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Summary record of the 1375th meeting

Topic:
State responsibility

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nevertheless illustrated the difficulties which would have to be faced if any attempt were made to confer upon the International Court of Justice a role in the determination of international crimes and application of sanctions.

40. In conclusion, he would urge the Commission, before taking a first step in dealing with the problem of international crimes, to consider carefully what was possible, workable and acceptable to the nations of the world.

The meeting rose at 12.55 p.m.

1375th MEETING

Monday, 24 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, 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. TSURUOKA said that paragraph 1 should be retained in its present form, since it stated an undisputed rule of international law. As the seriousness of the breach of international obligations varied with the content of the obligation, the Special Rapporteur had seen fit to distinguish, in paragraphs 2 and 3, two categories of more serious and less serious breaches. Paragraph 2 concerned the most serious breaches—those which related to the maintenance of international peace and security, and especially the prohibition of resort to the threat or use of force; such breaches were considered as international crimes *par excellence*. He agreed that the international community should treat such breaches with the utmost severity. The breaches covered by paragraph 3 were also characterized as international crimes, but were considered to be less serious.

2. Although the reasoning which had led the Special Rapporteur to propose paragraphs 2 and 3 was easy to follow, it was open to question whether the rules they contained should be affirmed. That question could only be answered when it was known how the two paragraphs would be applied, and what instance would establish that there had been a violation and decide on the measures to be taken to redress the wrong. It was no doubt too early to devote any time to that problem at the present stage, since the Commission would have to consider it in the course of subsequent work, but it should be remembered that in the meantime Governments would be invited to comment on the articles adopted by the Commission up to the end of the present session. If the Special Rapporteur would indicate briefly in the commentary to article 18 what régimes of responsibility he advocated, that would greatly facilitate the study of the provision by foreign ministries.

3. Paragraphs 2 and 3 were on the borderline between politics and law. The United Nations Charter dealt both with the maintenance of international peace and security, the subject of paragraph 2, and with the principles enunciated in subparagraphs (*a*) and (*b*) of paragraph 3. Chapters VI to VIII of the Charter also specified the way in which those principles should be implemented. Obviously the article could not amend the Charter, especially where it concerned the principal purposes of the United Nations. It might therefore be asked what function the rules stated in article 18 would perform in view of the fact that the United Nations was essentially a political institution. As political logic was often not the same as legal logic, he feared that the provisions of those paragraphs might clash with the Charter provisions dealing with the same issues but applied with political, not legal logic. According to Article 103 of the Charter, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter should prevail. In the circumstances, therefore, the Commission might be wasting its efforts.

4. United Nations practice, as revealed by the action of the Security Council and the General Assembly, confirmed his apprehensions. For example, according to purely legal logic, the possession of nuclear weapons constituted a threat to peace, but according to political logic, as expressed during the negotiation of the Treaty on the Non-proliferation of Nuclear Weapons, it was the proliferation of possessors of nuclear weapons which constituted a threat to peace. The Commission must therefore proceed cautiously if it intended to draft provisions concerning matters covered by provisions of the Charter. Again, the hierarchy among the breaches dealt with in paragraphs 2 and 3 was also determined by political logic: the use of force was prohibited when directed against the territorial integrity or political independence of another State, but it was frequently maintained that the use of force was not prohibited, and should even be encouraged, when its purpose was to help a people struggling for independence. There were even situations in which the principles enunciated in subparagraphs (*a*) and (*b*) of paragraph 3, might also conflict.

5. Mr. QUENTIN-BAXTER said that article 18 raised a number of problems that were central to what was perhaps the most challenging task ever entrusted to the Commission.

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

6. All members were agreed that the term "crime", as employed in article 18, had nothing to do with the notion of individual responsibility. However, the discussion had demonstrated that the use of that term, which added to the conceptual difficulties experienced by the Commission, might well prove to be an even greater stumbling block to a wider group of readers examining it not just in the purely legal context, but in the context of the world community and of the United Nations, which served the world community. Sometimes the political organs of the United Nations had legitimately taken into account the two aspects of "crime", the aspects of individual responsibility and of State responsibility. For example, the Governments which had concluded the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [2] had obviously considered that an act of genocide by a State was an extremely grave wrongful act and that it also entailed the responsibility of the individuals who had participated in it.

7. On the other hand, the word "crime" was more generally used by the political organs of the United Nations, again legitimately, to mobilize international opinion and draw attention to the heinous character of some particular conduct. There was also an analogy with the use of the term "crime" in national criminal law to designate an act that was punishable at the instance of the State. In a national parliament, however, some governmental action might be described by the indignant opposition as "criminal", just to characterize the seriousness of the action and not to suggest that it should be punished by an established process of law.

8. Consequently, it was very important to bear in mind the respective roles and methods of operation of judicial organs and political organs, so as to ensure that they continued to assist one another in the development of the law. The notion of "crime" almost inescapably carried with it other connotations that lay outside the Commission's fundamental concept of international responsibility. Even in war, when an individual was tried for international crimes, there was no deviation from the standard that a trial was necessary and that the conduct of the individual should, so far as possible, be impartially assessed. But that approach was not essential to the actions of political organs.

9. It was the duty of the principal organs of the United Nations to determine, at least in the first instance, legal questions falling within the sphere of their activities, but the methods employed were not the same as those required for a court trial. For instance, decisions by the General Assembly on important questions called for a two-thirds majority, but the decision as to whether an item should be classed as an important question was made by a simple majority and that decision, although it involved an element of objectivity, also involved wider considerations that were not of a judicial nature. Each delegation casting its vote had to make a broad political judgment in order to decide whether the particular purpose would best be served by declaring the matter an important question and proceeding accordingly, or by adopting the less exacting criterion of the simple majority. Again, in the decisions of the Security Council relating to the peace of the world, the criteria were not always objective, nor did they necessarily imply a judgment as to the quality of the action taken by a particular State. To realize that there was no parallel between the mode of operation of the Security Council and that of a court, it was enough to recall that an action by one of the permanent members could be characterized by the Council as a wrongful act only with the acquiescence of the permanent member concerned.

10. A great deal had been done to ensure that the political organs of the United Nations which took important decisions did so in accordance with objective legal principles. That was the basis and the justification for the enormous efforts that had been made to enunciate the great declarations adopted by the United Nations, but extraordinary care was needed to prevent a reversal of that process. It was in the interest of the members of the Commission, as lawyers, to make sure that decisions which must in the end remain political should nonetheless be taken, so far as was possible, in the light of objective legal standards. At the same time, the Commission was concerned to attach the fullest weight to developments in the political organs of the United Nations. One of the great merits of the text of article 18 was that it did precisely that, since it placed the United Nations in the forefront of the system of contemporary law.

11. Mr. Tabibi had been right to raise the extremely important question of economic aggression,[3] for a large number of Member States would want to see it mentioned in the article, or alternatively to be assured that the fact that it was not so mentioned did not harm the principle they wished to assert. Like most members of the Commission, however, he experienced the greatest difficulty with regard to incorporating that question specifically in the draft. Once again, the difficulty lay in the difference between the mode of operation of a political organ and the mode of operation of a judicial organ attempting to make an impartial and dispassionate statement of the law.

12. Nobody could contest the idea underlying the concept of economic aggression, namely, that a member of the international community could be crippled by some means other than the direct use of force. But it was almost impossible to convey that idea in legal terms. The Commission could not follow the example of resolutions of the General Assembly; it could not simply enunciate a number of important norms and leave their interrelationship to be worked out later, in a political or other context, as the occasion arose. Therefore, despite a wealth of authority to be found in the practice of international organizations and the writings of scholars, great care was needed to determine whether, at the present time, an act should be characterized as an international "crime". Obviously certain acts were regarded by the international community as forming a class apart, but it was difficult to ascertain exactly how the classification now being made by the Commission would fit in with the enumera-

[2] United Nations, *Treaty Series*, vol. 78, p. 277.

[3] See 1372nd meeting, paras. 7 *et seq.*

tion of internationally wrongful acts at a much later stage. Members of the Commission were, in varying degrees, worried by the possibility that the course now being taken might have to be radically reviewed.

13. On the other hand, it was essential to respond to the Special Rapporteur's call for boldness and to distinguish between a simple breach and a much more serious breach that affected the entire international community. Failure to make the distinction would prejudice the enormous task on which the Commission was now engaged. He favoured the kind of distinction drawn by the International Court of Justice in the *Barcelona Traction* case,[4] although he accepted the Special Rapporteur's warning that the Court had used the notion of obligations *erga omnes* in the special sense that they were obligations of such intrinsic importance that a mere breach thereof affected the legal interest of all the members of the international community.

14. Closer agreement might be reached, with less risk, if the term "crime" were replaced by the term "offence". Every action which involved the breach of an obligation towards all nations—an obligation *erga omnes*, as understood by the International Court of Justice—carried with it a notion of offence, for it offended international society. Moreover, the use of that term would to some extent take account of the doctrine that had been developed in the political organs of the United Nations with regard to the term "crime". Yet, like the language of the Court, "offence" might be better suited to the draft; if the Commission, as a legal organ of the United Nations, was to give maximum support to the Organization, it must not only attach the fullest value to the developments brought about through the action of States as members of the political organs of the United Nations, but it must also ensure that the kind of contribution it was making was in keeping with its own judicial standards.

15. He too shared the doubts expressed with regard to the expression "serious breach" in paragraph 3. However, if the term "offence" were used instead of "crime", there would be less need for the qualification "serious". After all, paragraph 1 already enunciated the basic notion that every breach of an existing international obligation was an internationally wrongful act, regardless of the content of the obligation breached—in other words, regardless of the relative seriousness of the breach. In distinguishing between the régimes of responsibility and in dealing with the higher order of breaches, the imprecise word "serious" could be eliminated by speaking of a breach by a State of an international obligation that constituted an offence because it was a breach of an obligation *erga omnes*. That would have the added advantage of dispelling another doubt—the doubt whether a classification of breaches in terms of the content of the obligation breached was possible before the consequences had been determined. In making that statement, he had no wish to imply a belief that all breaches of obligations *erga omnes* were of equal importance, since he did not question the hierarchy of obligations indicated in article 18.

16. He supported the view that paragraph 2 should reproduce in its entirety the formula used in Article 2, paragraph 4, of the Charter; it was right that subparagraphs (*a*) and (*b*) of paragraph 3 should embody the basic purposes of the United Nations by reflecting the language of the Charter, and that the current preoccupation of the international community, as mirrored in paragraph 3 (*c*), should underscore the non-exhaustive nature of the listing of breaches in paragraph 3 as a whole.

17. With those reservations regarding the wording—for words had such strong overtones that it was not always easy to distinguish substance from form—he fully and sincerely endorsed the basic purposes of the article.

18. Mr. BEDJAOUI said it was important to observe the distinction between the political and the legal; the law did not have an absolute value and should not be revered or worshipped for its own sake. The law performed an internal and international social function and if law and politics moved too far apart, it would mean disregarding that fundamental reality. In drafting article 18, the Special Rapporteur had followed the advice of the Emperor Marcus Aurelius to accept with good grace what could not be changed, to have the courage to change what could be changed, and to have the wisdom to take both into account; he had heeded the call of the times and had tempered boldness with caution; indeed, both the practice of some States, or groups of States, and doctrine had sometimes gone further than he had.

19. The Commission was sometimes reproached for not taking sufficient account of the rapid and revolutionary changes which the international community was undergoing. Article 18 offered it an opportunity to avoid an unduly long interval between the formation of a rule of law and its acknowledgement by jurists. It was Philip Jessup who had said that international law must not be regarded as an obsolete collection of moribund rules going back to a remote period of world history and that the "standard to be applied by the Court must be one which takes account of the views and attitudes of the contemporary international community.[5] The content of that provision, moreover, represented a minimum of international ethics. In their declarations, the non-aligned countries, which numbered over a hundred, had expressed views going far beyond what was said in article 18. They had characterized *apartheid* practices as international crimes and had declared themselves ready to intervene collectively on behalf of the victims of *apartheid*, or those threatened with the use of force or aggression, including economic aggression. At the Conference of Ministers for Foreign Affairs of the Non-Aligned Countries (Lima, 25-30 August 1975), it had been decided that, if a non-aligned country was subjected to "threats of the use of force or of aggression, or subject to measures applied under pressure destined to prevent the full, free and effective exercise of its sovereign rights," such measures, acts or threats "should be considered as being directed against the non-aligned countries as a

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

[5] South West Africa, second phase, judgment, *I.C.J. Reports 1966*, p. 441.

whole which, at the request of the country concerned, would provide it with assistance..." [6]

20. With regard to the contents of article 18, it was essential to establish different régimes of responsibility according to the seriousness of the breach of the international obligation. Paragraph 1 stated the principle that every breach of an international obligation was a wrongful act which entailed the responsibility of the State. That provision might not appear to add anything new to the preceding articles, but in the context of article 18 it gave a timely reminder that there was no such thing as a normal breach as opposed to an "abnormal breach". The Special Rapporteur had distinguished between two categories of breaches, which he had described as international "delicts" and "international crimes" respectively. Three problems, however, arose, namely, whether such a distinction was wise and legitimate; if so, whether the choice of breaches considered as crimes was not arbitrary, and whether the seriousness of the breach was a practicable criterion.

21. On the question of the desirability and validity of such a distinction, he said that certain obligations were fundamental because they affected the very existence of States, peoples, the international community or mankind in general. A breach of any such obligation struck a blow against every element of international society. That distinction was clearly eminently well justified, since the United Nations Charter itself made it in practice by providing for sanctions in certain cases and, moreover, by graduating those sanctions according to each case. Those remarks applied to the definition of aggression adopted by the General Assembly,[7] "aggression is the most serious and dangerous form of the illegal use of force". The use of force was in itself the negation of the foundation of present-day international society.

22. Similarly, the right of self-determination of peoples was an essential element of international law, since it governed the society of States; it had become a primary rule which took precedence over all other rules of international law, and was the starting point for an open society striving towards universality. The right of self-determination was the expression of a political and legal master concept (*idée-force*), which had matured in the depths of the universal consciousness and been confirmed by an impressive number of governmental, bilateral and multilateral declarations. Through the exercise of that right, the one-time "private club of civilized nations" had been enlarged, and the right itself had been strengthened thereby. It had become the instrument of an open and democratic international society. The right of self-determination, which was a right of *jus cogens*, conditioned the entire present-day international community. It should be distinguished from decolonization, which was only one of its forms. The violation of such a fundamental right could therefore be considered an international crime. The growth of universal awareness and of international law in regard to self-determination had been remarkable for its rapidity and the codifier could not disregard it.

23. The exercise of the right of self-determination had not been a matter of indifference to the international community, which had asserted an extensive right of supervision as it had gradually come to realize that violation of that right concerned all States. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[8] had proclaimed the principle of the equal rights of all peoples and of their right of self-determination, which was reaffirmed in paragraph 3 (*a*) of article 18. That principle made it the duty of States jointly and separately to promote decolonization, a process which concerned not only the administering Power but the international community as a whole. That was the principle on which the proclamation of the legitimacy of the struggle of peoples under colonial denomination was based. In its 1971 advisory opinion on the subject of Namibia,[9] the International Court of Justice had said that States Members, and even non-members, should give assistance to the United Nations in the action it had undertaken with regard to Namibia.[10] It was, in fact, action by the international community as a whole, and that action was considered as legitimate because the aim was to put an end to *apartheid*. Wars waged to reconquer colonies were characterized as a crime against humanity in General Assembly resolution 2270 (XXII) *inter alia*.

24. To reject article 18 would amount to a refusal to comply with the new law of nations and would raise the problem of the non-fulfilment of international obligations in terms which would seriously impair the credibility of international law in a society which unfortunately had no enforcing authority as yet. Now that the unlawful character of colonialism had been established and violation of the principle of the equal rights of peoples and of their right of self-determination was singled out for special opprobrium, a graduated scale of breaches of international obligations needed to be worked out, and that was precisely what the Special Rapporteur had done in article 18. The International Court of Justice had taken the same line in its advisory opinion on the subject of Namibia when it had stated that:

> A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. [11]

25. It had been suggested that the distinction made by the Special Rapporteur was arbitrary, but paragraphs 2 and 3 were based mainly on the Declaration of Principles of International Law concerning Friendly Relations and

[6] "Lima Programme for Mutual Assistance and Solidarity" (circulated to the General Assembly at its seventh special session as document A/10217), para. 119.

[7] Resolution 3314 (XXIX), annex.

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

[9] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding, Security Council Resolution 476 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

[10] *Ibid.*, p. 58.

[11] *Ibid.*, p. 54.

Co-operation among States. Only two of the principles set out in that Declaration were emphasized by the Special Rapporteur, namely, the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and the principle of the equal rights of peoples and of their right of self-determination (principles 1 and 5 of the Declaration). According to the Declaration, every State had the duty to promote the realization of the latter principle through joint and separate action and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of that principle. The Special Rapporteur appeared to have extracted the essence from that Declaration in adapting it to the subject of State responsibility. Other principles might of course prove to be fundamental in the future in the light of the new needs of the international community. For that reason article 18, although innovative up to a point and therefore welcome, nevertheless did not seem to make sufficient allowance for future developments, in other words for the possibility that breaches which at present constituted only international delicts might one day be considered as international crimes.

26. The criterion of the seriousness of the breach of an international obligation seemed bound to raise difficulties; he wondered, for instance, who would assess the degree and extent of a breach to characterize it as serious and therefore as constituting an international crime. He also wondered whether there could be a serious breach and a minor breach of the obligation to respect the principle of the right of self-determination of peoples. The international instance responsible for resolving such matters might have to take into account the trend of world opinion as well as that of international law.

27. Mr. ROSSIDES said that he was basically in agreement with the provisions of article 18, which were forward-looking and represented a step forward in the codification and development of the law of State responsibility. His comments would be directed to interpreting those provisions and strengthening the article so that it might command greater support, not only from the General Assembly but in a future conference of plenipotentiaries.

28. Paragraph 1 reflected a principle of international law which had long been accepted. In its subsequent paragraphs, the article made a much needed departure from traditional international law by recognizing the important distinction between different kinds of international obligations by reason of their content and of the consequences of their breach as affecting not only the injured State but also the interests of the international community as a whole. Internationally wrongful acts arising from the breach of the latter type of obligation had therefore to be classified as more serious offences —termed "international crimes"—as distinct from minor wrongful acts, which could be described as "international delicts". That distinction represented an advance in the progressive development of the law of international responsibility in the vitally important field of the maintenance of peace and security. It was not only in keeping with the Commission's mandate but would also bring international law into harmony with the present day international legal conscience.

29. The Special Rapporteur had acted wisely in placing in a separate category, in paragraph 2, breaches of international obligations pertaining to the maintenance of international peace and security, particularly the breach of the prohibition of the threat or use of force against the territorial integrity or political independence of any State. Those were particularly serious international crimes because of their devastating effects on the life of the international community. Such separate treatment was prompted also by the United Nations Charter itself which made specific provision for enforcement action to remove threats to the peace and to suppress acts of aggression. With regard to the partial text of Article 2, paragraph 4 of the Charter contained in paragraph 2 of article 18, he supported the suggestion that the full text of the Charter paragraph should be reproduced.

30. The maintenance of international peace and security was set forth as the very first of the Purposes of the United Nations in Article 1, paragraph 1 of the Charter which, to that end, called for "effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression". The obligation on Member States under Article 2, paragraph 4 of the Charter to refrain from the use of force and from acts of aggression was thus linked with a parallel obligation to take the effective collective measures required to suppress such acts. The point was important because the failure of the United Nations in its paramount responsibility of maintaining international peace and security resulted from the grave deficiency in the functioning of the Security Council, which had failed to adopt appropriate procedures to give effect to its decisions, thereby defeating the very purpose for which it had been established.

31. The problem of the implementation of Security Council decisions was vital to the future of the United Nations as an instrument of international security, and acquired greater significance at a time of increasing international insecurity like the present. As was well known, the detailed preparations in the late 1940s for making the necessary arrangements for collective enforcement action had fallen down over minor differences as to the relative ratios of armed forces, which had been magnified out of all proportion by the tensions of the cold war. Such difference would probably be no impediment in the present period of *détente* and should not be accepted as an excuse for not completing the necessary arrangements at a time of grave danger to the world. The imperfections of the Charter had been stressed by Mr. Kearney, who had pointed out that Article 2, paragraph 4 had not prevented acts of belligerency.[12] The reason for that, however, was not any deficiency in the Charter, but the fact that its provisions had not been implemented because of the failure of Member States to take the appropriate measures for giving effect to the provisions of Article 2, paragraph 4 in the manner prescribed by the Charter.

[12] 1314th meeting, para. 31.

32. On the domestic plane, law and order would inevitably break down if crime were not curbed. It was the knowledge of the existence of effective enforcement machinery which had the effect of curbing crime; law itself did not do it. The drafters of the Charter had had that point in mind when they had made provision for enforcement measures to ensure respect for Security Council decisions. Apart from their obligation to refrain from actual acts of aggression, Members of the United Nations had an international obligation under the Charter to contribute to effective collective action to suppress aggression; that obligation was mandatory under Articles 1, paragraph 2, 2, paragraphs 4 and 5 and Articles 25, 41, 42 and 49 of the Charter. Because of its importance to the international community, that obligation belonged to the category of obligations *erga omnes* the breach of which had been recognized by the International Court of Justice as being "the concern of all States" [13] and not merely of the injured State. It was therefore logical that, in cases of aggression against a Member State, there should be a degree of responsibility attaching to other members of the international community to participate in collective action to suppress the aggression. That decision by the International Court of Justice had initiated a trend in international judicial decisions more in keeping with the spirit of the Charter. As indicated by the Special Rapporteur (A/CN.4/291 and Add.1-2, para. 131), however, such early writers as Root in 1915 and Peaslee in 1916 had already arrived at the conclusion that it was necessary to distinguish between breaches of international obligations. Root had considered that any State should be authorized and even required to punish acts which affected the whole community of nations, but Peaslee had suggested the better course of institutionalized international action.

33. Such institutionalization had materialized with the establishment of the United Nations, whose declared purpose was the maintenance of international peace and security. The malfunctioning of the Security Council, however, had meant that the world today lacked even the modicum of international security which had existed in the nineteenth century during the concert of Europe. The situation was a matter of concern to the Commission in its task of codifying and developing the law of international responsibility. The only way to establish law and order in the world was to ensure the functioning of the Security Council in the event of a violation of a peremptory rule of general international law, and the Purposes and Principles of the Charter constituted indisputably such peremptory rules.

34. The term "international crime" was being appropriately applied to violations of peremptory rules of general international law. He could not conceive of any rule of *jus cogens* whose violation would not constitute an international crime. It was not of course possible to draw up an exhaustive list, but a contemporary author had written that "The least controversial examples of the class are the prohibition of aggressive war, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy".[14] The list might be expanded to cover unlawful acts of an economic character, but the international community had not yet accepted rules of *jus cogens* in that particular field. The rules of *jus cogens* were rules of general international law from which no derogation was permitted by treaty. The same restriction on treaty-making capacity also applied in respect of Charter obligations which, under Article 103, prevailed over any other treaty obligations. The overriding character of rules of *jus cogens* pertained, in particular, to the basic obligations imposed upon Member States by Articles 1 and 2 and Chapter VII of the Charter.

35. With regard to the wording of paragraph 3, he did not favour the use of the adjective "serious" before the word "breach", because it would lead to doubts concerning the criteria for determining whether a breach was sufficiently "serious" to constitute an international crime. He welcomed the Special Rapporteur's expressed willingness to clarify the meaning by introducing the words "as essential" after the words "a norm of general international law accepted", though he himself would prefer the qualification "accepted as fundamental". A number of drafting changes would also be needed in paragraph 3. First, the wording should not give the impression that the enumeration it contained was exhaustive. Secondly, in sub-paragraph (*c*), the expression "resource common to all mankind" should be replaced by the more appropriate one "resource which constitutes the common heritage of mankind". Thirdly, sub-paragraph (*e*) should also begin with the words "Respect for".

36. Lastly, he could accept the expression "international delict" which was appropriately used in paragraph 4.

37. Mr. USTOR said he would suggest that the title of article 18 be reworded so as to reflect better the contents of the article. Two possible wordings would be "International crimes and international delicts", or "Classification of internationally wrongful acts".

38. With paragraph 1, he had the same difficulties as with paragraph 1 of article 16. The real purpose of the paragraph was to state that, while the breach by a State of any of its international obligations constituted an internationally wrongful act, such acts could be classified either as international crimes or as international delicts. If the paragraph were retained in its present form, the words "existing" and "incumbent upon it" ("*existant à sa charge*" in the French version) should be deleted as superfluous.

39. The Special Rapporteur had rightly referred in his commentary to the gravity of the consequences of an internationally wrongful act implied by its categorization as an international crime (A/CN.4/291 and Add.1-2, para. 152). That was something that had to be kept in mind when drafting the article itself and because of the grave consequences of the classification, it was essential

[13] See *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, (second phase), judgment, *I.C.J. Reports 1970*, p. 32.

[14] I. Brownlie, *Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 500.

that the text should be extremely clear and precise. If it was intended to lay the foundations of an international criminal code with respect to the conduct of States, it was essential not to define international crimes by means of provisions which could be stretched at will. Bearing in mind the nature of the undertaking, it was necessary to circumscribe in exact terms the international wrongful acts which could be categorized as international crimes at the present time.

40. Perhaps because he came from a country which twice in his lifetime had suffered harsh sanctions, he felt strongly that any codification providing for sanctions, that was to say, the punishment of States, should define strictly and precisely the situations which entailed such sanctions. For that reason, he could not agree with the Special Rapporteur's statement: "The recognition in our draft that a distinction should be made between some internationally wrongful acts which are more serious and others which are less serious is comparable in importance to the recognition, in the Convention on the Law of Treaties, of the distinction to be made between 'peremptory' norms of international law and those norms from which derogation through particular agreements is possible." (*Ibid.*, para. 151.) There was a world of difference between article 53 of the 1969 Vienna Convention on the Law of Treaties [15] and the provision in draft article 18. The inherent uncertainty of article 53 could lead to problems in regard to the validity of a given treaty. The importance of that question, however great, could not be compared with that of the question of sanctions against, or punishment of, a State which was envisaged in draft article 18. For that reason, he considered that the use of the words "a norm of general international law accepted and recognized as essential by the international community as a whole", drawn from article 53 of the 1969 Vienna Convention, did not provide a firm basis for the description of an act as entailing the criminal responsibility of a State.

41. He fully shared the Special Rapporteur's hope that the rules of international responsibility would be accepted and ratified by States, including the concept that some internationally wrongful acts qualified as crimes. But it was unlikely that States would be prepared to submit to such a code unless it specified with the utmost precision the courses of State conduct which were categorized as "international crimes". The Commission was not in the same position as a national legislature which could impose a criminal code upon its subjects. If it wished to succeed in its work, it must take into account the unwillingness of States to risk being branded as criminals. Possibly all States would agree that armed aggression and genocide were international crimes, and the same probably applied to the practice of *apartheid*, to systematic racial discrimination and to colonization, but with regard to the other matters mentioned in paragraph 3, he very much doubted whether a sufficient number of States would agree to accept criminal responsibility unless the conditions were defined with greater precision. It was difficult, for example, to see how States, which were so slow in ratifying the International Covenants on Human Rights, could agree to accept criminal responsibility for the violation of some of those rights without clarification: the question which of those rights could be violated by a State only at the risk of being charged with a criminal act should be made crystal clear.

42. He fully understood the noble aspirations of the Special Rapporteur but the Commission should be cautious and remember the bitter experience of the past, as in the case of its draft on arbitral procedure. If the Commission wished its work to live instead of just being consigned to the records, it had to take into account the probable reaction of States. The Special Rapporteur had invited the Commission to embark on the progressive development of international law. Practically all the members of the Commission had responded to his invitation and agreed with the basic idea of dividing internationally wrongful acts into two categories. He fully shared that idea and also agreed with the use of the term "international crimes". He would urge the Commission, however, to moderate its intellectual aspirations so as to take account of the requirements of the international community as it was at present.

43. Subject to those comments, he could endorse article 18 in essence. It would mark an important step in the progressive development of international law in a direction which would not conflict in any way with the Charter, for the Charter itself provided for such development. The Commission was engaged in the preparation of a text on the substantive law of State responsibility, which did not touch at any point on the procedural rules of Chapter VII of the Charter. As had already been pointed out during the discussion, Chapter VII was concerned less with the punishment than with the prevention of crime. And article 18, if adopted, might also have a deterrent effect.

44. Lastly, a short paragraph might perhaps be introduced into article 18 to express the idea that its provisions were without prejudice to any criminal responsibility of individuals. Even if the point was self-evident, there was no harm in making it explicit.

The meeting rose at 6 p.m.

1376th MEETING

Tuesday, 25 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, 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.

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[15] 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.