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Summary record of the 1372nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

[Item 2 of the agenda]

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

ARTICLE 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.

called upon to decide whether there was any justification for drawing a distinction between the different categories of internationally wrongful acts according to the content of the obligation breached. He himself felt that the time had come to recognize such a distinction because it was in keeping not only with the Charter but also with the provisions of many important instruments, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[2] the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[3] and the definition of aggression adopted by the General Assembly.[4]

7. He could accept article 18 but he would propose that, in the light of the growing economic rights and interests of States as a whole and of those of the third world in particular, paragraph 2 should be amended so as to refer to the prohibition of any resort to the threat or use of force not only the territorial integrity or the political independence of another State, but also against its economic independence. The inclusion of that reference was essential because economic aggression was much more common than armed aggression, which was often inhibited by the fear of provoking a world war. Economic threats could also be much more effective than threats of armed intervention.

8. He realized that in making that proposal he was touching on the very complex area of the interpretation of the term "use of force" in Article 2, paragraph 4, of the United Nations Charter. In his view, the expression "threat or use of force" covered both economic and political coercion. It should be noted that paragraph (3) of the commentary to article 49 (Coercion of a State by the threat or use of force) of the Commission's 1966 draft articles on the law of treaties recorded the view of some members of the Commission "that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion".[5] The Commission had decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter" and had considered that "the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter".[6]

9. Ten years had elapsed since that commentary had been written and many important declarations and decisions had been adopted by the General Assembly of the United Nations, the most important of which were resolution 3281 (XXIX) on the "Charter of Economic Rights and Duties of States" and resolution 3171 (XXVIII) on "Permanent sovereignty over natural resources". Those resolutions supported his understanding of the scope of Article 2, paragraph 4, of the Charter, an understanding which was also consistent with the terms of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,[7] and the resolutions adopted at all the conferences of non-aligned countries held since 1964. Any failure now to recognize the importance of economic force would constitute a denial of history itself.

10. During the discussion at the United Nations Conference on the Law of Treaties of article 49 of the Commission's draft, he had proposed, on behalf of Afghanistan and a large number of other third world countries, an amendment which would have made a treaty void if its conclusion had been procured by the threat or use of force "including economic or political pressure" in violation of the principles of the Charter of the United Nations.[8] In a spirit of compromise, that amendment had later been withdrawn following the consent of the Conference to include as an annex to its Final Act a detailed "Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties".[9] Since that conference, the importance of economic coercion had steadily increased and the attention of the whole community of nations was now focused on the issue of economic rights. The adoption in 1974 by the United Nations of the Charter of Economic Rights and Duties of States was particularly significant in that respect.

11. For those reasons, he again proposed the insertion of the words "or economic" before the word "independence" in paragraph 2 of article 18, so that the violation of the economic rights of a State could be considered as an international crime and he urged the Commission to adopt his amendment.

12. Mr. YASSEEN said the Special Rapporteur was to be congratulated on his excellent report and oral statement. The international community was in a state of flux and the notions and rules of international law were evolving from year to year at such a rate that it seemed like a revolution. The international community had inherited a body of rules of international law protecting the rights of States, peoples and individuals, which had been developed and amended first by the League of Nations Covenant and then by the United Nations Charter. But the international community had not rested content with the Charter: it had created a United Nations law based on the Charter, by developing some notions which had already been latent in the Charter and producing others, while at the same time respecting the fundamental principles of that instrument.

13. International law had developed more especially in three spheres: international peace, the rights of peoples

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

[3] General Assembly resolution 3068 (XXVIII), annex.

[4] Resolution 3314 (XXIX), annex.

[5] *Yearbook... 1966*, vol. II, p. 246, document A/6309/Rev.1, part II, chap. II.

[6] *Ibid.*

[7] General Assembly resolution 2200 A (XXI), annex.

[8] *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. 172, document A/CONF.39/14, para. 449 (*a*).

[9] *Ibid.*, p. 172, para. 454; and *ibid.*, p. 285, document A/CONF. 39/26, annex.

and human rights. Progress in the first of those spheres had been remarkable, for it was beyond dispute that resort to force was now prohibited. The Charter stated the obligation to maintain international peace and security—an obligation which had already existed, but which had now become unchallengeable by virtue of the Charter and of United Nations law. At the present time, indeed, resort to force was only permissible in the very limited cases provided for in the Charter itself. A war, even between two States in a remote part of the world, now concerned the international community as a whole. Resort to force was therefore a threat to international peace which must be severely repressed, since it now put the survival of mankind at risk. Thus there was an obligation on States to respect international peace and, consequently, not to resort to force.

14. With regard to the rights of peoples, the development of international law had also been remarkable, thanks to the Charter and United Nations law, which was based on the body of resolutions adopted by the General Assembly and other United Nations organs, and on the favourable trend of the international conscience. In that connexion he might mention the Declaration on the granting of independence to colonial countries and peoples,[10] and the various resolutions adopted by the General Assembly in favour of the liberation of peoples and equal rights. Maintenance of a colonial régime by force had become an international crime. That principle was no longer contested, as was shown by the attitude of the international community to certain countries which were still trying to preserve a colonial situation.

15. In the sphere of human rights, classical international law had been content to prohibit States from infringing the rights of aliens. But it was now recognized that the human being had a right to some protection, even against his own country. There had been interesting developments in that sphere. After the last war, when the problem of *apartheid* had been raised in the United Nations, certain States had invoked Article 2, paragraph 7 of the Charter, according to which the United Nations was not authorized to intervene in matters which were essentially within the domestic jurisdiction of any State. But it would be inconceivable, today, that anyone should invoke that article in favour of certain discriminatory régimes, such as that of South Africa, because of the interest taken by the international community in peoples subject to such régimes. There was, indeed, no denying that international law imposed respect for fundamental human rights.

16. The breach of an international obligation by a State was an internationally wrongful act whatever the content of the obligation breached, and any breach of an international obligation entailed the responsibility of the State. But the content of the obligation could vary. The breach of a conventional obligation resulting from an agreement concluded between two States for the settlement of unimportant questions entailed the responsibility of the State, in the same way as the breach of an obligation to respect international peace and security. Nevertheless those two obligations were not of equal weight, and their difference in weight might perhaps represent a difference in kind which would justify the application of a special régime of responsibility when the obligation breached was particularly important. It would mean distinguishing basic obligations of vital interest to the international community, the breach of which would entail the application of a special régime of responsibility. That régime would involve not only reparation, but possibly also sanctions of a severity proportionate to the importance of the obligation breached. The distinction was necessary in contemporary positive law. United Nations law already contained the germ of that difference in régime, since it provided for a different régime of responsibility for the breach of obligations which related to the maintenance of international peace. The principle existed and so should be stated in the draft articles and developed with a view not only to the present, but also to the future.

17. Article 18 not only stated positive law, but also met the requirements of the international conscience. He therefore fully subscribed to the general idea it expressed, but he had a few comments to make on the structure and wording of the article. Paragraph 1, which affirmed that the breach of an international obligation entailed the responsibility of the State regardless of the content of the obligation, raised no problem.

18. Paragraph 2 stated a fundamental principle which was set out in Article 2, paragraph 4, of the Charter, but did not state it in full. He wondered why the phrase "or in any other manner inconsistent with the Purposes of the United Nations" had been omitted.

19. Paragraph 3 was based on article 53 of the Vienna Convention on the Law of Treaties,[11] which set out the concept of *jus cogens*. He admitted the need to take account of the seriousness of the breach, but thought it was wrong, by restricting the scope of the paragraph to a certain number of purposes, to exclude the possibility of evolution. It might be better to formulate a general principle, as the Conference on the Law of Treaties had done, and then merely give examples, instead of listing purposes. The article might say, for instance that an international crime was the breach of a fundamental norm indispensable to international life, and then refer as an example to the breach of obligations relating to the maintenance of peace, and others. The article should indicate the criterion for determining those obligations the breach of which entailed a special régime of responsibility, and give examples that were not restrictive, so that it would be possible subsequently to include any new categories of particularly important obligations which the development of international life might bring into being.

20. Mr. TAMMES said that he fully subscribed to the idea embodied in article 18 of making an essential distinction between violations of international law according to the weight of the international obligation breached in

[10] General Assembly resolution 1514 (XV).

[11] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (*op. cit.*), p. 289.

each case. That proposition was in line with the general evolution of international ideas, as demonstrated in the Special Rapporteur's commentary.

21. The progressive position adopted by the Special Rapporteur in article 18 was consistent with the Commission's earlier decisions on the topic of State responsibility. The concept of an international crime was also very much at the basis of the Commission's draft Code of Offences against the Peace and Security of Mankind which it adopted at its sixth session, in 1954.[12] It should be noted, however, that the offences defined as "crimes under international law" in article 1 of that draft were offences for which individuals were held responsible. The draft Code did nevertheless give a precise definition of the crimes of a State for which individuals were punishable.

22. In the light of those reflections, he unreservedly approved the basic idea contained in article 18, and his comments were intended only to facilitate the presentation of the draft article to States. As he saw it, article 18 was a tentative draft which would serve mainly to invite comments by Governments that would enable the Commission on second reading to take a decision on the full significance of the distinctions and selections made in the article.

23. It was only at the second reading stage that the terminology used in the article would take final shape. He had some hesitation regarding the use of the term "international crime", because of the danger of confusion with "crimes under international law, for which the responsible individuals shall be punished", referred to in article 1 of the draft Code of Offences against the Peace and Security of Mankind. At the present stage, however, it would serve no purpose to argue about terminology when little or nothing was yet known of the substance of the concepts covered by the terms used.

24. Article 18 adopted a tripartite classification of breaches of international obligations, namely, "international delicts", "international crimes" and the international crimes *par excellence* described in paragraph 2. He was not at all certain that international legal thinking had already evolved to such an extent as to make such a classification feasible. He had carefully examined the records of the proceedings both of the International Law Commission and of the United Nations Conference on the Law of Treaties on the subject of peremptory norms of international law from which no derogation was permitted (*jus cogens*), without finding any trace of a distinction being made between the various examples given in paragraphs 2 and 3. In fact all those examples, except for that in sub-paragraph (*c*) of paragraph 3, had been mentioned in connexion with *jus cogens*, and all those cases, including that of aggression, had been consistently treated as being on the same level. For those reasons, he would prefer to bring all serious breaches of international obligations under the one heading of peremptory norms of international law. The formula used in article 53 of the Convention on the Law of Treaties declared a treaty void if, at the time of its conclusion, it conflicted with a peremptory norm of general international law. The sanction thus specified for the breach of a rule of *jus cogens* was of more general application and could extend to a unilateral act and to material acts that flowed from a treaty or a unilateral act.

25. Subject to those observations and reservations, he welcomed draft article 18 and hoped the Special Rapporteur's new venture in the development of international law would be successful.

26. Mr. HAMBRO said that he shared some of the misgivings on points of detail which had been expressed by Mr. Yasseen and Mr. Tammes.

27. However, he entirely agreed with the Special Rapporteur that a distinction must be made between different cases of breaches of international obligations. The legal community expected the Commission to draw a clear distinction somewhere in its draft between ordinary breaches and more serious violations of international law. But he had some doubts regarding the terminology used in article 18, which made it difficult to distinguish between crimes attributable to States and crimes attributable to individuals. It was generally agreed that very grave violations of international law constituted international crimes attributable to the State, but there were also crimes under international law, such as piracy and war crimes, for which individuals were punishable. It was difficult to develop a terminology that would make it possible to distinguish between those two classes of crimes.

28. At a later stage the Special Rapporteur would have to clarify the question of the consequences of the "international crime" mentioned in article 18. From the commentary to article 18, it was clear that international crimes were acts of the State which were sanctioned by something more than a mere compensation in money. It would be agreed by all members of the Commission that provision would have to be made elsewhere in the draft for international sanctions by the world community.

29. He agreed with Mr. Tammes that article 18 had an even more tentative character than was usual for draft articles discussed by the Commission on first reading. The Commission would have to await the reactions of States before reaching a conclusion on the terms in which the contents of the article should be expressed. In particular, it would have to decide to what extent it should single out certain acts as international crimes and draft a detailed criminal code. He would have to reserve his position on that point until he had seen the comments by Governments.

30. With regard to the historical background of the subject, so ably dealt with by the Special Rapporteur in his commentary, he wished to mention two points which gave him grounds for optimism. The first concerned the crime of waging a war of aggression or using force in international relations. He himself had always agreed with the view that the use of armed force had been outlawed as an instrument of international policy by the 1928 Briand-Kellogg Pact. It must be remembered, however,

[12] See *Yearbook... 1954*, vol. II, pp. 151 and 152, document A/2693, chapter III.

that at the time a number of serious writers had maintained that the Pact only prohibited war in the legal sense and not armed reprisals. He himself, in a book he had written forty years ago,[13] had refuted the contention that the Briand-Kellogg Pact had only outlawed the word "war" and not the act itself. It was beyond doubt that no writer at the present day would dare to put forward the theory that, although aggressive war was outlawed, armed reprisals were permissible under international law. A great change had thus taken place in legal thinking in a matter of a few decades.

31. His second point related to colonialism, which for a very long time had been regarded as perfectly permissible under international law. Today, any attempt to retain a colony by force was regarded as an international crime, and that remarkable evolution, which had also taken place within a very short time, gave him further grounds for optimism. The magnitude of that historical development was shown by the fact that, in the ten years prior to the Second World War, international lawyers and experts on international relations had been discussing the problem facing certain countries which had no colonies and were therefore regarded as the "have nots" of international society. In those years, the possibility had been quite seriously discussed of transferring some colonies from one country to another in order to remedy the situation of "have not" countries. The fact that only forty years later such a discussion seemed palpably absurd was a reason not only for optimism but also for gratitude.

32. Sir Francis VALLAT said that it would be of assistance to the Commission in its further discussion if the Special Rapporteur, when answering the point raised by Mr. Yasseen, would explain the reason for including in paragraph 2 of article 18 only the first part of the wording of Article 2, paragraph 4, of the United Nations Charter and omitting the concluding words "or in any other manner inconsistent with the Purposes of the United Nations".

33. Mr. CALLE Y CALLE said that the Special Rapporteur exemplified the truth of the aphorism, that the wise man was not the man who gave the correct answers but the man who asked the real questions. In his admirable report the Special Rapporteur had also given the answers to the real questions, the questions that were bound to be raised by jurists, politicians or anyone who formed part of the existing legal order, which, though imperfect, constituted a set of rules to guide the conduct of States.

34. The wrongful act of a State had to be determined according to the rule concerned, for it was the content of the rule which shaped the particular obligation and defined the principle to be observed and the conduct to be followed. Paragraph 1 of article 18 rightly stated that the breach by a State of an existing international obligation was an internationally wrongful act regardless of the content of the obligation breached. But the question then arose whether, precisely because of the content of the obligation, not only the State injured by the breach but also the international community either might demand that the State which had committed the breach should be made to comply with the obligation, or might seek to restore the balance which had been disturbed by the wrongful conduct of the State.

35. The Special Rapporteur's report had demonstrated the changes and developments that had occurred in the international legal order. The first three paragraphs of the preamble to the draft Declaration on the Rights and Duties of States affirmed that the States of the world formed a community governed by international law; that the progressive development of international law required effective organization of the community of States; that a great majority of the States of the world had accordingly established a new international order under the Charter of the United Nations, and that most of the other States of the world had declared their desire to live within that order.[14] Obviously, a new international legal order did now exist and the wrongful nature of a State's conduct would have to be assessed in relation to that order.

36. The community of States in the United Nations had decided that a distinction must be drawn between breaches of obligations involving the permanent and fundamental interests of the international community embodied in the Charter, and breaches of obligations of a conventional character established between two or more States. The Special Rapporteur had drawn the necessary conclusions from the few pertinent judicial or arbitral decisions and had gone on to demonstrate that, in State practice, such distinctions had been drawn little by little, especially since the end of the Second World War.

37. Paragraph 2 of the article dealt with that had been described as the international crime *par excellence*, namely, resort to the threat or use of force, which constituted the first category of international crimes. That category was supplemented in paragraph 3 by an enumeration of other international crimes—breaches of the obligation to respect the right of self-determination, human rights and the free enjoyment of a resource common to all mankind. The paragraph was necessarily couched in general terms, since it was essential to leave no gap in the list of the major categories of international crimes. However, since the article was drafted on the basis of the concept of *jus cogens*, the general condition stated at the beginning of paragraph 3 should speak of the breach of a "peremptory norm of general international law". That was all the more indispensable because the same criterion had already been employed in article 17. It was also the formula used in article 53 of the Vienna Convention on the Law of Treaties. Again, the expression "international community as a whole" was somewhat tautological. It had once been an appropriate term, because it had meant that a rule had been accepted not just by a simple majority of States. But the time was long past when a rule could be applied simply because

[13] E. Hambro, *L'exécution des sentences internationales* (Paris, Sirey, 1936).

[14] *Yearbook... 1949*, p. 287, report to the General Assembly, part II, para. 46.

European States had accepted it. The nations of Africa, Asia and Latin America now formed part of the new international order and had helped to create the new legal system.

38. He fully agreed with the Special Rapporteur's commentary on the rules of *jus cogens*. Certain obligations were not accepted willingly by States, but were imposed on them by the international community. For example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations in fact represented a means of affirming certain international obligations and ensuring that they were recognized by States.

39. Mr. AGO (Special Rapporteur) said he would like to clarify a number of points which had been raised during the debate and might lead to unnecessary discussion.

40. With regard to Mr. Tabibi's proposal that article 18 should include a reference to the use of "economic force", it was a proposal that had provoked a lively discussion at the United Nations Conference on the Law of Treaties, which had considered it in relation to coercion as a cause of the nullity of treaties. In his opinion, article 18 was already delicate enough and it would be dangerous to introduce further complications. The Conference had not been unanimous in accepting purely economic coercion as a cause of the nullity of treaties, and had left it to international practice and jurisprudence to determine in individual cases whether the traditional notion of the use of force should be extended to include recourse to economic pressure. The introduction of the concept of economic pressure into article 18 would be even more serious than would have been a reference to economic coercion in article 52 of the Convention on the Law of Treaties. It would mean considering that the use of economic pressure was included in the concept of aggression and that mere recourse to that form of pressure constituted an international crime carrying the severest penalties envisaged by the United Nations Charter in cases of aggression. There was every reason to deplore recourse to economic pressure by States, but such conduct could not be assimilated to dropping bombs or firing cannon. The supreme international crime to be condemned was the use of armed force; to include recourse to economic pressure in that concept might weaken it and deprive it of its criminal character. In his opinion it would therefore be better to avoid embarking on a discussion on that subject.

41. The words "or in any other manner inconsistent with the Purposes of the United Nations" did not appear in paragraph 2, as Mr. Yasseen and Sir Francis Vallat had observed, for the reason that he had wished to circumscribe as closely as possible the supreme crime for which the Charter provided the severest penalties—the crime of aggression, in other words the use of force against the territorial integrity or political independence of another State. To his mind, offences, even with the use of force, against the other Purposes of the United Nations should be covered by paragraph 3. He nevertheless saw no objection to inserting those words in the article. To avoid misunderstanding and fruitless discussion in the United Nations bodies which would consider the fifth report on State responsibility, he would himself propose that those words should be added in the final version of the article.

42. He had indeed intended to refer to the rules of *jus cogens*, or rather to the rules of essential importance to the international community, in paragraph 3, and it was the haste in which he had had to draft addendum 2 to his fifth report (A/CN.4/291/Add.2) that was responsible for the involuntary omission of the words "and recognized as essential" from the mimeographed version of that addendum.

43. Like Mr. Yasseen, he believed that the list of international crimes in paragraph 3 should not only faithfully reflect the present situation but should be adaptable to future situations if necessary. That was precisely why he had refrained from expressly mentioning aggression, genocide and *apartheid* and had referred to general categories of international obligations which covered those crimes at the present time and could embrace new obligations added in the future. Future contingencies might be provided for by inserting the word "particularly" at the end of the introductory sentence of paragraph 3, to make it clear that the list which followed was not exhaustive. Care should be taken, however, to ensure that it would not be possible to invoke that provision in every situation by claiming that the breach of some international obligation constituted a crime warranting the application of sanctions.

44. For him, the text proposed for article 18 was by no means final. It was only a tentative solution, as Mr. Tammes and Mr. Hambro had remarked, and the Drafting Committee would no doubt change it considerably if the article was referred to it.

45. Although he had no fixed views on the wording of the article, he attached a great deal of importance to the basic distinction between two categories of internationally wrongful acts. Like himself, Mr. Hambro had distinguished between delicts—simple breaches involving only an obligation to make reparation—and international crimes. Mr. Tammes had perspicaciously remarked that the proposed bipartite division was really tripartite, since in article 18 the use of armed force was considered as a crime apart. When the Commission came to define the different forms of responsibility, it would perhaps provide that the measures envisaged in Article 42 of the Charter would be applicable to certain crimes and not others. United Nations practice, as reflected in the resolutions adopted and the attitudes of Member States, showed that, when certain internationally wrongful acts generally described as crimes were committed, the States concerned had themselves stopped short of asking the Security Council to apply the measures provided for in Article 42 of the Charter. They had confined themselves to the penalties specified in Article 41, which did not involve the use of armed force. The Commission should decide forthwith to make a distinction between crimes and delicts, as that would enable it later to distinguish several forms of responsibility. In doing so, however, it would retain full freedom to determine the nature of

those forms of responsibility and their relationship to the different categories of internationally wrongful acts. In his view, there need be no hesitation in dividing internationally wrongful acts into two categories, especially as such a division was not new. States accepted it when they accepted the Charter of the United Nations.

46. Mr. TABIBI said that he had no wish to introduce further complications into what was already an extremely complex matter; but he could not agree, not did he think that the countries of the third world would agree, that economic strangulation of a country constituted a minor breach of an international obligation. The effects of such strangulation were sometimes worse than aerial bombardment. They could lead to the destruction not just of a district or region but of an entire country. The question was of the utmost importance.

The meeting rose at 12.50 p.m.

1373rd MEETING

Thursday, 20 May 1976, at 11.00 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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

Filling of casual vacancies of the Commission (article 11 of the Statute) (A/CN.4/289 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN announced that, at a private meeting, in conformity with its Statute, the Commission had elected Mr. Frank X. J. C. Njenga, of Kenya, to fill the vacancy caused by the resignation of Mr. Taslim O. Elias.

2. A communication had been sent to Mr. Njenga inviting him to take part in the Commission's proceedings.

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*)

3. Mr. SETTE CÂMARA said the Special Rapporteur had started from the proposition that, regardless of the content of the obligation, the breach of an obligation constituted an internationally wrongful act. That was beyond dispute and so the text proposed for paragraph 1 presented no difficulties.

4. The problem that now arose was whether different kinds of internationally wrongful acts should be distinguished according to the content of the international obligation breached. That course was favoured by the Special Rapporteur for normative reasons, in other words, because it allowed him to establish different régimes of responsibility for different types of internationally wrongful acts. Earlier views with regard to responsibility, which had not accepted such a categorization of breaches of international rules, had now changed considerably and current thinking was that there should be one type of régime for breaches that injured the international community as a whole and another for the traditional type of wrongful act that was of immediate concern only to the particular State injured. Aggression, genocide, *apartheid*, gross violations of human rights and fundamental freedoms, colonialism and obstruction of the enjoyment of resources common to mankind were offences that affected everyone in the organized community of States, offences that called for something much more than reparation. Indeed, in those instances, it would be impossible to seek redress on the basis of reparation. How could the lives of millions killed in recent times by acts of genocide be replaced and what could be the *restitutio in pristinum* for centuries of enslavement under colonialism? Faced with the indisputable realities of the modern world, and conscious of the feelings of the vast majority of countries, the Special Rapporteur had taken a bold step forward in the progressive development of international law and had proposed a text for article 18 which dealt openly with a category of offences branded as international crimes.

5. The extracts quoted from the judgment of the International Court of Justice in the *Barcelona Traction* case [2] were conclusive evidence of an international decision favouring the idea of distinguishing between the obligations of States towards the international community as a whole, and their obligations towards other individual States. However, the Special Rapporteur had rightly recognized that the jurisprudence of the Court was somewhat inconsistent since, in the *South West Africa* cases, the Court had refused to admit the existence of a kind of right to an *actio popularis* on the part of any member of the community of States in specific types of breach of obligation.

6. In State practice, on the other hand, the Special Rapporteur had emphasized that, from the Second World War onwards, Governments had recognized the existence of breaches of international law that were so grave as to be regarded as crimes *erga omnes*. However, the texts prepared under the impact of war atrocities had not dealt with crimes of the State, but crimes under international law for which individuals would be punishable. That was true of early drafts of the International Law Commission, for example, the Principles of International Law

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

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