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Summary record of the 1374th meeting

Topic:
State responsibility

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

the breach of which did not always constitute an international crime.

38. He wondered whether article 18, paragraph 1, added anything to article 3. Article 3 already said that there was an internationally wrongful act of a State when that Act "constitutes a breach of an international obligation of the State".[18] By "an international obligation of the State" was to be understood "every international obligation of the State". The word "content" to be found in article 18 added nothing to what was said in article 3, since it was obvious that every obligation had content. In fact, what counted was not the content, but the importance, the scope of the obligation breached. Consequently, either article 18, paragraph 1, was pointless, or it meant that article 3 was incomplete and the reference in it was not to "any international obligation whatsoever of the State".

39. With regard to paragraph 2, he said it was not the breach of an international obligation which constituted an international crime, but the internationally wrongful act resulting from the breach. What was the significance of paragraph 2? Paragraph 2 stated the general rule that the breach by a State of an international obligation established for the purpose of maintaining international peace and security was an international crime. But, in the final analysis, all the rules of contemporary international law had been established for the purpose of maintaining international peace and security. Should it then be concluded that any violation whatsoever of a rule of international law was an international crime? That was what the general rule set out in the first part of the paragraph seemed to imply. In fact, it was only "the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State", mentioned by way of example in the second part of the paragraph, which constituted an international crime.

40. He accordingly proposed that, in order to avoid any problems of interpretation, paragraph 2 should be reworded to read, much like Article 2, paragraph 4, of the Charter:

> The internationally wrongful act arising from a breach of the obligation upon all States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, constitutes an international crime.

41. In the context of paragraph 3, the expression "accepted by the international community as a whole", was extremely ambiguous. Should it be taken to mean that the three rules which followed had already been accepted by the international community as a whole, or, on the contrary, that those rules had not yet been accepted and that their breach would not constitute an international crime until they had been universally recognized?

The meeting rose at 1 p.m.

[18] *Yearbook... 1975*, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B.

1374th MEETING

Friday, 21 May 1976, at 10.10 a.m.

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

Members present: Mr. Ago, 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.

APPOINTMENT OF THE DRAFTING COMMITTEE

1. The CHAIRMAN said that, following consultations in accordance with the Commission's usual practice, he proposed that the Commission appoint a drafting committee consisting of the following twelve members: Mr. Šahović as Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ushakov, Sir Francis Vallat and Mr. Tsuruoka, the Commission's Rapporteur.

It was so agreed.

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

[Item 2 of the agenda]

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

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

2. Mr. USHAKOV, resuming the statement he had begun at the previous meeting, said that the expression "serious breach by a State of an international obligation", in paragraph 3 of article 18, raised the question of the weight to be attached to the seriousness of the breach. Admittedly there were more serious and less serious breaches, but he questioned whether the seriousness of the breach warranted an internationally wrongful act being characterized as an "international crime"? In his opinion, the characterization of an internationally wrongful act depended, not on the seriousness of the breach, but on the importance of the obligation breached, in other words, the interests protected by the obligation. In internal law, it was not the seriousness of the breach but the importance of the obligation breached which determined the crime. For example there might be a serious breach of an obligation to refrain from defamation, but that did not make the act of defamation a crime. Conversely, manslaughter was not a serious breach of the obligation to respect human life, but it was nonetheless a crime, because respect for human life was an important obligation.

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

3. Similarly, with regard to respect for the principle of equal rights of all peoples and their right of self-determination, mentioned in paragraph 3 (*a*), there could be serious breaches which were not international crimes. For example, the fact of not having admitted certain States to the United Nations for several years was a serious violation of the principle of equal rights of peoples, but it was not a crime. On the other hand, to keep a people under colonial rule was an international crime. Thus, a serious breach of a minor obligation was not an international crime, whereas even a minor breach of an essential obligation was. For example, any breach, irrespective of its gravity, of the obligation to refrain from the use of force against the territorial integrity or political independence of another State constituted the crime of aggression. It was therefore the importance of the obligation, not the importance of the breach, which determined the crime.

4. He questioned too, whether the breach of every international obligation whose purpose was to ensure respect for the principles stated in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 3, constituted an international crime. There were many obligations whose purpose was to ensure respect for those principles, but did that mean that a breach of any one of those obligations was a crime? Of course not. For example, refusal to admit certain States to the United Nations might be considered a violation of the principle of the equal rights of peoples, but it was not a crime. Again, an isolated act of discrimination constituted a violation of human rights, but that did not make it an international crime. *Apartheid* and genocide, however, were international crimes since they imperilled the existence of an entire people. The term "international crime" could not therefore be applied to breaches of all international obligations whose purpose was to ensure respect for the principle of the equal rights of peoples and of their right to self-determination, or respect for human rights and fundamental freedoms. Similarly, with regard to sub-paragraph (*c*), if a ship polluted the sea with oil, it would breach the obligation to conserve a resource common to all mankind, but would not be committing an international crime. On the other hand, if a State conducted large-scale nuclear tests near the territory of another State, that could be called an international crime.

5. Some internationally wrongful acts were therefore crimes, but there were others which merely constituted breaches of international law. An international crime might therefore be defined as "the breach of an obligation whose purpose was to safeguard a fundamental interest of the international community". Where the interests protected by the international obligation were less important, there was an offence but not a crime. In his opinion, that was the criterion by which "international crimes" could be distinguished from "international offences".

6. A distinction must also be made between the acts of individuals, which entailed only criminal responsibility, and the acts of subjects of international law such as States, which always gave rise to international responsibility. Criminal responsibility of persons could arise at the same time as the international responsibility of the State, but the Commission was at present concerned only with international responsibility.

7. Mr. AGO (Special Rapporteur), replying to Mr. Ushakov's last point, said that he had emphasized in his report that it was absolutely essential to draw a clear distinction between the international crimes of the State and the acts of individuals punishable under internal law, even if they were described as crimes against international law or crimes against the peace. Admittedly there appeared to be an increasing tendency on the part of the international community to attribute criminal responsibility to persons who, as organs of the State, had taken part in the perpetration of an internationally wrongful act by the State. That tendency had been particularly marked in the matter of genocide. The crime of genocide committed by the Nazis had been considered as a crime of the State, but the persons who had physically participated in perpetrating it had themselves also been punished under internal law. It would be wrong, however, to see a special form of international responsibility in the "right and duty" recognized as possessed by certain States to punish individuals guilty of certain acts. That would have to be made clear in the commentary. To make that distinction clearer in the text of the article, it might be better to speak of an "international crime of the State". The term "international crime" should not lead to any ambiguity since it was already established in international law in the definition of aggression adopted by the General Assembly.[2]

8. Sir Francis Vallat had brought out clearly the true sense of article 18 when, at the previous meeting[3] he had referred to the two separate paragraphs on which it was based: the maintenance of international peace and security, and the interests of the international community as a whole. Mr. Ushakov in turn had emphasized the basic aspects of an international crime, which he had defined as an offence against a fundemental interest of the international community. Sir Francis Vallat had shown that, by giving prominence to those two aspects, the Commission was inevitably moving towards the subsequent definition of the régime and forms of responsibility and the establishment of essential procedural safeguards for the protection of States.

9. There were two omissions in his draft article, one deliberate and one inadvertent. In paragraph 2 he had deliberately omitted the phrase "or in any other manner inconsistent with the Purposes of the United Nations", which appeared at the end of paragraph 4 of Article 2 of the Charter. In fact, the entire economy of article 18 was based on the pursuit of the Purposes of the United Nations: paragraph 2 dealt with the breach of one among several international obligations established for the purpose of maintaining international peace and security, and paragraph 3 with the breach of obligations safeguarding the pursuit of the other purposes of the United Nations. Nevertheless, as he had already said, if the reader was likely to misinterpret the omission of

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

[3] See 1373rd meeting, para. 14.

the last phrase of paragraph 2, it might be preferable to reproduce therein the wording of paragraph 4 of Article 2 of the Charter as a whole. The Commission should perhaps also reproduce in paragraph 2, which dealt with aggression, the wording used in article 1 of the Definition of Aggression, which seemed more restrictive than the one in the Charter.

10. He had, however, inadvertently omitted to refer in paragraph 3[4] to the rules accepted and recognized as "essential" and hence, in particular, to the rules of *jus cogens*. His intention had precisely been to make it clear that, for there to be an "international crime", the norm of international law breached would have to be one that was recognized as essential by the international community as a whole. That qualification was a fundamental one and its omission had been responsible for most of the misunderstandings which had arisen over paragraph 3.

11. Like Mr. Ushakov, he did not think that the breach of any one of the international obligations whose purpose was to ensure respect for the principles enunciated in subparagraphs (*a*), (*b*) and (*c*) constitued an international crime, but only the breach of certain of those obligations, namely, the ones recognized as essential by the sections of the international community. Was that limitation sufficient? Perhaps not. Perhaps it should be added, as suggested by Mr. Ushakov, that the obligation must be one whose purpose was to "safeguard a fundamental interest of the international community".[5] It was important not to broaden unduly the concept of an international crime, which should apply only in very serious, and fortunately rare, cases.

12. With regard to the concept of obligations *erga omnes* used by the International Court of Justice in its judgment in the *Barcelona Traction* case,[6] the fully shared Mr. Ushakov's views on the inadvisability of making use of it. Indeed, was prepared to go further than Mr. Ushakov and say that, not only the rules of the law of the sea, but virtually all the rules of customary international law were *erga omnes* rules. What in fact had the International Court of Justice meant? It had wished to distinguish between certain categories of obligations whose "breach" harmed the interests of all States. Clearly, if a State denied the vessel of another State passage through its territorial waters, it harmed the interests of only one State. But if a State committed an act of aggression, it infringed not only the rights of the State which was the victim of aggression, but the rights of all members of the international community, since the maintenance of peace was an interest of the entire international community. The concept of obligations *erga omnes* was dangerous, for it could be ambiguous.

13. He had emphasized the relationship between the concept of the "peremptory rule" and that of an "international crime". However, as Sir Francis Vallat had rightly remarked,[7] although it was difficult to imagine an international crime which was not a breach of an obligation arising from a peremptory rule of international law, it was questionable whether the converse was true, that the breach of any obligation arising from a peremptory rule was an international crime. There could be peremptory rules whose breach was not a crime. In diplomatic relations, for example, although the safeguarding of embassy archives might be considered, as suggested in some quarters, as a peremptory rule from which there could be no derogation, no one would claim that a breach of that rule was *ipso facto* an international crime. It would in any case be going too far to say that an international crime was the breach of a peremptory rule of international law. The provision would have to be more restrictively drawn, since the idea of an international crime and that of a peremptory rule where two separate concepts which, although they derived from the same principle, did not fully coincide. Only the breach of certain imperative rules could be considered an international crime.

14. The United Nations Conference on the Law of Treaties had, probably rightly, confined itself to a general definition of the concept of a "peremptory rule", since it had not been possible, for the purposes of the Convention on the Law of Treaties, to study all the rules of international law one by one, in order to determine which of were peremptory rules. The Conference had therefore simply laid down a general criterion for determining them and had left it to judicial opinion progressively to identify, as it had already done in internal law, those specific rules from which no derogation was possible.

15. But the Commission had to be more precise in the case it was now dealing with, because it could not leave international crime as a vague concept. The doctrine, jurisprudence and practice of States and of the United Nations clearly identified at present certain categories of internationally wrongful acts, such as aggression, genocide, *apartheid* and colonialism. Those were the categories of breach that had to be characterized as international crimes, and that was what the Commission must try to do, because if it confined itself to a vague general criterion, it would not be producing the clarification that was expected of it. It was therefore essential to define certain categories of internationally wrongful acts, such as those now mentioned in article 18, and also to provide a number of guarantees—perhaps even stricter ones than he had proposed.

16. Mr. Ushakov had said, in connexion with paragraph 2, that all rules of contemporary international law ultimately had been established for the purpose of maintaining international peace.[8] But the international law of a century ago, many of the rules of which were still in force, had not had as its essential purpose the preservation of peace. The wording he had used to describe for the present purposes the main categories of rules was that of the Charter: those categories were determined by the Purposes of the United Nations, as set out in Article 1 of the Charter.

[4] In the mimeographed version of document A/CN.4/291/Add.2.

[5] See para. 5 above.

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

[7] 1373rd meeting, para. 13.

[8] *Ibid.*, para. 39.

17. Paragraph 1 should be retained; if it were deleted, he would be unable to accept the rest of the article. He was quite agreeable to its being stated that some breaches were more serious than others, but he did not wish States to conclude from that that the Commission attached little importance to the breach of other international obligations. It should be emphasized above all that the breach of an international obligation of any kind whatsoever was an internationally wrongful act which entailed the responsibility of the State. That principle should remain intact. Only after it had been stated could a distinction be made between more serious and less serious internationally wrongful acts. How should internationally wrongful acts which were not international crimes be characterized? Was it possible to speak of a simple breach or an ordinary offence? Were breaches of international law which did not fall into the category of crimes really simple offences? Would not such treatment suggest that little importance was attached to such breaches? The Commission would have to answer that question in paragraph 4.

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

18. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the use of the term "delito" in the Spanish version would not create any great difficulty.

19. He thanked the Special Rapporteur for his interesting observations which would be very helpful for the preparation of the final commentary to article 18, particularly the explanation of his reasons for not using the term "peremptory norm" in paragraph 3. Of course, a peremptory norm of general international law was not only one from which no derogation was possible by agreement between States, it also prohibited any conduct which conflicted with it. The purpose of sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 3 was to indicate the various categories of norms of general international law the violation of which constituted an international crime.

20. Mr. RAMANGASOAVINA said that the principles stated in article 18 were already established in international law, even though they had not yet been confirmed in a convention having the force of positive law. In his presentation of the article, the Special Rapporteur had traced the development of opinion, showing that today's views were no longer those which had prevailed in 1930 when an attempt had been made to codify certain rules relating to State responsibility. The Conference for the Codification of International Law (The Hague, 1930) had distinguished three sources of international obligations—treaties, custom and the general principles of law. Since then, new principles had emerged and become established, such as the principles of the equal rights of peoples and their right of self-determination and the principle of respect for human rights and fundamental freedoms. The League of Nations Covenant had initiated a prohibition of recourse to war and required the States Members of the League to settle by peaceful means any dispute between them likely to lead to a rupture, giving them the choice of two procedures. It was the Briand-Kellogg Pact which, a few years later, had outlawed war. The new outlook of the international community after the Second World War had found expression in the Charter of the United Nations, which set out the major principles relating to international security. Whereas, in the period between the two World Wars, certain States had still taken pride in being colonial powers, as soon as the United Nations was established, wars of aggression had been considered genuine international crimes. Since article 18 followed that trend of thought, as reflected in the practice of States, he approved of it in principle.

21. With regard to the international cases cited by the Special Rapporteur, he wished to draw attention to two judgments of the International Court of Justice. In the *South West Africa* cases (1966), the Court had rejected the claims of Ethiopia and Liberia, on the ground that the applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of the claims.[9] Four years later, in the *Barcelona Traction* case, referring to the determination of subjects having a legal interest in the observance of international obligations, the Court had considered it necessary to make a distinction between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection.[10] The former obligations concerned all States and each of them could be held to have a legal interest in invoking the breach of an obligation of that kind. The Court had specified that those were obligations *erga omnes*. That development of jurisprudence was significant. The judgment rendered in the *South West Africa* cases had been adopted by a majority of one vote, that of the President, and the Court's decision had been much criticised, particularly by the younger States. It was not surprising, therefore, that in the *Barcelona Traction* case the Court had thought fit to make a kind of restatement of the principle.

22. With regard to legal writings, he had nothing to add to the Special Rapporteur's detailed report.

23. The wording of the proposed article could be improved in certain respects, but that would be the task of the Drafting Committee. Paragraph 1 stated a well-established principle which did not raise any difficulties. Paragraph 2 contained a sort of definition of an international crime, while paragraph 3 related more particularly to the international crime resulting from the serious breach by a State of an international obligation. That paragraph was acceptable, but it might raise difficulties when it became necessary to determine the seriousness of a particular breach. The principles of the equal rights of peoples and their right to self-determination, which were the subject of paragraph 3 (*a*), were considered sacrosanct by the great majority of States Members of the United Nations, and it was time they were enshrined in an instrument on State responsibility. Paragraph 4,

[9] *South West Africa (Ethiopia* v. *South Africa: Liberia* v. *South Africa)*, second phase, judgment, *I.C.J. Reports 1966*, p. 51.

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

which established the concept of an international delict, was an innovation. That new concept would still have to be discussed, but there was no doubt that, in addition to the serious breaches referred to in paragraph 3, there were breaches which came under the ordinary law of reparation and the protection of aliens. The expressions used in the different provisions of article 18 should be carefully examined, for they could raise practical problems. There was no denying, however, that the article would take the Commission a great step forward, especially when it was remembered that it had taken some twenty years for the Special Committee on the Question of Defining Aggression to reach a definition of that concept, and that the definition finally adopted was a rather unsatisfactory compromise.

24. Article 18 should not, however, raise any false hopes. It would be difficult to obtain the consent of practically all the members of the international community to a definition of an international crime. Again, it was very difficult to apply Chapter VII of the United Nations Charter; when the Security Council had to take concrete measures it was generally reduced to making a recommendation, like the General Assembly. The notions of a threat to the peace, a breach of the peace and an act of aggression were established in the Charter, as were the principles of the equal rights of peoples and respect for fundamental freedoms, but it was difficult in practice to take coercive measures against a State. There was some doubt about the practical efficacy of General Assembly resolutions such as resolution 2625 (XXV) to which was annexed the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, a war of aggression constituted a crime against the peace, entailing responsibility under international law, and resolution 3314 (XXIX) (Definition of aggression).

25. In that connexion, be stressed that, under Article 24 of the Charter, the great Powers were the principal guarantors of international security in so far as they could call a halt to the bellicose gestures of some States, but in reality they were responsible for international insecurity rather than international security. For instance, on the pretext of maintaining the balance of power, they took the liberty of setting up bases in parts of the world where their presence caused grave concern, thus creating a threat to peace; he was thinking particularly of an ocean which had recently been declared a peace zone by all the coastal States. Again, the proliferation of nuclear weapons, which constituted a threat to small States, conflicted with the decision of the international community to use nuclear energy for peaceful purposes only.

26. To sum up, the concept of an international crime entailed not only reparation, as formerly, but also sanctions. It was, however, precisely on the value of those sanctions, as provided for in Chapter VII of the Charter, that the efficacy of the instrument in preparation would depend. He nevertheless wished to pay a tribute to the Special Rapporteur, who had adopted a very pragmatic approach in preparing his draft. The Commission was moving towards a distinction between international crimes and international delicts with correspondingly different régimes of responsibility. Article 18 might raise some doubts about its application, but it must not be forgotten that it would be supplemented by other provisions which would further define its content. Moreover, the article was so worded that it could be applied to unforeseeable situations which might arise as international law evolved.

Mr. El-Erian resumed the Chair.

27. Mr. KEARNEY said Mr. Ramangasoavina had concluded that, despite his misgivings on various points, the Special Rapporteur's proposal for article 18 constituted a great step forward. The question was, however, whether it was a step in the right direction. It was sometimes tempting to start on a path that appeared attractive but it was always wise to try to ascertain where the path was leading.

28. Article 18 was of very great importance because it dealt with problems which could give rise to serious international disputes. That was true not only of paragraph 2, which referred to the problem of "maintaining international peace and security", but also of paragraph 3, which covered equally important problems.

29. Article 18 constituted in fact an attempt to remedy the deficiencies of the United Nations Charter. That was clear from paragraph 105 of the Special Rapporteur's report (A/CN.4/291 and Add.1-2), which caused him much concern. That paragraph began by stating:

> Of course, it is not for us to examine in detail the system provided for in Chapter VII of the Charter to permit specific action by the Security Council or to retrace the history of the circumstances which have prevented that system from being established.

The Special Rapporteur then proceeded to state that the question of the measures which might be taken within the United Nations system would be examined in detail at a later stage in the draft and added:

> We shall then indicate whether, and within what limits, such measures can be juridically characterized as *sanctions* which of them are of a *punitive* nature and purpose and which may be described more aptly as a means of constraint to enforce performance of the obligation which has not been complied with.

30. He believed it was quite inappropriate to begin an attempt to fill the gaps in the Charter with respect to the maintenance of peace and security by trying to define the term "international crime". Some thought ought first to be given to the reasons for the present world situation with regard to wars of aggression and the use of armed force. It was clear that the system provided for in Chapter VII of the Charter (Action with respect to threats to the peace, breaches of the peace and acts of aggression) did not operate at all in a conflict which opposed major Powers; that it operated to some extent in the case of conflicts between smaller Powers, when the major Powers supporting the contenders to the dispute wanted to avoid a confrontation; and that it operated well only in those rare cases in which the major Powers were in full agreement to prevent a minor conflict.

31. The result of that unsatisfactory experience had been that Article 2, paragraph 4 of the Charter, which outlawed war, had not in practice materially reduced the number of actual acts of aggression; and that situation was likely

to continue, not only because of man's aggressive instincts but also because the concept of unrestricted national sovereignty still dominated international life. For the international community to outlaw war in reality and not merely on paper, it would be necessary for human beings to learn to regard themselves as brothers and for the spirit of nationality to be replaced by the international spirit.

32. As matters now stood, however, the facts of aggression and belligerency had to be dealt with in the knowledge of the inadequacy of the system embodied in Chapter VII of the Charter, and in recognition of the fact that international violence remained a factor in international life. In those circumstances, the question was whether the Commission could do anything to improve the machinery of the Charter and bring it into accord with the lofty principles embodied in it. The problem was one of feasibility, of formulating a draft that was workable.

33. There was, however, one preliminary question, namely, whether it was wise to try to supplement the Charter in the context of State responsibility. It could be argued persuasively that there was no imperative need to deal with international crimes in article 18, the article could be confined to the provisions of paragraph 1, followed by a statement to the effect that the question whether an act was criminal or not had no effect upon the obligation of the State concerned to make reparation for the violation of its international obligations. There were sound arguments in favour of the view that a criminal code did not necessarily fall within the scope of international responsibility. Of course, the contrary view could also be put forward, on the grounds that the two questions of State responsibility and international crimes were closely interconnected.

34. Should the Commission decide to deal in its draft with criminal activities, it would have to decide how to approach the task. Some passages of the Special Rapporteur's commentary might be misconstrued as a proposal to deal with international crimes entirely without reference to the Charter. He was particularly concerned at the concept of "an international wrongful act *erga omnes*", which could mean that every State had a right to prevent such acts and possibly even to take action to punish them. A sweeping proposition of that kind would constitute a challenge to the terms of the Charter.

35. He had been struck by the contents of paragraph 140 of the report, which analysed the position taken by a number of Soviet authors, particularly with regard to the distinction between simple offences and "international crimes", regarding which those authors held that "besides the State directly injured, in the case of an 'international crime' other States may 'require compliance with the rules of international law' ". They also held that "the transgressor is liable to the immediate application of sanctions, including measures of military coercion, there being no need to wait until the transgressor has refused to meet the obligation to make reparations".

36. Further on, the Special Rapporteur had queried the view of one author—Schindler—that "the perpetuation of a colonial régime or a régime of racial discrimination should be regarded as an internationally wrongful act *erga omnes* and, as such, justifying non-military intervention by third States" (A/CN.4/291 and Add.1-2, para. 141). The same author had also asserted that, "in the case of an 'international crime', the third State might have recourse to reprisals against the perpetrator of the crime and against those who may have assisted the perpetrator" (*ibid.*).

37. The doctrinal views quoted in those passages of the report were inadmissible. It would be contrary to the Charter of the United Nations to allow any State the licence to take such action. In fact, to allow any such licence to third States would be extremely dangerous to international peace and security. It would be tantamount to allowing large States to intimidate small ones and to intervene in their affairs. He was firmly opposed to any approach of that kind and it should be totally excluded.

38. If, however, the Commission were to embark on a consideration of international crimes within the context of the Charter, the problem would be a very arduous one; it would mean attempting to make the Charter more workable in dealing with threats to international peace and security. The question would arise whether failure on the part of a State to observe certain provisions of the Charter should be regarded as an international crime. Article 25 of the Charter imposed upon Member States the obligation to carry out Security Council decisions, while Articles 36 and 37 conferred upon the Security Council the power to recommend appropriate steps for the settlement of disputes; would non-compliance by a State with such recommendations constitute an international crime? The same problem arose with regard to the powers of the Security Council under Chapter VII of the Charter to take action to avoid threats to the peace, to put a stop to breaches of the peace, and to impose sanctions upon States which committed acts of aggression. The question would thus have to be examined whether failure by a State to comply with a Security Council decision under such Charter provisions as Article 41 should be treated as an international crime. Under those provisions, the Council would call upon States to take measures "not involving the use of armed force", such as the interruption of economic relations and the severance of diplomatic relations.

39. Another important point was that crime could not be considered in a vacuum. If the Commission were to embark on a study of international crimes, would it not also have to take up the problem of punishment? If the Commission drafted a code of crimes, the work would probably have to be completed by drawing up a list of penalties. And the next problem would be that of devising machinery for imposing penalties upon States and enforcing those penalties. Regarding the possibility that the International Court of Justice might play a part in that respect, it was worth recalling that the *Corfu Channel* case [11] was the only case in which the Court had dealt directly with a problem involving an alleged breach of the peace and was also the only case in which a judgment of the Court had never been complied with. Although only one precedent could thus be cited, it

[11] Corfu Channel (*United Kingdom* v. *Albania*) (Merits), judgment, *I.C.J. Reports 1949*, p. 4.

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.