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Summary record of the 2315th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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able for it to examine the proposals made for that purpose.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he—and the Drafting Committee, too—had seen matters at the outset, the intent of the subparagraphs in question had merely been to compare restitution in kind and compensation. None of those provisions really affected the general problem of reparation or the particular problem of compensation. Article 6 *bis*, subparagraph 2 (*b*), for example, covered the case where a State would be satisfied to accept a form of reparation instead of demanding that the right of a part of its population to self-determination should be observed. The problem of full reparation raised by Mr. Mahiou was an entirely different matter, in which connection it should be noted that article 8 (Compensation), for example, spoke of compensation, not of full compensation. It was therefore difficult to see how compensation, within the meaning of paragraph 1 of that article, could pose a serious threat to the political independence and economic stability of a State. In his view, article 7 should therefore stand and its provisions should not be slanted towards either the general (art. 6 *bis*) or the particular (art. 8).

The meeting rose at 1 p.m.

2315th MEETING

Thursday, 1 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,[1] A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur) said that chapter II, section A, of the fifth report (A/CN.4/453 and Add.1-3) could be considered as a historical survey of the question of the consequences of international crimes of States, summarizing the discussions which had taken place in 1976 in the Commission[2] and in the Sixth Committee of the General Assembly, as well as the relevant literature, which was not always readily available to the Commission members. Section A was also essential because the 1976 debates and that doctrine were the starting points for identifying the issues discussed in chapter II, sections B and C.

2. According to article 19 of part 1 of the draft,[3] crimes consisted of serious breaches of *erga omnes* obligations designed to safeguard the fundamental interests of the international community as a whole. That did not imply, however, that all breaches of *erga omnes* obligations were to be considered as crimes. The basic problem was, therefore, to assess to what extent the fact that the breach seriously prejudiced an interest common to all States affected the complex responsibility relationship which arose even in the presence of "ordinary" *erga omnes* breaches.

3. The best approach was to distinguish between the objective and subjective aspects of the issue. From an objective viewpoint, the question was whether and in what way the severity of the breaches in question aggravated the content and reduced the limits of the consequences—substantive and instrumental—that characterized an "ordinary" *erga omnes* breach, namely a delict. From a subjective viewpoint, the question was whether or not the fundamental importance of the rule breached gave rise to any changes in the otherwise inorganic and not "institutionally" coordinated multilateral relations that normally arose in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrongdoing State and all other States or among the multiplicity of injured States themselves.

4. He would deal first with the substantive consequences of crimes, namely cessation and reparation. With regard to cessation, it did not seem that crimes presented any special character in comparison with "ordinary" wrongful acts, whether or not *erga omnes*. That was understandable, considering that, first, the obligation of cessation did not allow for a "qualitative" aggravation, attenuation or modification, and secondly, what was involved, even in the case of delicts, was an obligation incumbent on the State responsible even in the absence of any demand on the part of the injured State or States; chapter II, section B, of the fifth report presented some examples from the relevant State practice. An extended analysis of practice in that area would be appropriate at a later stage, after comments had been heard from the Commission and others.

5. The issue of reparation *lato sensu*, which encompassed *restitutio*, compensation, satisfaction and guarantees of non-repetition, was more complex than the issue of cessation. From an objective standpoint, some of the forms of reparation, especially *restitutio* and satisfaction, were subject in the case of delicts to certain limits. Thus it had to be determined whether, in consequence of a crime, such limits were subject to derogation and, if so, to what extent; in other words, whether, in the case of crimes, the "substantive" obligations were more bur-

[1] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[2] See *Yearbook... 1976*, vol. II (Part Two), pp. 69-122.

[3] For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*

densome for the wrongdoing State than in the case of "ordinary" breaches.

6. Three possible derogations could be envisaged: the excessive onerousness limitation for *restitutio*; the prohibition of "punitive damages", humiliating demands or demands affecting matters generally considered to pertain to the freedom of States; and demands for satisfaction or guarantees against repetition which seriously impinged on the domestic jurisdiction of the wrongdoing State.

7. As to the subjective aspect, it should be borne in mind that, unlike the case of cessation, the forms of reparation were covered by obligations which the responsible State was required to perform only upon demand by the injured party. Since a crime always involved, additionally or solely, States less directly injured than a "principal victim", the question arose whether, in the current state of international law, each of those States was entitled to claim reparation *uti singulus* or whether, according to the *lex lata* in the matter, some mandatory form of coordination was required among all the injured States. Examples of cases in which demands had been made by individual States (other than the "principal victim") as well as by international or regional bodies could be found in practice and were also presented in chapter II, section B, of the fifth report.

8. Once the *lex lata* on those points had been clarified, it would be possible to assess whether and to what extent it was appropriate to provide *correctifs*, or radical innovations, by way of progressive development, particularly with respect to coordinating the demands of several injured States.

9. In regard to the "instrumental" aspects of the possible special consequences of crimes, as compared with delicts, the first hypothesis that naturally sprang to mind was the reaction to aggression. While the Commission had already dealt with self-defence in part 1 of the draft,[4] it needed to provide clear definitions for some of the requirements traditionally considered to be conditions of self-defence, namely: immediacy, necessity and proportionality, the first two of which were often overlooked. It would also have to clarify under what circumstances and preconditions the right of "collective" self-defence included the use of armed force against an aggressor by States other than the main target of the aggression: was such recourse legitimate only at the express request of the victim State; was a presumption of that State's consent sufficient; or could the third State's reaction follow automatically in such situations?

10. The Commission should adopt a position on those issues even if it preferred not to lay down express provisions governing them but rather to refer simply to the "inherent right of individual or collective self-defence". Nevertheless, a simple commentary on the meaning of that "inherent right" would not suffice to prevent dangerous misunderstandings, especially with regard to the requirements of immediacy and necessity which are more frequently overlooked.

11. However, the problem of resort to force in response to an international crime was not solely a question of self-defence against armed attack. The question arose whether armed measures were not admissible also in order to bring about the cessation of crimes other than aggression, a problem which presented above all an objective aspect. It had to be established whether resorting to force in order to obtain cessation was admissible in circumstances other than those justifying self-defence against armed attack, namely, against the crime of aggression. He had in mind crimes listed in article 19, paragraph 3, subparagraphs (*b*) to (*d*). Among the problems which had to be considered in that context were those of armed support to peoples oppressed by alien domination or more generally by regimes committing grave violations of the principle of self-determination; and armed intervention against a State responsible for large-scale violations of fundamental human rights or for perpetrating genocide or violent forms of "ethnic cleansing", for example.

12. If in such cases the use of armed force was to be deemed admissible *de lege lata* or desirable *de lege ferenda*, the question arose as to whether that would constitute the standard sanction for a crime, namely, a reaction against the wrongdoing State under the law of State responsibility, or whether it would correspond to a different rationale, such as that underlying the state of necessity or distress—circumstances which ruled out illegitimacy but, unlike self-defence, were not characterized by the fact of authorizing a direct reaction against the perpetrator of a particularly serious international breach.

13. Another problematic aspect of resort to force in response to a crime was whether armed countermeasures were admissible when they were intended not to bring about the cessation of a crime in progress but to obtain reparation *lato sensu* or adequate guarantees of non-repetition. An example was the *debellatio* of a State which had started a war of aggression, including military occupation of that State by the victors or other sanctions imposed by force of arms in order to "undo" all the consequences of the crime. The situation of post-war Germany was a case in point. More recently, the possibility, contemplated in paragraphs 33 and 34 of Security Council resolution 687 (1991) of 3 April 1991, of using force to guarantee the disarmament obligations imposed on Iraq by that resolution, raised the question of how far resort to force was legitimate in cases of such a kind.

14. The subjective aspect of the instrumental consequences of crimes involving armed force gave rise to a different problem: did the admissibility of armed measures vary depending on whether they were taken by one or more injured States *uti singuli* or by the community of States *uti universi*? Were such measures considered inadmissible if they were resorted to unilaterally by one State or a small group of injured States and legitimate if they were the expression of a "common will" of the organized international community?

15. That problem was central to the entire regime of crimes, not just to the regime of armed measures aimed at cessation. It arose in connection with a number of substantive consequences and affected all the instrumental consequences whenever the regime of international crimes of States involved the possibility of a competence of the international community as a whole or of the organized international community.

[4] Ibid.

16. Practice offered more than one example of injured States dealing with the consequences of a very serious breach—particularly one in progress—by means of the intervention of an international body belonging to a system of which the wrongdoing State was also a member. The actions of United Nations organs, and the Security Council in particular, were of special relevance in that respect. A number of examples of such "organic" armed or non-armed reactions to very serious breaches were presented in chapter II, section B, of the fifth report.

17. Precedents of that type were invoked to support the notion that the competence to adopt sanctions against particularly serious international delinquencies did not, and should not, belong to States *uti singuli*. The question was thus raised whether that competence should not belong instead, more or less exclusively, *de lege lata* and/or *de lege ferenda*, to the so-called organized international community, as represented by the United Nations and, in particular, the Security Council as the organ endowed with the greatest powers of action.

18. A considered juridical answer to such a question for the purposes of codification or progressive development of the legal consequences of crimes, as distinguished from a mere *constat* of actual conduct, would require an analysis of issues situated at the very apex of the international legal system. Those issues ranged from the nature of the international community, the inter-State system and the organized international community to the nature of the United Nations and the functions and powers of its organs.

19. The central issue was whether and to what extent the various functions and powers of the United Nations organs in the areas of international law governed by article 19 of part 1 were or should be made legally suitable for the implementation of consequences of international crimes. Three specific questions then arose: first, *de lege lata*, whether the existing powers of United Nations organs, among them, the General Assembly, the Security Council, and ICJ, were such as to include the determination of the existence, attribution and consequences of the wrongful acts contemplated in article 19; secondly, *de lege ferenda*, whether and in what sense the existing powers of those organs should be legally adapted to such specific tasks as the determination of the existence, the attribution and the consequences of the internationally wrongful acts in question; and thirdly, to what extent the powers of United Nations organs affected or should affect the *facultés*, the rights or the obligations of States to react to the internationally wrongful acts in question, either in the sense of substituting for individual reactions, or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

20. Starting with the first, *de lege lata*, position, as presented in chapter II, section B, of the fifth report, it should be stressed that the issue was not whether a United Nations body had in fact taken some action, in the form of a decision, recommendation or a concrete measure, with regard to international crimes as defined in article 19, paragraph 3. The question was, *de lege lata*, whether any United Nations body had exercised, as a matter of law (written or unwritten), the specific function of determining that such conduct had occurred and that it had constituted a crime of one or more given States, and of determining the resulting liability and applying sanctions or contributing to their application. Only on such a basis would it be possible to determine whether a legally organized reaction to international crimes of States was provided *de lege lata*.

21. It was difficult to answer that question by comparing the various kinds of international crimes contemplated in article 19, paragraphs 3 (*a*) to 3 (*d*), with the powers vested in the organs of the United Nations.

22. If one combined the various kinds of crimes contemplated in article 19, paragraphs 3 (*a*) to 3 (*d*), on the one hand, with the functions and powers of United Nations organs, on the other hand, one would find it difficult to answer the above question. For the present purpose, he would confine himself to picking a number of points from a list that would otherwise be longer.

23. *Ratione materiae*, the General Assembly, as the most representative body of the inter-State system, was surely, under the Charter of the United Nations, the competent organ for the promotion and protection of human rights and of self-determination of peoples. At the same time, the Charter did not endow the Assembly with such powers as would enable it to produce an adequate reaction to violations of human rights and self-determination or of other obligations of the kind contemplated in article 19, paragraphs 3 (*b*) to 3 (*d*). With regard to such acts, the Assembly could not go beyond non-binding declarations of unlawfulness and of attribution and non-binding recommendations of reaction by States or by the Security Council.

24. The Security Council, for its part, was competent *ratione materiae* for the maintenance of international peace and security. Its powers under the Charter of the United Nations enabled it to provide for an adequate reaction in the form of economic, political or military measures against the crime of aggression mentioned in article 19, paragraph 3 (*a*). The Council could also react through the same measures against any crime, among those envisaged in subparagraphs (*b*) to (*d*) of paragraph 3, provided, however, that they corresponded to situations of the kind contemplated in Article 39 of the Charter.

25. The Security Council, however, was empowered under Chapter VII of the Charter to assess discretionally any situation involving a threat to peace, a breach of the peace or an act of aggression, with a view to maintaining or restoring international peace and security. The Council had neither the constitutional function nor the technical means to determine the existence, the attribution or the consequences of any wrongful act. Its competence to decide on the existence of one of those situations was confined to the purposes set forth in Chapter VII of the Charter.

26. That consideration, however, did not dispose entirely of the issue of the Security Council's competence. Although that organ had not been entrusted by the drafters of the Charter of the United Nations with the task of determining, attributing and sanctioning the serious breaches in question, a different situation might exist at present. The question might indeed be raised, in particular, whether recent practice did not show that the scope of the Council's competence had undergone an evolution

with regard precisely to the "organized reaction" to certain types of particularly serious international delinquencies. He was referring to some recent less easily justifiable decisions, under Charter language, such as Council resolution 687 (1991) in so far as it imposed upon Iraq reparations for "war damage", Council resolution 748 (1992) of 31 March 1992 which allowed the taking of measures against the Libyan Arab Jamahiriya for the failure to extradite the alleged perpetrators of a terrorist act, and Council resolution 808 (1993) of 22 February 1993 on the establishment of an ad hoc international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

27. In order to regard that practice as concurring to consolidate the Security Council's competence in the area of State responsibility for crimes—a problematic proposition—one would have to produce convincing arguments to the effect that it constituted a "juridically decisive" practice, reflecting a customary rule or a tacit agreement accepted or adopted by United Nations Member States and liable as such to derogate from the written provisions of the Charter.

28. Actually, ICJ was the only existing permanent body which possessed the competence and the technical means to determine the existence, attribution and consequences of an internationally wrongful act, including possibly a crime of State. It was the function of the Court under Article 38, paragraph 1, of its Statute "to decide in accordance with international law" and under Article 59 its pronouncements possessed "binding force... between the parties" to the dispute. Those two features of the Court's function, as well as its composition, made it in principle more suitable than any other United Nations organ to rule on the existence and legal consequences of an internationally wrongful act. There were, however, two sets of serious difficulties.

29. First, the Court's system involved a major difficulty in that its jurisdiction was essentially voluntary. For the Court to be entitled to exercise its jurisdiction with regard to a crime, its competence would have to derive from a prior acceptance by the alleged wrongdoer of the Court's jurisdiction in such terms as to allow the injured State or States to summon unilaterally the alleged wrongdoer before the Court. That could result either from the acceptance by all States (wrongdoer included) of the so-called optional clause of Article 36, paragraph 2, of its Statute, or by virtue of multilateral, bilateral or unilateral instruments binding the participating States in such a way as to allow unilateral applications to the Court against the wrongdoer. The only other way would be a very improbable ad hoc acceptance of the Court's competence by the wrongdoer itself.

30. Secondly, a series of difficulties arose from the absence of organs juridically empowered to investigate the facts, to play the role of public prosecutor in bringing a case to ICJ and to determine the sanctions. The implementation of any State's liability pronounced by the Court would thus escape any control by the Court itself. Any "sanction" other than the mere finding of the breach and its attribution would thus have to be determined and applied either by the injured party or parties or be left to the discretionary action of other United Nations organs.

31. He then turned to the second question identified in chapter II of the report, namely, the question *de lege ferenda*, whether the existing functions and powers of United Nations organs should be legally adjusted to the determination of the existence, the attribution and consequences of international crimes of States. The question arose there whether the Security Council—with a restricted composition in which some members enjoyed a privileged status—should be vested with the competence to act for the "international community as a whole". As a political body, the Council was entrusted with the essentially political function of maintaining peace, so that it operated with a high degree of discretion; it acted neither necessarily nor regularly in all the situations that would seem to call for action; it operated, on the contrary, in a selective way. The Council was not bound to use uniform criteria in situations which might seem to be quite similar; crimes of the same kind and gravity could be treated differently, or not be treated at all. Indeed, serious crimes could be ignored. Lastly, the Council was under no duty to motivate its decisions or its action or inaction. That fact precluded contemporary or subsequent verification of the legitimacy of its choices.

32. Those difficulties could perhaps be accepted as unavoidable drawbacks of the prevention and repression of aggression and other serious breaches of the peace. In that respect, it could be accepted, for lack of a better solution, that a political body should operate without the guarantees of a judicial process, which was inevitably uncertain and always much too slow: *vim vi repellere*, as in the case of self-defence, calling for immediate reaction.

33. Whatever the position regarding aggression, the propriety of relying too much on political bodies for the implementation of State liability for crimes was highly questionable with regard to the other cases contemplated in article 19, paragraph 3. The crimes of the kind described in subparagraphs (*b*) to (*d*) of that paragraph should be met by judicial means. The history of the penal law in national societies showed that, in the repression of criminal offences, the following three features were essential: (*a*) subjection to the rule of law, procedural as well as substantive; (*b*) regular, continuous and systematic conduct of criminal prosecution and trial; and (*c*) impartiality—or non-selectivity—of such action as to investigation, prosecution and pronouncement. For those reasons, the Security Council did not seem to meet the requirements of criminal justice or indeed those of justice in general.

34. A further matter on which the Commission should provide him with guidance related to the kind of dispute settlement provisions to be included in the draft. That matter was dealt with in article 4 (*b*) of part 3 as proposed by the previous Special Rapporteur, Mr. Riphagen,[5] but was not covered in part 3 as proposed in the fifth report presently under consideration. The Commission should consider the possibility of improving on the text proposed in 1985 and 1986 by Mr. Riphagen, with special reference to the Court.

[5] For the texts of draft articles 1 to 5 and the annex of part 3 proposed by the previous Special Rapporteur, see *Yearbook... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

35. The last issue identified in chapter II, section B, of the fifth report was the relationship between the reaction of the organized community through international bodies such as United Nations organs and the individual reaction of States. The possibility of the organized community adopting measures against a wrongdoing State posed the problem of harmonizing the exercise of that competence with the carrying out of those measures which the injured State or States might still be entitled to adopt unilaterally, and he gave a number of examples in that connection.

36. As to measures not involving force, resort to measures short of force in reaction to a crime—unlike the adoption of measures involving force—did not give rise to problems of admissibility; those questions were generally settled in the affirmative with respect to any *erga omnes* breach. The problem which did arise was that of the possible aggravation of the measures taken by way of reaction to crimes. Such aggravation might take the form of the removal or the attenuation of the conditions or limitations to which resort to countermeasures was subjected.

37. Regarding the procedural limits, the question arose whether, in the case of crimes resort to countermeasures should not be admissible even in the absence of prior notification and also prior to the implementation of available dispute settlement procedures.

38. With respect to the substantive limitations, it was possible to conceive the setting aside, in the case of crimes, of such limitations as those concerning: (*a*) extreme measures of an economic or political nature; (*b*) measures affecting the independence, sovereignty or the domestic jurisdiction of the wrongdoer; (*c*) measures affecting "third" States; and (*d*) "punitive" measures. Illustrations of those four possibilities were given in the fifth report.

39. As to the "subjective" element, it should be noted that the following "subjective-institutional" questions arose:

(*a*) Did the possible attenuations of the limitations of recourse to "peaceful" countermeasures apply only to the "principal victim" of a crime or should they benefit all States in any way injured? Or did the entire handling of any countermeasures belong to the organized international community?

(*b*) If such "collective" competence existed—or ought to be provided for—also in respect of measures not involving the use of arms, would it be an "exclusive" or only a "primary" competence?

(*c*) In the latter case, in what manner would the "collective" competence be coordinated with the residual faculty of unilateral action on the part of the injured State or States?

40. With regard to the problem of obligations to react on the part of injured States, the previous Special Rapporteur had singled out those obligations in his sixth report.[6] Foremost among them was the obligation not to recognize as "legal and valid" the acts of the wrongdoing State pertaining to the commission of the breach or the follow-up thereof. Examples of the practice in the matter—which would be analysed at the appropriate time—were to be found in his fifth report.

41. In addition to the duty of non-recognition there was the obligation not to help or support the wrongdoing State in maintaining the situation created by the unlawful act. International practice showed a trend in favour of recognizing, on the part of States, an obligation not to assist a wrongdoing State in enjoying or preserving any advantages resulting from acts of aggression and other major breaches. Examples taken from State practice were contained in the report.

42. Moreover, States were under an obligation not to interfere with the response to a crime on the part of the "international community as a whole" and to carry out such decisions as were adopted by that community in connection with the sanctioning of a crime.

43. Having thus identified the main issues arising (*de lege lata* or *de lege ferenda*) with regard to the consequences of international crimes of States, the Special Rapporteur tried to put forward some tentative considerations on the main difficulties involved. Surely, the most important questions with regard to the consequences of international crimes were those which related to the role of the organized international community and, in particular, to that of United Nations organs. Those questions were far too difficult for the Special Rapporteur to submit, at the present stage, more than merely tentative reflections. The general picture of the international society—and in particular the picture of the so-called organized international community—was actually so grim as to justify the most pessimistic forecasts about the possibility of finding appropriate solutions for an organized implementation of the possible special consequences of international crimes of States. In the face of the impervious difficulties involved, one might even be led to conclude that it would be better to fall in with those who, like at least two members of the Commission, were not in favour of giving effect in parts 2 and 3 to article 19 of part 1.

44. Those who had criticized the adoption of article 19 could, of course, find arguments in the difficulties to which he had referred and also in the work of the Commission itself. With regard to the Commission he was thinking both of the broad thrust of the articles on State responsibility and of the draft Code of Crimes against the Peace and Security of Mankind, and also of the questionable approach adopted by the majority of the Commission concerning fault, including *dolus*, punitive damages and other consequences that did not come strictly within the context of reparation. Those considerations provided the basis for chapter II, section C, of the fifth report. The main question raised in that section was whether international criminal responsibility should be incurred by States and/or individuals.

45. Were it not for article 19 of part 1, one might assume that the Commission's work on international responsibility was based upon an implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a penal responsibility of individuals on the other. After an initial phase of indecision, the work on the draft Code of Crimes against the Peace and Security of Mankind was firmly based on the assumption that

[6] See *Yearbook... 1985*, vol. II (Part One), p. 3, document A/CN.4/389.

the Code would cover only crimes of individuals, though the individuals in question would have close ties with the State. According to the said dichotomy, individuals would be amenable to criminal justice, but States would not. On the basis of the maxim *societas delinquere non potest* and of the negative attitudes in the Commission with regard to fault and the strictly compensatory nature of international liability, it could be argued that article 19 had no place in the draft on State responsibility and that such an illogical and contradictory element should be done away with. He, however, could neither subscribe unconditionally to the notion that criminal responsibility would be incompatible with the nature of the State under existing international law nor to the view that the international responsibility of the State was confined *de lege lata* within a strict analogy with civil responsibility under municipal law.

46. The first and main cause of the alleged incompatibility of criminal liability with the nature of the State was the maxim *societas delinquere non potest.* That maxim was surely justified for juridical persons of municipal law, but it was doubtful whether it was justified for States as international persons. Although States were collective entities, they were not quite the same, *vis-à-vis* international law, as the *personnes morales* of municipal law. On the contrary, they seemed to present the features—from the viewpoint of international law—of merely factual collective entities. That obvious truth, concealed from students by the rudimentary notion of juridical persons themselves as "factual collective entities", found the most obvious recognition in the commonly held view that international law was the law of the inter-State system and not the law of a world federal State.

47. As to the second cause of alleged incompatibility, however strongly it was believed—as many members of the Commission seemed to—that the liability of States for internationally wrongful acts did not go beyond the strict area of reparation, the practice of States showed that the entities participating in international relations were quite capable of criminal behaviour of the most serious kind. Even in the words of Drost—a strong opponent of any "criminalization" of States: "Undoubtedly, the 'criminal' State is far more dangerous than the criminal person by reason of its collective power".[7] The study of international relations—whether from the viewpoint of politics, morality or law—also showed that just as they could act delinquently towards each other, States were not infrequently treated as delinquents by their peers, the treatment being expressly or implicitly punitive—and often very heavily punitive.

48. In the most ordinary cases of internationally wrongful conduct, the penalty was either implicit in the fact of ceasing the unlawful conduct and making reparation by restitution in kind or compensation, or visible in that typically inter-State remedy which was known by the term "satisfaction". In the most serious cases, such as those calling for particularly severe economic or political reprisals, or outright military reaction, followed by more or less severe peace settlements, the punitive intent pursued and achieved by the injured States was manifest. In that connection, Drost had singled out the various forms of "political" measures against States, and distinguished them from "legal penalties", against individual rulers. Those political measures, Drost had said, took on "all sorts of forms, ways and means"; and he listed a variety of measures such as:

> Territorial transfer; military occupation; dismantling of industries; migration of inhabitants; reparation payments in moneys, goods or services; sequestration and confiscation of assets; armaments control; demilitarization; governmental supervision, together with many other international measures ... Besides the two general categories of economic and military sanctions.[8]

Drost apparently did not suspect that most of the measures he had listed consisted of far more severe sanctions than just "civil" remedies. In addition, they were all such as to affect—some of them dramatically—the very peoples he rightly wished to spare from sanction by confining the "legal penalties" to the rulers.

49. The fact that numerous scholars and diplomats of international law preferred to conceal such obvious truths under the fig-leaf represented either by the omission of any reference to a punitive connotation of liability for internationally wrongful acts or by the suggested express indication that the only function of countermeasures was to secure reparation, did not alter the hard realities of the inter-State system. It was indeed recognized by the most respected authorities that international liability presented both civil and penal elements, the prevalence of one or the other depending upon the objective and subjective features and circumstances of each particular case.

50. Obviously, a staunch critic of the idea underlying article 19 of part 1 could contend—not without some justification—that, if States were at present not *societates* or *personnes morales* in the proper sense of the term, they would inevitably have to become so within an organized legal community of mankind. States would then not differ, in essence, from the subdivisions of a more or less decentralized federation. In so far as it could be assumed that such a scenario was a valid prediction, the same staunch opponent of the idea embodied in article 19 could further contend that the right way for the Commission to proceed would be precisely to maintain the distinction he had just mentioned, in which connection he would refer members to the distinction between a draft code of crimes against the peace and security of mankind covering exclusively the penal liability of individuals and a draft on State responsibility contemplating merely the civil liability of States. According to the same staunch opponent, that "civil" liability of States should be codified and developed by a convention on State responsibility of which article 19 of part 1 of the draft would not be a part. That, always according to the same opponent, would be the way to harmonize the Commission's two existing drafts with the presumable lines of progressive development of the international system towards the "ultimate" end—to use Lorimer's adjective[9]—represented by the establishment of a more or less centralized (or decentralized) organized community of mankind or world federation.

[7] P. N. Drost, The Crime of State (Leiden, A. W. Sijthoff, 1959), Book I, *Humanicide: International Governmental Crime against Individual Human Rights,* p. 294.

[8] Ibid., pp. 296-297.

[9] J. Lorimer, *The Institutes of the Law of Nations* (W. Blackwood and Sons, Edinburgh and London, 1884), vol. II, pp. 183 *et seq.*

51. It seemed equally evident, however, that the establishment of such a legal community was very far from imminent. Even the 12 European Community countries were very far from having reached that stage. And the inevitable consequence was that mankind would for a long time to come remain, for good or ill, in that condition of lack of integration which was, at one and the same time, the main cause and the main effect of what sociologists and lawyers called, in a technical sense, the inter-State system. Within such a system, States seemed bound to remain, whether one liked it or not, under an international law which was inter-State law, not the law of the international community of mankind. States remained essentially factual and not juridical, collective entities. As such, they remained not only able to commit unlawful acts of any kind—notably the so-called crimes as well as the so-called delicts—but equally susceptible of reactions quite comparable, *mutatis mutandis*, to those which are met by individuals found guilty of crimes in national societies.

52. Much had rightly been written in order to condemn "collective" responsibility, and he was indeed firmly convinced that it was a decidedly primitive, rudimentary institution. It was, however, difficult to deny the following facts:

(*a*) The inter-State system, from the standpoint of legal development, presented rudimentary aspects that could not be ignored without danger;

(*b*) One such aspect was that States did commit, together with delinquencies that could be classified as "ordinary" or "civil", delinquencies that definitely qualified, because of their gravity, as "criminal" in the common sense of the term;

(*c*) Another aspect was that, for such grave delinquencies as aggression, States adopted forms of reaction which even a strong opponent of the penal liability of States like Drost recognized as so severe and numerous as those listed in the report. Drost classified such forms of reaction, which he termed "political" measures, as opposed to "individual penalties", as "territorial, demographic and strategic; industrial, commercial and financial; even cultural, social and educational; last [but] not least, technological and ideological".[10]

53. It was really hard to believe that measures of such tremendous weight were not, *mutatis mutandis*, abundantly similar, in their effects, to the penalties of national criminal law. It would thus seem that, for some time to come, lawful reactions to the kinds of crimes contemplated in article 19 of part 1 should be available. The Commission should therefore provide, in parts 2 and 3 of the draft, follow-up provisions to article 19.

54. The problems to be solved, however, seemed to be *de lege lata* or *de lege ferenda*, even more difficult than those, not yet resolved satisfactorily, of collective security. That was especially true for those problems that were related to the existing structure of the so-called organized international community.

55. A number of issues involved, *de lege lata* or *de lege ferenda*, had been summarily and tentatively evoked, others had not. Subject to any further additions and corrections from his colleagues, he wished to raise three more issues.

56. One of the most crucial problems was that of distinguishing the consequences of an international State crime for the State itself—and possibly the State's rulers, on the one hand, and the consequences for the State's people, on the other. Drost—a not very consistent opponent, as shown, of the "criminalization" of States—had rightly stressed the moral and political necessity of separating the political measures against the delinquent State from the individual penalties against its rulers, the former measures to be of such a nature as to spare the "innocent" population of the "criminal" State. One could not but agree wholeheartedly. Considering, however, the kinds of measures Drost himself seemed to admit so liberally—measures that seemed to go pretty much beyond those contemplated in Articles 41 and 42 of the Charter of the United Nations—it did not seem easy to make the distinction. That was especially true with regard to economic and peace settlement measures (for the case of aggression), some of which seemed to hit the people themselves directly. There was also a further question that neither the sociologist, the lawyer, nor the moralist should ignore—though Drost himself seemed to ignore it totally: could it be assumed in any circumstances that a people was totally exempt from guilt—and liability—for an act of aggression conducted by the obviously despotic regime of a dictator enthusiastically applauded before, during and sometimes even after the act? The second problem was that of State fault. Should the Commission, or should it not, reconsider that matter which it had set aside, in his view unconvincingly, with regard to "ordinary" delinquencies? Was it possible to deal, as "material legislators", with the kind of breaches contemplated in article 19 without taking account of the importance of such a crucial element as wilful intent (*dolus*)?

57. The last problem to which he felt bound to call attention concerned article 19 itself. He would leave aside the seriously problematic features of that article's formulation—a formulation which was perhaps less difficult in the original version proposed by the previous Special Rapporteur in 1976.[11] Those features, not the least of which was the unclear nature of the provision compared with the so-called secondary character of the other articles in the draft, could be reconsidered by the Commission on second reading. For the time being, he would confine himself to a certain number of substantive questions.

58. In the first place, if there existed substantial or, in any event, significant differences in the manner in which the various specific types of crime were dealt with, was it in fact appropriate to elaborate a single dichotomy between "crimes" and "delicts"? Would it not be preferable, for example, to distinguish aggression from other crimes? Or to make several subordinate distinctions, so as to avoid placing on the same footing specific acts that were obviously quite remote from one another and would or should entail equally different forms of responsibility?

[10] Op. cit., p. 297.

[11] See footnote 2 above.

59. Secondly, the exemplary list of wrongful acts constituting crimes contained in article 19 dated back to 1976. Were those still the best examples for identifying the wrongful acts which even today the international community as a whole considered, or would do well to consider, as "crimes of States"? In other words, could not that list, if indeed it was desirable to maintain a list, be "updated"?

60. Thirdly, in examining practice, it was often difficult to distinguish cases of crime from cases of delict, especially where very serious delicts were involved. Might not the reason lie partly in the manner in which the general notion of crime contained in article 19 was formulated, with wording characterized by certain elements that perhaps rendered it difficult to classify a breach as belonging to the category of crimes or that of delicts and hence to ascertain which unlawful acts now came, or ought to be placed, under a regime of "aggravated" responsibility.

61. Fourthly, if it was true that there existed a certain gradation from ordinary violations to "international crimes", especially from the standpoint of the regime of responsibility they entailed, was it in fact proper to make a clear-cut nominative distinction between "crimes" and "delicts"?

62. Mr. THIAM, supported by Mr. YANKOV, said that, in view of the wealth of material contained in the fifth report on State responsibility, any substantive discussion of the topic should be deferred until the Commission's next session.

63. The CHAIRMAN said that any member who wished to speak on the topic at the present session could, of course, do so. However, since the number of speakers was likely to be limited, the debate would probably not be representative of existing trends. He therefore suggested that in the report of the Commission on the work of its forty-fifth session (1993) the topic of State responsibility should be confined to the introduction just given by the Special Rapporteur, on the understanding that any views expressed at the present session would be reflected in the summary of the debate in the report of the Commission on the work of its forty-sixth session (1994). The Special Rapporteur might receive from the Sixth Committee the guidance which he was requesting concerning the questions he had raised.

64. Mr. ROSENSTOCK said that he could agree to defer the discussion to the next session. However, he wished to make it clear that his silence on the Special Rapporteur's comments on current activities in the United Nations system should not be interpreted as indicating either agreement or disagreement. The distinction made in article 19 of part 1 remained a disturbing example of the "taxonomania" in the first part of the report. If the Commission followed that approach, its work on the topic would not be completed within anyone's lifetime. Instead of making such distinctions, the Commission needed to consider a continuum of wrongful acts and ways of dealing with them.

65. Mr. VERESHCHETIN said that the Special Rapporteur's introduction of his fifth report had been brilliant but also tendentious in that he had tried to demonstrate that the codification of norms concerning the consequences of crimes was an impossible task. He could not agree. He supported Mr. Thiam's suggestion to defer the discussion: the report of the Commission on the work of its forty-fifth session should merely state that the fifth report on State responsibility had been introduced and that the substantive discussion of the topic would begin in 1994.

66. Mr. KUSUMA-ATMADJA said he agreed that the discussion of the topic should be deferred. The Special Rapporteur's introduction had been brilliant: intellectual courage was indeed needed for the progressive development of international law. When the Commission had been established, international law had consisted essentially of inter-State law. The law of the sea provided a good example of how things had moved on since then. International law was in a period of transition, and the problems went far beyond inter-State law. Deferral of the discussion would not solve what was a very long-term problem.

67. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was apparent that there would not be an exchange of substantive views at the present session, although comments from the Commission would have helped him in his future work on the topic. The question of crimes was a difficult one, and it was possible that even in 1994 he would not be able to produce anything more than another list of questions. However, he would do his best, and advice might be forthcoming from academic circles.

68. On the point made by Mr. Rosenstock, it was the duty of any international lawyer to look as objectively as possible at any problems raised by the practice of States or international bodies that was relevant to the topic and to evaluate how existing international instruments had worked in the past and would work in the future with respect to crimes. He was not sure what Mr. Vereshchetin meant by "tendentious". In the report he had stated his doubts about certain problems and some recent practices in the United Nations system. The problem was one of crimes, which States certainly did commit. He was torn between the position of those who wanted article 19 of part 1 to be dropped and that of Mr. Vereshchetin, who wanted something to be done on the question of crimes. He simply did not know what to do, for he was genuinely perplexed by the contrast between the legal means available and the need to curb the phenomenon of criminality.

69. Mr. AL-KHASAWNEH, speaking on a preliminary basis, recalled that the previous Special Rapporteur had envisaged a "three-tier" system in terms of the consequences of delicts, crimes, and the crime of aggression which carried additional consequences to those of other crimes.

70. He also recalled that in an earlier report on the topic of the draft Code of Crimes against the Peace and Security of Mankind, Mr. Thiam, when commenting on the fact that "criminal law was steeped in subjectivity",[12] had spoken of the fact that the reprobation created in the public conscience as a reaction to the commission of a certain act was never uniform. With that in mind he wished to ask the Special Rapporteur whether he wished to maintain the classification of his predecessor, Mr. Ri-

[12] *Yearbook... 1985*, vol. II (Part One), p. 69, document A/CN.4/387, para. 47.

phagen, as far as the additional consequences of the crime of aggression were concerned.

71. Mr. ROSENSTOCK said that he had not intended to suggest any impropriety in the Special Rapporteur's reference to decisions taken in the United Nations system. However, he doubted the correctness of what the Special Rapporteur had said and wanted to emphasize the point which he had made about the interpretation of his own silence.

72. If there was any substantive discussion of the topic at the present session it must be included in the 1993 report. It would in fact be better not to have such a discussion; that report could then refer merely to the exchange of a few preliminary remarks.

73. Mr. THIAM said he endorsed the last point made by Mr. Rosenstock.

74. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was glad that Mr. Rosenstock was not taking a stand for or against any position on the issue. He had not done so either: he had merely described the perplexing legal problems.

75. Mr. AL-KHASAWNEH said he was still puzzled as to why a "small aggression", for example, should carry more consequences than a large-scale genocide.

76. Mr. ARANGIO-RUIZ (Special Rapporteur) said, in response to Mr. Al-Khasawneh, that in his report and his introduction he had indeed referred to the need to distinguish acts of aggression from other crimes. Acts of aggression posed less of a problem because there was a specialized United Nations body to deal with them, at least for the purposes of the maintenance of peace and security. The Commission was in a more difficult position with respect to other crimes.

77. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to proceed along the lines just suggested by Mr. Rosenstock and supported by Mr. Thiam.

It was so agreed.

The meeting rose at 1.05 p.m.

2316th MEETING

Tuesday, 6 July 1993, at 10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,[1] A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

CONSIDERATION OF DRAFT ARTICLE 1, PARAGRAPH 2, AND OF DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* OF PART 2, AS ADOPTED BY THE DRAFTING COMMITTEE AT THE FORTY-FOURTH SESSION[2] (*continued*)*

1. The CHAIRMAN, speaking as a member of the Commission, asked for his position on the text of article 1, paragraph 2, of part 2 of the draft on State responsibility to be reflected in the summary record of the discussions in the Commission. Actually, the text appeared to make for some confusion by subjecting the State which had committed the internationally wrongful act to obligations which fell into two different categories and did not have the same source. On the one hand, there was the primary obligation, for example, which had its source in a treaty between the States concerned, and on the other hand, secondary obligations, which were the legal consequences of the internationally wrongful act and which had their source in the convention that the Commission was in the process of drafting. Endorsing the proposed text would mean completely ignoring the distinction between primary obligations and secondary obligations, which the Commission had been using successfully for many years and which was not simply a trick of formal logic that could be applied when it suited the Commission to do so. On the contrary, in his opinion, it corresponded to inescapable reality.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he partly agreed with Mr. Barboza's views and explained that the paragraph in question had not originally been part of his proposed text. He had tried, without success to prevent it being added to the draft article.

3. Mr. YANKOV said that, as he had indicated at the previous session in his capacity as Chairman of the Drafting Committee, article 1, paragraph 2, had been designed as a safeguard clause in regard to the general rule set out in the article.[3] It had been intended to show that new relations formed after the internationally wrongful act did not automatically relieve the State committing the act from its duty to perform the obligation it had breached. He failed to see how that safeguard clause would destroy the structure of the article and, in the absence of convincing arguments, he could not endorse any proposal to delete it.

4. The CHAIRMAN pointed out that the Commission had already adopted the text in question.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, for personal reasons, he was compelled to be away from Geneva until the middle of the following week. During his absence, the Drafting Committee could, as it was perfectly entitled to do, move ahead in finding a solution to difficulties of both form and substance still posed by article 12 as he had proposed at the previous

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* Resumed from the 2314th meeting.

[1] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[2] Document A/CN.4/L.472.

[3] See *Yearbook... 1992*, vol. I, 2288th meeting, para. 13.