for everyone of a resource common to all mankind,
is also an "international crime".

4. The breach by a State of any other international obligation is an "international delict".

10. Mr. AGO (Special Rapporteur) said that it had been established in article 16 that the source of the international obligation breached did not affect either the existence of the internationally wrongful act or the régime of responsibility resulting from it. To his mind, the expression "régime of responsibility", which was widely used by writers, and which he was using, though without any wish to impose it on the Commission, covered both the form of responsibility applicable and the determination of the subjects entitled to invoke that responsibility. In article 18, the same questions were examined from the point of view of the possible effect, not of the source but of the content of the international obligation breached. Did a breach by the State of an international obligation incumbent upon it constitute an internationally wrongful act regardless of the content of the international obligation breached? Did such a breach always entail the same régime of responsibility whatever the content of the international obligation breached, or was it necessary in that connexion to distinguish between different régimes of responsibility applicable according to the content of the obligation?

11. Since the first question raised no difficulty, he would merely refer members of the Commission to his report (A/CN.4/291 and Add.1-2, paras. 73-78) and his conclusion that "a breach by the State of an international obligation incumbent upon it is an internationally wrongful act regardless of the content of the international obligation breached. No restrictions are to be laid down in this regard."

12. On the other hand, it was not so easy to determine whether differentiation between separate categories of internationally wrongful acts should not be justified according to the content of the international obligation breached. Clearly, such a differentiation, if it was to be

included in the present draft, should be normative and not purely scientific or didactic. It would necessarily have to be expressed by a difference in the régime of responsibility applicable; otherwise it would amount to no more than, for instance, the differentiation made in speaking of internationally wrongful maritime acts because the breaches in question related to the law of the sea, though that did not entail any difference from the point of view of responsibility.

13. Formerly, the great majority of international jurists had held that the content of the international obligation breached had no incidence on responsibility and they had therefore recognized only one régime of responsibility applicable to all internationally wrongful acts. Between the two World Wars, that "classical" view had begun to be contested and there was now a broad current of opinion that a different régime of responsibility should apply when the content of the obligation breached was of special importance for the international community as a whole. Obligations of that kind included those prohibiting States from committing certain acts, such as acts of aggression, genocide and *apartheid* and other acts of comparable gravity. Breaches of those obligations were often called "international crimes". That category of breaches was sometimes distinguished from "normal breaches" or "ordinary breaches", which were hardly acceptable expressions either, since they suggested that it might be "normal" or "ordinary" to commit a breach. Bearing in mind the development of international thought, the Commission would have to decide whether it wished to adopt the classical view, or to go cautiously beyond it and accept that certain internationally wrongful acts could not be treated like others and entailed the application of a different régime of responsibility.

14. On the questions dealt with in article 18, international jurisprudence was relatively sparse. It was true that there was no decision which expressly excluded the possibility of attributing to a breach of an international obligation having a certain content legal consequences more serious than those ensuing from other obligations, but it was equally true that there was no evidence of an actual trend of jurisprudence in the direction of such attribution. Moreover, international tribunals had always confined themselves to recognizing the existence of an obligation to make reparation incumbent on the State which had committed an internationally wrongful act; and that was not surprising, for when the parties to a dispute agreed to refer it to a judicial or arbitral tribunal, it was in order that the tribunal might decide whether reparation was due and, if so, fix the amount to be paid, and not for any other purpose. On the other hand, when a State injured by an internationally wrongful act considered itself entitled to apply a sanction, it did not think of asking an international tribunal for authority to do so. States did not take reprisals or go to war on the authority of a court. Conversely, when the offending State agreed that the dispute should be referred to an international tribunal, it was not in order that the tribunal should give an opinion as to the possibility of a sanction being applied to it, but, at most, in order that the tribunal might decide whether reparation was due and if so, fix the amount.

15. Moreover, international tribunals were not generally competent to pronounce on consequences of the breach of an international obligation other than reparation. That applied particularly to the International Court of Justice; Article 36, paragraph 2 (d), of the Statute of the Court only empowered it to determine the nature or extent of the reparation to be made for the breach of an international obligation. In the *Corfu Channel* case, between the United Kingdom and Albania, the United Kingdom had had to confine itself to asking the Court to declare that Albania was bound by an obligation to make reparation, that limitation being imposed by article 36, paragraph 2, of the Statute of the Court. Yet, in the memorial it had submitted to the Court on 1 October 1947 and in the draft resolution it had previously submitted to the Security Council, the United Kingdom had characterized the act complained of as an "offence against humanity".⁴ The only case in which an international tribunal had given an opinion on the application of a sanction by an injured State appeared to be that of the *Responsibility of Germany arising out of damage caused in the Portuguese colonies of Africa*, heard in 1928 by the arbitral tribunal set up under articles 297 and 298, paragraph 4, of the annex to the Treaty of Versailles. The tribunal had held that the reprisals had been legitimate, in so far as they had been proportionate to the wrongful act.⁵

16. International jurisprudence went into greater detail, however, on the problem of entitlement to invoke the responsibility of a State which had committed a wrongful act. In 1966, in the *South-West Africa* cases, the International Court of Justice had refused to admit that contemporary international law recognized "the equivalent of an *actio popularis*" or "right resident in any member of a community to take legal action in vindication of a public interest".⁶ But in 1970, in the *Barcelona Traction* case, the International Court of Justice had recognized the notion of obligations *erga omnes* deriving, for example, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person. Where there was a breach of obligations of that kind, the Court had stressed that "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection".⁷ That statement of opinion by the International Court of Justice had been interpreted in different ways, but he thought it would mark an important stage in the history of international jurisprudence. It should not, however, be seen as showing a final position.

17. The practice of States had passed through three successive phases. Before the First World War, it was held that the content of the international obligation breached had no incidence on the régime of responsibility. During the period between the two World Wars, there

⁴ *I.C.J. Memorials 1949*, p. 40, para. 72b.

⁵ United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 1025 *et seq.*

⁶ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 47.

⁷ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32.

had been signs of evolution, which had found expression in 1930 in the attempted codification of the responsibility of States for damage done to the person or property of foreigners (Conference for the Codification of International Law, The Hague, 1930). It was moreover possible that Governments would have expressed more decided opinions if that work had related to responsibility in general and not to a limited aspect of it. None of their replies, however, could be interpreted as meaning that the obligation to make reparation constituted the only form of responsibility arising from an internationally wrongful act. One of the questions put by the Preparatory Committee of the 1930 Conference had concerned reprisals, though they were considered not from the point of view of the consequences of the breach of an international obligation, but from that of the circumstances excluding responsibility. Basis of discussion No. 25, which had been drafted in the light of the replies from Governments, had recognized the legitimacy of the exercise of reprisals by the injured State, on condition that it had first vainly attempted to obtain reparation and that the reprisals were proportionate to the internationally wrongful act.

18. The period between the two World Wars had been marked by the affirmation of the principle prohibiting recourse to war. In that connexion there had been a gap in the League of Nations Covenant, since it had prohibited the use of armed force only where States Members could settle their disputes by peaceful means. Once those means had been exhausted, war became lawful. To fill that gap States Members had made several attempts to conclude other international instruments such as the Treaty of Mutual Assistance drawn up in 1923 by the League of Nations; the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, which had defined a war of aggression as a violation of the solidarity of the members of the international community and an international crime; the resolution adopted on 24 September 1927 by the League of Nations, which had confirmed that definition; and the resolution adopted on 18 February 1928 by the VIth Pan American Conference, which had declared that a war of aggression constituted an international crime against the human species.⁸ None of those instruments specified the régime of responsibility applicable to an aggressor, but the very fact of declaring that breaches of obligations relating to international peace constituted international crimes necessarily implied that, in regard to responsibility, such breaches did not have the same consequences as breaches of less important obligations, such as those deriving from a trade agreement. In view of the premise, such differentiation was logically inevitable. It was during the same period that the Briand-Kellogg Pact was concluded, which outlawed war and prohibited recourse to war as a means of settling international disputes. At the end of the Second World War it had been held that that Pact had been in force at the outbreak of hostilities and represented the law applicable.

19. After the Second World War, the need to distinguish between two categories of internationally wrong-

ful acts had been felt more strongly. The terrible memory of that war had raised the fear of another conflict, in which the new weapons of mass destruction would be used. That being so, war could no longer be regarded as a means of settling disputes to which recourse might be had after the exhaustion of other means. Moreover, before and during the Second World War, whole populations had been deported and exterminated in brutal violation of the most elementary human rights, and the conscience of mankind had been shocked. Acts of that kind could no longer be considered as merely entailing an obligation to make reparation. It was also after the Second World War that recognition had been given to the right of peoples subject to colonial domination to gain their freedom and establish independent States.

20. It was logical that a breach of obligations in those different spheres should have come to be regarded as different from a breach of obligations that were less serious for the fate of mankind and less repugnant to the conscience of the international community. That view had been given expression in three ways, which it would be necessary to examine successively; namely, by the recognition in international law of the existence of rules of *jus cogens* from which it was not possible to derogate by special treaty, by the acceptance of the principle of the criminal responsibility of the individual for his part in certain acts as an organ of the State, and by the fact that the United Nations Charter imposed special consequences on the breach of certain international obligations.

21. The rules of *jus cogens* were rules which appeared so important to the international community that the international legal order did not permit derogation from them by means of a special convention between two or more members of that community. That did not mean that the breach of an obligation of *jus cogens* necessarily constituted an international crime, an internationally wrongful act more serious than the breach of another international obligation. Conversely, the possibility that the breach of a non-preemptory rule of international law might constitute an international crime was not ruled out. Generally, however, obligations to which the international community attributed such importance that it did not permit derogation from them coincided with the obligations whose breach constituted an internationally wrongful act entailing more serious consequences from the point of view of responsibility. Indeed, the rules he had referred to as rules of *jus cogens* in the course he had given at the Hague Academy of International Law in 1971⁹ were in his view precisely those from which arose the obligations whose breach was a matter of particular gravity for the international community.

22. At the present time, international law imposed on States the obligation to punish individuals guilty of crimes against peace, crimes against humanity and war crimes properly so called. It would be wrong to see that as a special form of the international responsibility of States. It would be only too easy for a State to evade its international responsibility, for example after starting a war

⁸ See document A/CN.4/291 and Add.1-2, para. 96.

⁹ *Ibid.*, foot-note 147.

of aggression or committing genocide, by claiming that it had punished the individuals responsible at the internal level. The obligation of the State to punish the guilty persons in case of aggression, genocide or *apartheid* simply showed that the international community attached exceptional importance to certain obligations—an importance which found expression both in the fact that it was the State's duty to punish the persons guilty of having taken part in carrying out a breach of those obligations and in the graver international responsibility imputed to the State itself.

23. The third and most important element to be taken into account as evidence of the trend which had emerged after the Second World War was the fact that the United Nations Charter itself had instituted a special régime of responsibility for the breach of certain international obligations. It laid down certain obligations firmly, without leaving any gaps—something the League of Nations Covenant had not done—and provided, in the event of a breach of one at least of those obligations, for the application of collective measures which included the use of force.

24. What were the obligations laid down by the Charter? First and foremost was the obligation in Article 2, paragraph 4, for States Members to “refrain in their international relations from 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”. And what were the purposes of the United Nations? As stated in Article 1 of the Charter, they were first of all to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace” (paragraph 1). But they also included ensuring “respect for the principle of equal rights and self-determination of peoples” (paragraph 2), and encouraging “respect for human rights and for fundamental freedoms for all” (paragraph 3). However, when Chapter VII, especially Article 39, specified the conditions under which enforcement action could be taken in accordance with a Security Council decision, it referred only to the first of the purposes stated in Article 1 and specified only that enforcement measures could be taken in the event of a threat to the peace, breach of the peace or act of aggression. For the drafters of the Charter, therefore, aggression, breach of the peace or threat to peace clearly represented the ultimate breach, the supreme international crime. Only that crime entailed the application of the procedure envisaged by the Charter for restoring peace, namely, not only the penalties not involving the use of armed force specified in Article 41 of the Charter, but also the enforcement action provided for in Article 42. Also in the case of that crime, the Charter lifted the general ban on the use of force and authorized its use in the exercise of the right of self-defence in response to an act of aggression. The other penalties provided for in the Charter, such as expulsion from the Organization or suspension of the rights of membership, were always mentioned in connexion with a breach of that fundamental obligation to preserve the peace.

25. The whole of United Nations practice proved beyond any doubt that a breach of the peace was the fundamental international crime. Many countries had tried to broaden that concept by representing certain acts—especially the forcible maintenance of colonial rule by a State, genocide and the adoption of measures of large-scale racial discrimination such as *apartheid*—as a threat to peace, in order to induce the competent organs of the United Nations to take enforcement measures to punish such breaches of certain international obligations. United Nations practice had revealed the unanimous belief that a breach of the international obligation not to use force was not the only breach which could be characterized as an international crime. In the view of the majority of States, there were other international crimes, such as the breach of the obligation to respect the independence of peoples and not subject them to colonial rule by force, and the breach of the obligation to refrain, in internal matters, from recourse to the destruction of a racial minority or to intolerable, large-scale forms of racial discrimination such as genocide and *apartheid*.

26. However, although the Members of the United Nations more or less unanimously agreed that a breach of those two obligations was an international crime which ought to have particularly manifest consequences in regard to responsibility, they did not agree on the nature of those consequences. While perhaps a majority of the present Members of the United Nations would equate colonialism, *apartheid* and genocide with a breach of the obligation not to use force, other Members, including the majority of the members of the Security Council, were not prepared to go so far. Moreover, even the States whose position on the matter was the most extreme had never gone so far as to say that the maintenance of colonial rule or *apartheid* constituted a “breach of the peace”. They had always talked of “a threat to peace” and when speaking of the penalties attaching to such a threat, had generally invoked Article 41 rather than Article 42 of the Charter. In connexion with such breaches the tendency had been rather to envisage the possibility of assistance to peoples struggling for their independence. Moreover, although some States had referred to the “right of self-defence” in regard to the struggle of peoples to free themselves from colonial rule or *apartheid*, the legitimacy of assistance, especially military assistance, to such peoples by a third State had been contested. Nonetheless, both United Nations practice and State practice in general undeniably distinguished the more serious wrongful acts as constituting crimes and therefore entailing a more severe régime of responsibility. The question was what régime of responsibility should be applicable to each of those crimes and what States would be qualified to invoke that responsibility.

27. It was indeed clear that not all breaches belonging to that category of wrongful acts grouped under the heading of “international crimes” were considered by the international community as a whole as being on the same level. It was possible to say that the breach of such and such an international obligation was an international crime, but all international crimes were not equally serious, just as under internal law crimes differed in

degree of seriousness, and homicide and aggravated theft did not carry the same penalty. Consequently, even if the concept of international crime was accepted and international crimes were distinguished from other internationally wrongful acts, it was necessary to accept that a distinction had to be made between international crimes. Shocking though they might be to the conscience of mankind, crimes such as colonialism, *apartheid* and genocide did not entail the same legal consequences for the international community as a whole as the supreme international crime, a war of aggression. Members of the United Nations appeared to be unanimous on that point.

28. That conclusion was supported, not only by United Nations practice, but also by the discussions in the Sixth Committee of the General Assembly during consideration of the International Law Commission's reports on the subject of State responsibility. The representative of Iraq at the twenty-eighth session, the representative of the German Democratic Republic at the twenty-ninth session, and the representatives of the Soviet Union and Cyprus at the thirtieth session, had cited aggression, genocide, *apartheid* and colonialism as examples of offences to be included in the category of most serious wrongful acts,¹⁰ although they had not suggested that they should be made subject to the same régime of responsibility as that which was applied to armed aggression.

29. As regards doctrine, writers before the First World War had generally made no distinction between internationally wrongful acts according to the content of the obligation breached. In the middle of the nineteenth century, however, the Swiss jurist Blüntschli had urged the need to make a distinction between different régimes of responsibility according to the seriousness of the offence.¹¹ He had also approached the question from the angle of the determination of the subject or subjects of international law entitled to invoke the responsibility of the State guilty of an international breach; his contention was that, when a breach constituted a danger to the community, not only the injured State but all other States which had the necessary power to safeguard international law were entitled to take action to restore and safeguard the legal order.¹² Other writers of that period, such as Heffter, had expressed similar views.

30. At the beginning of the First World War, United States jurists had also tried to decide what subjects of international law were authorized to invoke the responsibility of the State guilty of aggression, with a view to instituting, after the conflict, a régime of law capable of averting another world war in the future. For example, Root in 1915 and Peaslee in 1916 had maintained that international law should follow the same evolution as municipal law and distinguish between two kinds of breaches, those affecting only the injured State, and those which affected the whole community of nations. Root

had considered that any State should be authorized, and indeed required, to punish the latter kind of internationally wrongful act, whereas Peaslee had suggested that the organs of the community, which he recommended should be established after the end of the war, should be responsible for the punishment of such acts.¹³

31. After the Second World War, two periods were clearly discernible: that of the 1950s and that of the 1960s and 1970s. In the 1950s, Lauterpacht, expounding the British doctrine, and Levin the Soviet doctrine, had both asked the question whether international law should make a distinction between two different categories of internationally wrongful acts according to the gravity of the act. Both had replied in the affirmative. Lauterpacht had concluded that, in the case of breaches which "by reason of their gravity, their ruthlessness and their contempt for human life place them within the category of criminal acts as generally understood in the law of civilized countries", State responsibility was not confined to the obligation to make reparation, but also included the application of coercive measures such as war or reprisals under traditional international law, or the sanctions provided for in Article 16 of the Covenant of the League of Nations, or in Chapter VII of the Charter of the United Nations.¹⁴ Levin had stressed the need to distinguish between simple breaches of international law, and international crimes which undermined the foundations and essential principles of the international legal order. At the same time, the American jurist Jessup had taken up the idea put forward by Root in 1916, of the need to treat offences endangering the peace and order of the international community as a violation of the right of every nation.¹⁵

32. It was during the 1960s and 1970s that the idea of distinguishing among different kinds of internationally wrongful acts on the basis of the importance of the content of the obligation breached had finally taken shape and been formulated. In the first place, the position taken by a number of Soviet authors on that subject was noteworthy. In a 1962 study devoted to consideration of the consequences of the internationally wrongful act, supported by an analysis of international jurisprudence, Tunkin had arrived at the conclusion that, since the war, international law had distinguished between two categories of offences, each entailing different types of responsibility. In the first category he had included offences which represented a danger to peace, and in the second all other breaches of international obligations. In 1966, Levin had adopted the distinction established by Tunkin between international crimes and simple breaches, and his ideas with regard to the consequences of that distinction for the régime of responsibility. Soviet doctrine thus distinguished between two categories of breaches of international law: those affecting the rights and interests of the particular State and those more serious breaches which "are assaults upon the fundamental principles of international relations and thus encroach upon the rights

¹⁰ *Ibid.*, para. 119.

¹¹ *Ibid.*, para. 124.

¹² *Ibid.*, para. 125.

¹³ *Ibid.*, para. 131.

¹⁴ *Ibid.*, para. 136.

¹⁵ *Ibid.*

and interests of all States", the latter category comprising attacks on peace between peoples and on the freedom of peoples. That distinction between simple offences and "international crimes" entailed consequences with respect to the subjects entitled to demand compliance with the rules of international law, and with respect to the forms of responsibility. The doctrine had been adopted by jurists of other socialist countries, particularly Graefrath and Steiniger in the German Democratic Republic, who had proposed a division of internationally wrongful acts into, not two, but three groups, based on the content of the obligation breached.¹⁶

33. During the same period, in western doctrine, some authors had distinguished between an ordinary delict and an international crime. For Verzijl, for example, an international crime was distinct from a delict in that it not only created an obligation on the part of the offending State to restore the previously existing situation or indemnify the victim of the offence, but also entailed the application of sanctions by the international community. Schindler had proposed that the perpetuation of a colonial régime or a régime of racial discrimination should be treated as an internationally wrongful act *erga omnes* justifying non-military intervention by third States. According to Brownlie, the category of international crimes should include the breach of any obligation deriving from a rule of *jus cogens*, such as the rules which prohibited wars of aggression and other crimes against humanity, and the rules which sanctioned the self-determination of peoples. Following the same reasoning, some authors had asked whether, in the event of the breach of particularly important obligations, it might not be necessary to envisage the possibility of an *actio popularis*.¹⁷

34. There had thus been a marked evolution in doctrine, as in jurisprudence and State practice. The thinking of the International Law Commission had also evolved. Since 1963, following its decision to codify the general principles of State responsibility separately from the question of the treatment of aliens, the Commission had progressively recognized the need to draw a distinction between internationally wrongful acts and their consequences, on the basis of the content of the international obligation breached. The time had now come for the Commission to decide whether or not a distinction should be made between different categories of internationally wrongful acts on the basis of the content of the obligation breached.

35. It was premature, however, to specify what régime of responsibility should be applicable to the various types of internationally wrongful acts. For the present, the Commission should confine itself to deciding whether the seriousness of an internationally wrongful act depended on the degree of importance for the international community of the obligation breached. It would have to be very cautious in answering that question and be careful not to turn all breaches of international obligations into international crimes, since the concept of an

international crime was one which should be confined to the most serious breaches. The basic obligation of refraining from the use of armed force was a clear and definite obligation, and care should be taken not to obscure it by asserting that all kinds of other acts constituted a breach of that specific obligation, just as care should be taken not to broaden the category of other international crimes unduly. While an act of aggression was always an international crime, an act of discrimination could only be described as an international crime if it attained a certain magnitude, as in the case of genocide or *apartheid*.

36. There were two conditions governing the identification of an international crime: the exceptional importance for the international community of the obligation breached, and the seriousness of the breach itself. The content of the obligation should be crucial to the distinction between a crime and a simple breach, since there was a whole range of other obligations whose violation could not be regarded as a crime. But even in the case of a violation of an obligation whose content was of special importance, it was also necessary to take into account the seriousness of the breach, even if that might seem difficult to assess, for it was possible to speak of an international crime only when the breach reached a certain degree of gravity.

37. The Commission would therefore have to be very cautious in distinguishing between international crimes and other breaches. For there to be an "international crime", he would once again emphasize, the breach must be a serious one and the obligation breached must be an obligation whose crucial character was recognized by the entire international community, that was to say, by all its main components, since even a majority of States should not be allowed to impose their views on a minority. It should not be forgotten, moreover, that the United Nations Conference on the Law of Treaties had been most cautious in that respect when it had adopted the concept of *jus cogens*: in the text of the Convention on the Law of Treaties,¹⁸ it had accompanied that concept with the necessary safeguards, leaving it to the International Court of Justice to decide, in case of dispute, whether a rule was a rule of *jus cogens*. It had in fact incorporated a clause (article 66) to the effect that any dispute over the interpretation of article 53 or article 64 of the Convention, on *jus cogens*, could be submitted to the Court by unilateral application. The Commission should take the same precautions on the basis of similar criteria. The existence of an international crime should always be established by an international instance—the Security Council in the case of certain matters and the International Court of Justice in the case of others.

38. The Commission would have to return to that subject when it came to deal with the forms of responsibility. That was not the only point on which a safeguard of that kind would be needed, since there were other

¹⁶ *Ibid.*, para. 140.

¹⁷ *Ibid.*, para. 141.

¹⁸ 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.

forms of dispute which had to be settled by an impartial authority. The Commission would have to include clauses to that effect, as it was impossible to codify rules on the international responsibility of States without taking the necessary precautions. The Commission should be bold and not hesitate to move forward in the direction pointed by doctrine, jurisprudence and State practice.

The meeting rose at 1.5 p.m.

1372nd MEETING

Wednesday, 19 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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

State responsibility (*continued*)

(A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

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

ARTICLE 18 (Content of the international obligation breached)¹ (*continued*)

1. Mr. TABIBI said that he would be the first to respond to the Special Rapporteur's appeal to members of the Commission to be bold and accept the rule in article 18. The basic ideas contained in the four paragraphs of that article were in line with present-day international law and with the views of both past and contemporary authors who advocated the categorization of breaches of international obligations embodied in the article.

2. He fully agreed with the Special Rapporteur that the Commission's task would be made much easier if a provision were included at an appropriate point in the draft to deal with the settlement of disputes by means of some legal or political machinery such as the Security Council.

3. The basic rule of article 18 was stated in paragraph 1, which specified that the breach by a State of an existing international obligation incumbent upon it constituted an internationally wrongful act regardless of the content of the obligation breached. The actual concept of an "international crime" was, however, specified in paragraphs 2 and 3. Paragraph 4 dealt with the breach of an obligation of lesser significance, termed an "international delict". There was no doubt that contemporary international law distinguished between different categories

of internationally wrongful acts, and recognized the special gravity of breaches of certain obligations whose observance was of fundamental importance to the international community as a whole, such as those concerning the maintenance of international peace and security, prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, and respect for the principle of equal rights and self-determination of peoples. That distinction clearly should be made. Just as private law did not treat theft and homicide in the same manner, so international law could not treat an act of armed aggression on the same footing as the breach of a minor international obligation.

4. But for an act to be described as an international crime, the peremptory rule of international law which is violated must be recognized by the entire international community. In his account of the historical background of the subject, the Special Rapporteur had noted that the principles and the categorization embodied in article 18 had been recognized by prominent authors of western Europe long before the Covenant of the League of Nations and the Charter of the United Nations. He would point out that those same principles had already been recognized many centuries before by the great eastern religions—Buddhism, Brahmanism, Judaism, Christianity and Islam. The principles of Islam enunciated thirteen centuries ago enshrined the fundamental rights of man; so far as the breach of an obligation was concerned, the Koran said that a complaint should be made only when an individual's right was violated, adding "Then ask redress with a loud voice because God sees and hears and protects those who have seen injustice".

5. The concept of an international crime could be illustrated by reference to three factors of contemporary life. The first was the emancipation of colonial peoples and the great changes which had taken place in the countries of Asia, Africa and Latin America, whose fundamental rights had been violated for centuries. The peoples of the third world were now in a position to seek redress and to brand the acts from which they had suffered as breaches of international law. The second element was the suffering undergone by the western countries during the First and Second World Wars. The third was the invention of weapons of mass destruction. The emancipation of the peoples of the third world had meant that in all United Nations organs there had emerged a strong body of support for human rights and fundamental freedoms. Their suffering during the two World Wars had led the European countries to recognize those rights which they had themselves violated when colonizing Asia and Africa for many centuries. The invention of weapons of mass destruction had been largely responsible for inducing the major Powers to agree at Yalta, Postdam and San Francisco to adopt the provisions of the Charter for safeguarding peace and human freedom. And now the prospect of the appearance of weapons even more destructive than the atomic and hydrogen bombs made it all the more imperative to safeguard peace and security and to treat resort to the threat or use of force as an "international crime".

6. As pointed out by the Special Rapporteur (A/CN.4/291 and Add.1-2, para. 146), the Commission was now

¹ For text, see 1371st meeting, para. 9.