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Summary record of the 1376th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1976, vol. I

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.

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

[Item 2 of the agenda]

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

ARTICLE 18 (Content of the international obligation breached) [1] (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission, said that a number of important points had been raised in the course of a debate conducted in the best traditions of the Commission and marked by a remarkable depth of analysis and breadth of coverage as well as by a notable contrast of opinions. He shared the hope of Sir Francis Vallat that the discussion would produce a common pool of understanding from which the Commission would be able to draw the elements for a text of article 18 that would prove generally acceptable.

2. With regard to the place of the article in the general economy of chapter III (Breach of an international obligation), it should be remembered that, in its discussion on article 16,[2] the Commission had agreed that the source of the obligation breached was irrelevant to the question of determining the different régimes of responsibility. In his commentary to article 16, the Special Rapporteur had explained that the pre-eminence of certain international obligations was determined by their content and not by the process by which they were created:

> ... the responsibility entailed by a breach of an international obligation should be more serious not because the obligation has one origin rather than another, or because it is embodied in one document rather than another, but because international society has a greater interest in ensuring that its members act in accordance with the specific requirements of the obligation in question (A/CN.4/291 and Add.1-2, para. 32).

Article 18, the purpose of which was to set forth the different régimes of responsibility with due regard for the content of the obligations breached, thus appeared as the corollary to article 16. The provisions of article 18 followed logically from those of article 16.

3. Article 18 played a very important role in the draft; it was one of the pillars on which the whole law of State responsibility rested. The Commission's first attempt, in 1961 and 1962, to deal with the topic of State responsibility (on the basis of six reports produced by the then Special Rapporteur, Mr. García Amador) had proved unacceptable to the General Assembly. Its approach to the topic at that time had followed the traditional lines of the textbooks, which were pivoted on the status of aliens. The concepts of denial of justice, of the exhaustion of local remedies and of international claims had been developed in connexion with the rules of State responsibility for injury to aliens.

4. The Commission had then proceeded to appoint a Sub-Committee on State Responsibility with Mr. Ago as Chairman. The Sub-Committee had met in January 1963 and had recommended in its report to the Commission that much more general scope should be given to the topic of State responsibility. The Commission had agreed that "careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility",[3] while some members had felt that "emphasis should be placed in particular on the study of State responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law".[4] The broad scope of the topic had been confirmed by the Commission at its nineteenth session.[5] Such was now the Commission's mandate, as approved by the General Assembly, regarding the scope of the topic and the impact upon it of new developments in international law.

5. On the question of the different régimes of responsibility, the Commission was not working in a vacuum. The Charter of the United Nations set forth in Chapter VII a system of responsibility with respect to threats to the peace, breaches of the peace and acts of aggression. That chapter established machinery to deal with the requirements of collective security. Article 6 of the Charter laid down a very serious sanction—expulsion from the Organization—against a Member State which persistently violated the Principles of the Charter. The purpose of Article 6 was thus to provide for punishment and not merely preventive action. Other provisions of the Charter, such as Article 41, empowered the Security Council to recommend the severance of diplomatic relations and the interruption of economic relations against a State responsible for a threat to the peace, breach of the peace or act of aggression. Contrary to what had been suggested by one or two speakers during the discussion, the Charter of the United Nations did not merely define obligations: it also made provision for sanctions and established different régimes according to the gravity of the act to be punished. Those Charter provisions showed the universal recognition of the fact that there existed different régimes of responsibility—a point on which there was virtual unanimity in the Commission.

6. The problem with regard to article 18 was that of determining the criteria for applying the different régimes and also how far it was appropriate to elaborate on the subject by giving examples. Speaking from different standpoints, Mr. Kearney[6] and Mr. Ustor[7] had both counselled prudence because of the need to secure the acceptance of Governments. Personally he felt that it was universally recognized that there were serious violations which undermined the very foundations of the international order. They included aggression and 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

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

[2] 1364th to 1366th meetings.

[3] See *Yearbook... 1963*, vol. II, p. 224, document A/5509, para. 52.

[4] *Ibid.*, para. 53.

[5] *Yearbook... 1967*, vol. I, pp. 225-228, 934th meeting, paras. 75 *et seq.*, and 935th meeting, paras. 2-14.

[6] 1374th meeting, paras. 27 *et seq.*

[7] 1375th meeting, paras. 39 *et seq.*

Nations", as stated in Article 2, paragraph 4, of the Charter. The Purposes and Principles of the Charter constituted an international order; whoever struck at the foundations of that order committed an international crime.

7. There were two categories of international crimes. The first category included (1) the violation of the territorial integrity of a State, (2) the suppression of the right of a people to self-determination, which struck at the identity of the people concerned, and (3) the violation of basic human rights and fundamental freedoms, which struck at the dignity of man. Breaches in that first category violated basic norms of State conduct and outraged the conscience of mankind; they included such crimes as genocide, *apartheid* and doctrines based on racial discrimination. The second category of international crimes consisted of violations injurious to international co-operation or detrimental to a common heritage of mankind. In that connexion Mr. Ushakov [8] and Mr. Ustor [9] had made the important point that the obligations whose breach, even serious breach, could be characterized as an international crime, did not correspond with the obligations covered by the notion of *jus cogens* as defined in article 53 of the Vienna Convention on the Law of Treaties.[10] Paragraphs 2 and 3 of article 18 dealt only with categories of rules of *jus cogens* whose violation constituted an international crime.

8. The distinction between those two categories of violations involved a distinction between different régimes of responsibility. The second category did not have the element of culpability which called for punitive sanctions. For example, a breach of the principles governing the use of resources which constituted the common heritage of mankind gave rise to reparation and not to punishment.

9. There was yet a third category of breaches, namely, that of violations which did not have a grave character, and which were described in paragraph 4 of article 18 as "international delicts".

10. During the discussion, attention had been drawn to the difficulties involved in the use of the term "international crime" and it had been pointed out that both the Convention on the Prevention and Punishment of the Crime of Genocide [11] and the Commission's own Draft Code of Offences against the Peace and Security of Mankind [12] used the expression "crimes under international law" and specified that individuals were responsible for such crimes. The solution of that problem was the usual one of including in the draft article dealing with the use of terms a specific provision to explain the meaning attached to the term "international crime", or any other term chosen, for the purposes of the draft articles. Provisions of that type did not represent general definitions but constituted merely explanations regarding the use of a term in a particular draft or instrument.

11. Much had been said during the discussion on the relationship between the United Nations Charter and international law and between law and politics. On that last point, he associated himself with the pertinent remarks of Mr. Bedjaoui.[13] It was well to recall the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[14] During the many years spent on the formulation of the Declaration, its contents had been frequently criticized as political, but the drafters had not been deterred by that criticism and had ultimately formulated a legal instrument which, like all such instruments, inevitably had political implications. It should also be remembered that all questions, even technical ones, had their political undertones. The International Court of Justice itself, in its advisory opinion on *Certain Expenses of the United Nations*, had disposed in the following terms of the objection that the question put to it was political rather than legal in character:

> It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise.[15]

The question of the different régimes of responsibility was a legal one but any attempt to separate law from politics in that connexion would condemn the law to remaining static. In fact, the mere statement that law should not deal with politics was, in itself, a political pronouncement.

12. Nor was the Commission attempting, in article 18, to revise or supplement the provisions of the Charter. In that connexion it was appropriate to refer to the theory of implied powers developed by John Marshall, the fourth Chief Justice of the Supreme Court of the United States of America. The provisions of article 18 could not impair in any way those of Chapter VII of the Charter; they came under the heading of implied powers deduced by way of interpretation. Chapter VII entrusted the Security Council with the task of determining whether an act of aggression had been committed and empowered it to take action in pursuance of collective security. Those Charter provisions did not preclude other action that might be taken in connexion with acts of aggression or the threat or use of force. At the previous meeting, Mr. Bedjaoui had appropriately drawn attention to the responsibility of all States to take action whenever a basic norm of international law was violated. Such violations included, apart from aggression itself, the occupation of territory, violations of the Geneva Conventions, the attempt to annex occupied territories and the suppression of the will of their inhabitants.

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[8] 1374th meeting, paras. 2 *et seq.*

[9] 1375th meeting, para. 40.

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

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

[12] *Yearbook... 1954*, vol. II, p. 150, document A/2693, para. 50.

[13] 1375th meeting, paras. 18 *et seq.*

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

[15] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155.

13. Finally, he commended the Special Rapporteur for his imaginative formulation of article 18. He was reminded of a passage in a book by the late Wilfred Jenks where the author emphasized the revolutionary changes brought about by the Second World War in the political, economic and scientific background of contemporary international law, which could "no longer be presented within the framework of the classical exposition of international law as the law governing the relations between States but must be regarded as the common law of mankind at an early stage of its development". Jenks had stressed the difficulties created by the severe crisis of growth through which the law was passing, commenting that those difficulties would nevertheless provide "the elements of a universal legal order more comprehensive in character than any previous generation could have even imagined", and concluding by calling for "a radical appraisal of the scope of international law ... worthy of the opportunities presented by a decisive stage in the development of the law as an element in the creation of an effective world order".[16] He (Mr. El-Erian) hoped that the Commission would accept the challenge contained in that remarkable passage written almost twenty years ago.

14. Mr. BILGE said that the Special Rapporteur had been right in article 18 in making a distinction between internationally wrongful acts according to the content of the international obligation breached and the seriousness of the breach. That distinction already existed in international law, for certain conventions spoke of international crimes. The sufferings caused by the two World Wars had led the international community to safeguard peace by prohibiting all acts of aggression. Thus the League of Nations Covenant and the Briand-Kellogg Pact, following the First World War, and the United Nations Charter, following the Second, categorically condemned recourse to force.

15. Should a distinction be made between different régimes of responsibility according to the content of the international obligation breached? In theory, it was not difficult to establish a special régime of responsibility for international crimes. But careful thought must be given to the practical consequences of such a distinction. The first question to arise in that respect was that of sanctions, and the Special Rapporteur had shown clearly its importance in paragraph 144 of his report (A/CN.4/291 and Add.1-2). Should the sanctions be collective, like those provided for by Chapter VII of the Charter in the event of breaches of the peace? The Commission should draw the attention of Governments to that question, for there could hardly be acceptance of a different régime of responsibility for the breach of certain particularly important obligations without acceptance of a régime of collective sanctions. But, while the members of the international community were generally in agreement when it came to condemning an international crime, they were not always united in applying a sanction against the guilty State. Governments must, therefore, be fully conscious of their responsibility in that respect when they gave their opinions as to the advisability of applying régimes of responsibility differing according to the importance of the obligation breached.

16. A criterion must be found for characterizing certain internationally wrongful acts as international crimes. It was not a question of defining primary rules, but of cataloguing international crimes. The Special Rapporteur had proposed various categories of such crimes. He had made a distinction between the use of force (paragraph 2), and the breach of other obligations established by the Charter (paragraph 3). Was that distinction justified or should the Commission go no ruther than to distinguish international crimes in general from other international offences? There was no doubt that aggression was an international crime. But the Special Rapporteur had placed the use of armed force in the front rank of international crimes. However, the use of armed force was not always an international crime. In order that it should be considered an international crime the acts concerned or their consequences must, as stated in article 2 of the definition of aggression adopted by the General Assembly[17] be "of sufficient gravity". Mere border incidents, for example, were not generally considered as international crimes. A distinction must therefore be made, in both paragraph 2 and paragraph 3, between varying degrees of seriousness of a breach, for the breach of an international obligation established for the purpose of maintaining international peace and security was not necessarily an international crime. That being so, it could be asked whether there was any need to distinguish between the obligations referred to in paragraphs 2 and 3 respectively.

17. It was difficult to find a criterion by which an international crime could be distinguished from a mere international offence. The Special Rapporteur had spoken in paragraph 3 of a "serious breach". Other possible terms were "systematic breach", for example, in the case of human rights or "continuous breach". Should there be express and individual mention of the various international crimes, or should the Commission limit itself, as the Special Rapporteur had done, to referring to the main categories of international crimes? The solution adopted by the Special Rapporteur was probably the best, but perhaps it would still be preferable to be more laconic, as the International Court of Justice had been in its decision in the *Barcelona Traction* case.[18]

18. Being aware of all those difficulties, the Special Rapporteur had taken his precautions and, like the United Nations Conference on the Law of Treaties, in the case of the rules of *jus cogens*, had suggested the possibility of entrusting to an international authority the task of determining, in the event of dispute, whether an offence constituted an international crime. That task could hardly be entrusted to a judicial body for States seemed ill-disposed to such a solution and generally preferred to settle their disputes amongst themselves or to bring them before a political body such as the Security

[16] C. W. Jenks, *The Common Law of Mankind* (London, Stevens, 1958), pp. xi and xii.

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

[18] *Barcelona Traction, Light and Power Company, Limited*, second phase, judgment, *I.C.J. Reports 1970*, p. 3.

Council. The Security Council's practice with respect to the use of armed force showed that it reached its decisions on the basis of certain political considerations, for it had to weigh up the situation in the light of the circumstances. It would therefore be advisable to draw the attention of Governments to the Council's practice with respect to aggression.

19. The Commission was faced with a very difficult problem: it could not ignore the development of international law or overlook the fact that there were international crimes. It could not therefore refuse to make a distinction between different régimes of responsibility, for international crimes could not be treated like other international delicts. But it must also consider the very significant consequences which the application of different régimes of responsibility could have in the future and draw the attention of Governments to those consequences.

Mr. Calle y Calle (second Vice-Chairman) took the Chair.

20. Mr. AGO (Special Rapporteur), replying to the observations on article 18 made since his previous statement (at the 1374th meeting), said that he would comment first on the most favourable of them and end with the least favourable.

21. Mr. Ramangasoavina had emphasized the development of international judicial opinion and shown how the principle of "no interest, no action" had given place to the principle asserted by the International Court of Justice in its decision in the *Barcelona Traction* case.[19] It was precisely that development that underlay article 18. While it was true that by endorsing it the Commission would to some extent be entering the realm of the progressive development of international law, it would be wrong to infer that it would be altogether innovating. In fact, the Commission would be simply reflecting a trend which had gradually developed in the legal consciousness of States. The idea of an international criminal law of States had long been established, both in international practice and judicial decisions and in legal opinion. Mr. Ramangasoavina had also said that the wording of article 18 could be improved.[20] Personally, he fully concurred with that view but he wished to stress that it would not be easy to produce an entirely satisfactory text which faithfully reflected the Commission's intentions.

22. Mr. Bedjaoui had considered that article 18 represented only a minimum of international ethics, and that without that minimum it would probably injure the non-aligned countries.[21] He had emphasized the need to accept as a basis the fact that the breach of certain international obligations affected not just a particular State, but the entire international community. That, indeed was the essential point which article 18 was intended to bring out. Mr. Bedjaoui had also considered that the right of self-determination was a right of *jus cogens*.[22] He was inclined to share that view since, if there were legal rules relating to self-determination, they could only be rules of *jus cogens*. It would, after all, be inconceivable at the present day for two States to conclude an agreement whereby one of them would be placed, or placed again under the colonial domination of the other; by virtue of the Vienna Convention on the Law of Treaties, such an agreement would certainly be void. However, the Commission was not now concerned with identifying the rules of *jus cogens*, and furthermore it ought to be cautious in broaching the possibility of establishing new internationally wrongful acts as international crimes. For an international obligation really to be considered as essential for the protection of the fundamental interests of the international community and for its breach to constitute an international crime, its essential character must be recognized by the entire international community. The obligation must be vital for the existence or survival of the international community as a whole and not just of a group of States, however important, like the group of non-aligned countries or any other.

23. When speaking as a member of the Commission, the Chairman had emphasized that article 18 was the logical corollary to the considerations contained in the introduction to chapter III and in the commentary to article 16,[23] since chapter III concerned the breach of an international obligation, which raised the question whether the content of an obligation had a bearing on the responsibility arising from its breach. As he saw it, the boundaries of the Commission's task were clearly defined, it must not go any further, even if it knew that article 18 raised problems which would have to be solved in the future. The Chairman considered that a distinction should be drawn between breaches of different international obligations—a distinction which had already taken root in the international legal consciousness—but that that was no justification for claiming that any violation of a peremptory rule of international law constituted an international crime.[24] On that last point, there seemed to be general agreement. The international obligations referred to in article 18 were those which were more or less unanimously considered as vital to the existence of the international community at the present time. Thus, recourse to war, which had previously been considered admissible at least, in certain cases, was no longer so considered, since it now endangered the existence of the international community as such. As Mr. Ushakov had pointed out, any war endangered the very foundations of modern international society. That was why the breach of international obligations relating to the maintenance of international peace and security had been dealt with separately in article 18.

24. Several members of the Commission had referred to the right of self-determination. The Commission's efforts to codify the rules on international responsibility followed closely upon the greatest revolution mankind

[19] 1374th meeting, para. 21.

[20] *Ibid.*, para. 23.

[21] 1375th meeting, para. 19.

[22] *Ibid.*, para. 22.

[23] See above, para. 2.

[24] *Ibid.*, paras. 7 and 8.

had ever known; peoples which had long been under the domination of other peoples had liberated themselves. The perpetuation or restoration of colonial domination was so abhorrent to the contemporary international conscience that it was bound to be considered an international crime. The same was true of certain violations of the most elementary rights of the individual. Much water had flowed under the bridges of the Tiber since the time when the Treaty of Westphalia had endorsed the principle *cujus regio ejus religio*, according to which a human being had to change his religion by reason solely of the fact that a piece of territory had passed from one sovereignty to another. That principle showed a complete disregard of human rights. Later, massive attacks upon human dignity had finally aroused the conscience of nations. While he did not wish to be accused of blind optimism, he felt bound to place on record that awakening of conscience, thanks to which an act of genocide or an absolute policy of *apartheid* were now considered inadmissible. A tiny breach had thus been opened in the principle of the sovereignty of States. International law now prohibited States from committing, even against their own subjects, certain acts which, under the notion of exclusive domestic jurisdiction would previously have been considered legitimate. Again, the notion of the common heritage of mankind had now emerged. A State could not destroy a common heritage and thereby deprive the international community of an asset essential for its survival. It was all those developments that had led the international community to realize that certain offences were more serious than others.

25. Mr. Quentin-Baxter had clearly demonstrated that the distinction between international offences and international crimes was inevitable;[25] in his view it was primarily a question of terminology. It was indeed a case where, as in many others, legal language was inadequate. The terms in common use were confusing and it was important to specify as clearly as possible the sense in which they were used, mainly in order to avoid any confusion between the international crimes of the State and the crimes of individuals. None the less, it should be noted that chapter II of the draft was devoted to the act of the State and that chapter III dealt with the case where the act of the State constituted a breach of an international obligation of that State. Again, the commentary should make it clear that the Commission was dealing only with acts of the State. The obligation to punish individuals might be part of the responsibility of the State for its own crime but it did not exhaust that responsibility, and the international responsibility of the State should on no account be confused with the criminal responsibility of individuals. The term "offence" suggested by Mr. Quentin-Baxter[26] was the equivalent of the French term "*infraction*". He wondered whether those terms adequately conveyed the idea of a particularly serious breach affecting the international community as a whole. He would be reluctant to drop the term "crime", since it was used in several international instruments, particularly in connexion with genocide, *apartheid* and aggression. It would be better to retain the term "crime" and to explain in the commentary that it applied only to a crime of the State. The Drafting Committee might even consider the possibility of using the term "State crime".

26. Mr. Quentin-Baxter, like other members of the Commission, had mentioned the notion of economic force[27] but the use of economic force could not be described as an international crime without first establishing the existence of an international obligation not to exert economic pressure to induce a State to adopt or not to adopt a certain line of conduct. In his opinion, such an obligation, if it existed, could apply only in exceptionally serious cases. If the Commission accepted the notion that economic pressure on a State to force it to conclude a treaty was not only a cause of the nullity of the treaty but also justified the application of penalties, it would run the risk of making international relations impossible. Besides, the economic pressure might be applied, not by a State, but by a commercial undertaking, in which case there could be no question of a breach by the State of an international obligation. The Commission ought at all events to be cautious in dealing with that subject. It might confine itself to a statement in the commentary to article 18 that some members did not wish to confine the concept of acts of aggression solely to the use of armed force but held that it also covered the use of economic force.

27. Mr. Rossides approved the content of article 18, particularly paragraph 3 (*c*), but considered that paragraph 3 should be redrafted.[28] He shared that view, but did not think that it would be an easy task for the Drafting Committee. When considering the definition of a breach, the, Drafting Committee should emphasize the fact that the obligation breached must be of an "essential" or "vital" character—the words he had himself used—or of a "fundamental" character—the word used by Mr. Rossides—or it should try to find a better word with a similar meaning.

28. Judging by his comments, Mr. Ustor was half way between those who were most satisfied and those who were least satisfied with article 18. He had approved of the content of that provision, but had dwelt on points of drafting. He had rightly suggested that the title of the article should bring out the distinction between international delicts and international crimes.[29] On the other hand, he had questioned the need for paragraph 1. The answer was that if the Commission did not specify that the breach of any international obligation incumbent upon a State was an internationally wrongful act, the emphasis which the later paragraphs placed on the breach of certain specific obligations might create the false impression that, in the Commission's view, breaches which were not crimes did not constitute internationally wrongful acts. At the same time, there should be no possibility of the list of international crimes being lengthened as soon as a State had reason to accuse another State of committing an internationally wrongful act.

[25] 1375th meeting, para. 13.

[26] *Ibid.*, para. 14.

[27] *Ibid.*, para. 11.

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

[29] *Ibid.*, para. 37.

Mr. Ustor had noted that the Commission was engaged only in laying the foundations for an international criminal code. Referring to rules of *jus cogens*, he had pointed out that where the breach of an international obligation of *jus cogens* constituted an international crime it would have far more serious consequences than the mere nullity of a treaty.[30] It should not therefore be thought that the breach of any obligation arising from a peremptory rule constituted an international crime. The concept of international crime must be restrictive. It was precisely for that reason that he himself had proposed the distinction between various categories of breaches. Furthermore, he considered that it was not possible to refer in general terms to the essential rules for the international community without laying down some criteria for identifying them. If they could not at present be formulated as precisely as the rules of internal criminal law, the obligations whose breach constituted an international crime should at least be defined as closely as possible.

29. He agreed with Mr. Ustor that too much attention should not be paid to relationships between the draft articles and the Charter of the United Nations, especially Chapter VII.[31] Obviously the Commission could not amend that Charter, as was clear from its Article 103, or even add to it, but it would have to take the Charter into account, especially when dealing with sanctions and régimes of responsibility.

30. Mr. Bilge also kept to the middle of the road. He believed that certain international crimes could entail the application of penalties, but stressed that those penalties should be essentially of a collective nature[32]: international crimes involved the breach of an obligation *erga omnes*—one which concerned, more or less directly, all the members of the international community—and they should react in a co-ordinated manner. He shared that view, unlike those authors who claimed that any State was entitled to take individual action in such cases. The United Nations Charter did not exclude the possibility of individual action, especially in the exercise of the right of self-defence, which could be either collective or individual. But in any case the fact that he had mentioned authors who claimed that any State was entitled to react to any breach of an international obligation *erga omnes* by no means implied that he shared their view. In internal law, it was originally the principle of private punishment that had held sway; it was only later that the State had acquired a monopoly of punishment. Sanctions in international society would also have to be institutionalized, but that was going to be a long job. For the present, the Commission had to establish the notion which had taken root in world consciousness, that some breaches were more serious than others and should entail more serious consequences. For the time being, the Commission should not spend too much time on trying to work out a precise definition of sanctions.

31. In his opinion, undue importance should not be attached to the comments of the International Court of Justice, which Mr. Bilge had mentioned,[33] on the subject of obligations *erga omnes* in its judgment in the *Barcelona Traction* case. Those comments had been made *obiter* in a diplomatic protection case and more by way of explanation. It would be dangerous to give the impression that all obligations *erga omnes* could be included in the list of obligations the breach of which constituted and international crime. He was not opposed to the idea of including examples, such as genocide or *apartheid*, so as to give a better indication of the nature of the offcences concerned.

32. In Mr. Tsuruoka's opinion, the justification for paragraphs 2 and 3 would depend on the effects which the provision would give rise to. He had suggested that the commentary to article 18 should briefly indicate the régimes of responsibility envisaged.[34] However, even a mere outline of those régimes of responsibility would inevitably lead Governments to raise questions prematurely. It would therefore be better for the Commission to confine itself for the present solely to the question of determining the obligations whose breach constituted an international crime. It should also refrain from defining the content of international obligations. Mr. Tsuruoka had wondered whether the possession of nuclear weapons constituted a breach of an international obligation.[35] In his view, it was not the fact of possessing such weapons —apart from weapons covered by specific conventions, such as bacteriological weapons—which constituted a breach of an international obligation, but the use their possessor intended to put them to. If he intended to use them for aggression, their possession constituted a threat to peace. On the other hand, a State could possess nuclear weapons for its own defence and have no intention of committing acts of aggression.

33. While showing a great deal of understanding, Mr. Kearney had expressed some apprehensions.[36] He had already replied to one of them when he had explained that he did not share the opinions of all the authors he had cited. As early as in 1939 he had noted that a distinction could perhaps be made between "civil responsibility" and "criminal responsibility" in international law, when he had pointed out that sanctions were sometimes applied, especially in the form of reprisals. Nowadays, in United Nations practice, recourse to armed reprisals by one State against another was considered unlawful. When the Commission came to deal with penalties, it would be concerned principally with collective penalties rather than with those which an individual State might decide to apply. For the time being, the Commission's only task was to give expression to the world legal conscience, according to which the breach of certain international obligations, which it considered to be an international crime, was more serious than the breach of other obligations. Mr. Kearney had asked whether it would not be enough to say that the fact that an act was considered as criminal and punishable did not affect

[30] *Ibid.*, para. 40.

[31] *Ibid.*, para. 43.

[32] See above, para. 15.

[33] *Ibid.*, para. 17.

[34] 1375th meeting, para. 2.

[35] *Ibid.*, para. 4.

[36] See 1374th meeting, paras. 27 *et*

the obligation to make reparation.[37] That was not untrue, but it seemed to him that the Commission should lay the emphasis on the converse idea, namely, that a criminal act should entail the application of penalties in addition to the obligation to make reparation. There was no need to be unduly apprehensive about possible abuses, which were in fact inevitable, both at the internal level and at the international level.

34. In conclusion, he said that the very affirmation that international crimes existed might make it easier subsequently to determine the penalties and the procedures applicable. Historically, the definition of crimes had preceded that of punishments, which in turn had preceded the establishment of a procedure for the application of punishments. At the international level there could be no rapid evolution, but there was a discernible tendency to distinguish between international crimes and international delicts, and that should lead to the establishment of more severe régimes of responsibility for the former and, ultimately, to a system for the application of sanctions.

35. The CHAIRMAN suggested that draft article 18 be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

It was so agreed.[38]

The meeting rose at 1.5 p.m.

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

[38] For consideration of the text proposed by the Drafting Committee, see 1402nd and 1403rd meetings.

1377th MEETING

Wednesday, 26 May 1976, at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, 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, Mr. Yasseen.

Most-favoured-nation clause (A/CN.4/293 and Add.1)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the most-favoured-nation clause (A/CN.4/293 and Add.1).

2. Mr. USTOR (Special Rapporteur) said that the Commission had adopted articles 1-7 of the draft articles on the most-favoured-nation clause at its twenty-fifth session, in 1973, and articles 8-21 at its twenty-seventh session, in 1975.[1] The seventh report had been prepared in the light of the relevant discussion in the Sixth Committee of the General Assembly at its thirtieth session.[2] It consisted of two parts, the first containing general provisions, which should be dealt with expeditiously, so as to allow ample time for consideration of the second part, which dealt with the more important aspect of the question, namely, provisions in favour of the developing countries.

3. The first part of the report contained a brief introduction discussing the topicality of the most-favoured-nation clause. The view had been expressed in the Sixth Committee that the clause was clearly an institution corresponding to past economic realities, which were being superseded by new realities that required an adjustment of rules. That view was to some extent true, but the clause was still a most important provision of many treaties —a fact that had been recognized by the Charter of Economic Rights and Duties of States,[3] article 26 of which stated that

> ... International trade should be conducted without prejudice to generalized non-discriminatory and non-reciprocal preferences in favour of developing countries, on the basis of mutual advantage equitable benefits and the exchange of most-favoured-nation treatment.

Admittedly, the Commission was not considering the clause exclusively in relation to international trade, but in a more general context. Nevertheless, international trade was an extremely important field in which the clause was commonly used, and the provision he had quoted from the Charter of Economic Rights and Duties of States attested to the fact that the most-favoured-nation clause was not an obsolete institution.

4. Thus the Commission was considering a matter of great current interest, and it would be useful to codify the rules pertaining to the clause, for two reasons. First, codification of the rules would be instructive and helpful to legal departments and foreign ministries in developing countries, since new States sometimes experienced difficulties in concluding treaties containing a most-favoured-nation clause. Secondly, the Commission now had an opportunity of examining the question whether, and to what extent, exceptions in respect of developing countries had become, or should become, general rules of international law—a matter that would encompass some aspects of what was considered to be a new branch of international law, namely, the international law of development.

5. The Commission was not called upon the judge the utility of the most-favoured-nation clause, but to determine the rules applicable when the clause was stipulated in a treaty. The principal rules governing all treaties were embodied in the Vienna Convention on the Law of

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[1] For the text of the articles adopted, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. IV, sect. B.

[2] *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 120-164.

[3] General Assembly resolution 3281 (XXIX).