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Summary record of the 2339th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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For example, a State could not be summoned to appear in court and certainly could not be served an arrest warrant. With regard to penalties, it was impossible to impose a prison sentence upon a State.

43. As to the consequences of responsibility, the differences between his own topic and that of the Special Rapporteur were enormous. The responsibility of States was primarily reflected in the reparation which was proportional to the damage caused. In his own topic that was impossible. Although a crime might well cause damage, the main point of criminal proceedings was not to repair that damage, but to decide upon a punishment, something that was very different.

44. If an individual acting as a head of State or Government or simply as a civil servant committed a crime, clearly he was personally and directly responsible for that act, but the responsibility of his State was also involved, and there might be some confusion between the two forms of responsibility. From the conceptual point of view, however, the two ideas were completely different.

45. While he thanked the Special Rapporteur for his enriching discussion of the subject, he did not think that it would ever be possible to mix the two topics.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had no intention of mixing the topic of State responsibility with that of the draft Code of Crimes against the Peace and Security of Mankind or of confusing the criminal responsibility of individuals with the criminal liability of States under article 19,[11] however interrelated the breaches in question could obviously be. He entirely agreed with Mr. Thiam that it was inconceivable to put a State in prison. Indeed, if the Commission was to look for special consequences for crimes, it would need to go beyond the very strict limits of State responsibility for the offences envisaged so far.

47. Mr. THIAM said that he had one simple question: Could a term other than "crime" be found for that type of responsibility?

48. Mr. ROSENSTOCK said he fully agreed with the thrust of Mr. Thiam's question.

The meeting rose at 4.15 p.m.

[11] Ibid.

2339th MEETING

Tuesday, 17 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/453 and Add.1-3,[1] A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,[2] A/CN.4/L.501)

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BENNOUNA said that, in chapter II of his sixth report on State responsibility (A/CN.4/461 and Add.1-3), the Special Rapporteur had asked whether the crimes could be defined, and all the following questions would depend upon the reply. For that reason, he suggested that the debate should be organized in two parts: the first would be devoted to the question of defining the crimes set forth in article 19 of part one of the draft[3] and the second to the consequences stemming from the definition agreed. In his view, that approach was important given that the Commission must express an opinion on the fate of article 19.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said he took the view that the members of the Commission should be allowed to decide what questions they raised during their statements. He was well aware that certain members would like to focus first on the question of consequences. It was therefore inappropriate to specify what form the debate must take.

3. Mr. MAHIOU said that Mr. Bennouna's comments were very much to the point, but, noting that article 19 of part one had already been adopted on first reading, he did not think that it was necessary to reply to the question in chapter II, section A of the sixth report of the Special Rapporteur before moving on to the following questions. In his opinion, the Commission might have a better idea of those crimes after the debate on the consequences of internationally wrongful acts characterized as crimes under article 19.

4. Mr. BENNOUNA said that he would not insist on his suggestion, but he did want to formulate a reservation about Mr. Mahiou's comment. In his opinion, the Commission could not wait until the second reading of article 19 to reply to the Special Rapporteur's question on the definition of crimes. It could not work in the abstract, but must clearly state its opinion on that point at the outset.

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

[2] Reproduced in *Yearbook... 1994*, vol. II (Part One).

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

5. The CHAIRMAN, speaking as a member of the Commission, said that the basic idea which emerged from the Special Rapporteur's reports on State responsibility was that the drafting of rules on State responsibility for international crimes was a very complex question that was encountering numerous difficulties. The Special Rapporteur had asked two basic questions. The first, which appeared in chapter II of his fifth report (A/CN.4/453 and Add.1-3), was whether it was appropriate to make a clear-cut distinction between "crimes" and "delicts" and the second, which was the subject of chapter II, section A, of the sixth report, was that of the definition of the crimes. In that context, it should be borne in mind that article 19 had been adopted unanimously in 1976[4] and that the distinction drawn between crimes and delicts was already firmly anchored in general international law, as recalled in the commentary to article 19, from which it was also clear that the Commission had termed the adoption of article 19 a "step comparable to that achieved by the explicit recognition of the category of rules of *jus cogens* in the codification of the law of treaties".[5] He saw no reason whatsoever to reconsider what had been completed or to abandon the concept of international crimes of States. In the 18 years that had elapsed since the adoption of the article on first reading, States, to be sure, had committed international crimes, but there had also been considerable progress in the reaction of the international community to those crimes and, in particular, to crimes of aggression. There was also good reason to hope that, with the end of the cold war, the situation in that area would continue to improve. It was clear, however, that it would be impossible for the Commission to draft rapidly rules on the consequences of international crimes because there was no ready-made solution in that regard. First, unlike delicts, crimes against States were not very frequent and established practice thus did not exist and, secondly, it must be borne in mind that the question was very sensitive and affected the principle of State sovereignty.

6. Concerning the question of defining crimes raised in the Special Rapporteur's sixth report, he said that the list of breaches which could constitute international crimes and which appeared in article 19, paragraph 3, were only examples or illustrations and some of the obligations mentioned were obviously no longer topical. That was the case, in particular, of the obligation prohibiting the establishment or maintenance by force of colonial domination or the obligation to safeguard and preserve the human environment, which was confined to prohibiting massive pollution of the atmosphere or of the seas and today appeared to be a bit too restrictive. It would therefore be useful to specify and update those primary obligations. The value of article 19 lay not in the list of breaches of international obligations, but in the actual definition of international crimes. The criterion chosen was basically the danger represented by a breach of an international obligation essential for the protection of the fundamental interests of the international community, as seen in paragraph 2. The purpose of the list that followed was in fact only to facilitate the application of that definition in concrete situations. Once again, the list was only indicative, and that meant that no analogy could be drawn with general criminal law, which was based on the principle *nullum crimen sine lege*.

7. The second question that then arose, even in the case of crimes recognized by the international community as being international crimes, was who had the right to determine that a crime had been committed by one or more States and thus to define the applicable regime of responsibility. It would be logical for an international body to have that prerogative, and not one or several States, even if they were the direct victims of the crime committed. In his view, that fundamental provision should appear in one form or another in the articles on responsibility, although that did not solve the entire problem. It was only a general principle subject to certain restrictions, such as the inherent right of individual or collective self-defence, in accordance with Article 51 of the Charter of the United Nations. The main obstacle to the application of the principle of the "collective reaction" of States was that currently no international body, including the Security Council, had the express power to settle matters relating to all categories of international crimes and it was not for the Commission to propose to confer certain rights and obligations on United Nations bodies which would allow them to perform their functions in connection with action to combat international crime. For that reason, it was tempting to determine the possible consequences of international crimes and to provide for a special regime of responsibility for the crimes set forth in Chapter VII of the Charter and to apply to other crimes, such as those that did not constitute a threat to the peace or an act of aggression, the existing rules on responsibility for international delicts, without certain conditions and restrictions. Such a solution would be no more than a stopgap measure because it would not answer the basic question already raised, namely, who could determine on behalf of the international community that a crime had been committed if the act in question did not come under Chapter VII of the Charter.

8. Other problems also had to be solved. First, should a distinction be drawn between the rights of the State that was a victim of the crime and the rights of other States that had sustained injury with regard to remedies available and the adoption of countermeasures? It was also difficult to know what the consequences of international crimes would be from the point of view of the obligations of States to which indirect injury had been caused. Lastly, it was worth asking whether it was possible to solve the problem of State responsibility for international crimes by totally disregarding the concept of fault, as the Commission had been able to do when it had established the criteria for the determination of the international responsibility of States for international delicts. There was no quick and easy answer to all those questions and it was therefore difficult to draft detailed provisions on the consequences of international crimes. Hence, the unavoidable conclusion was that, as international relations now stood, such a task could not be completed in the time available to the Commission and given the time-limits that it had set itself for carrying out its programme of work.

[4] *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 *et seq.*

[5] Ibid., p. 122, para. (73) of the commentary.

9. In closing, he reiterated his opinion that it would not be appropriate to reconsider the concepts already embodied in international law and the definition of international crimes in article 19, even though the four categories of breaches mentioned in that article ought to be updated. It would also be wiser, at the current stage of the Commission's work, to stop formulating detailed provisions on the material consequences of international crimes and on the determination of the relevant responsibility. On that point, the Commission should confine itself to noting that there was a close link between the material consequences of crimes and the reaction to those consequences of the international community as a whole, which derived from the definition in article 19. That would be the best solution because it did not reject everything that had been done so far and because it would not delay further the completion of the Commission's work.

10. Mr. ROSENSTOCK said that he endorsed the view expressed in the Special Rapporteur's sixth report that the definition of crimes of States adopted by the Commission in article 19 should receive some attention as a preliminary point in the expected debate. He doubted that there was much point in trying to cure the many defects of the text of article 19. In the end, the Commission would only have found out the hard way that a workable definition had escaped it and that the only acceptable consequences were trivial, harmful to other more realistic aspects of the law and likely to enhance the threat to peace and security or to erode the viability of the concept of *erga omnes* violations in general by focusing on only some of them.

11. He believed that the wisest course would be to take another hard look at article 19, paragraphs 2 to 4, with a view to considering whether the deletion of the notion of crimes by States might not be advisable. In support of that view, he noted that considerable changes had taken place in the world since the 1970s, with the end of the cold war, the reduction of North-South tensions and the elimination of apartheid and colonialism.

12. The starting-point for any reconsideration of article 19 could be an examination of the extent to which it could be said to reflect existing law. Had it been *lex lata* in 1976 and was it *lex lata* in 1994?

13. In his view, article 19 was not *lex lata* because it did not reflect customary law and there were no instruments making it an obligation for States to accept the notion it defined. On what basis had the Commission in 1976 included the notion as if it had been *lex lata*?

14. Leaving aside a few remarks by politicians clearly devoid of *opinio juris*, the Commission had made much of the widespread acceptance at the Vienna Conference on the Law of Treaties in 1969 of *jus cogens* as a ground for asserting the invalidity of a treaty. In his view, there were two fundamental reasons why the *jus cogens* articles of the Vienna Convention on the Law of Treaties did not establish any basis for article 19. First, the fact that a community, national or international, found a contract or treaty concluded *contra bonos mores* or *jus cogens* to be unenforceable and void *ab initio* did not necessarily mean that the act or instrument was viewed as criminal at the national level and hardly established a basis for creating a notion of crimes of States. Secondly, it should be noted that, at the Vienna Conference on the Law of Treaties, the acceptance of *jus cogens* as a ground for treaty invalidity had been expressly made conditional on acceptance of a definitive role for ICJ in ruling on the validity of such a claim.

15. In the 1970s, the Commission had, moreover, associated itself with *dicta* in the *Barcelona Traction, Light and Power Company, Limited* case,[6] noting the existence of *erga omnes* obligations or, more precisely, refusing to regard the concept as non-existent. It had also sought to draw the same conclusions from the advisory opinion rendered by ICJ on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[7] However, the Convention related only to crimes committed by individuals. The most that could be deduced from the *dicta* of the Court in that advisory opinion was the view that some of the provisions of the Convention had become part of general international law and a hint at the notion of *erga omnes* violations. The fact remained that recognition of *erga omnes* violations did not imply recognition of a new and qualitatively different category of acts *contra legem.* Neither did it imply that the distinction between civil and criminal responsibility had to be ignored.

16. Furthermore, the idea of "crimes of States" had been explicitly rejected, both in the Sixth Committee and in the written comments by such States as Australia, France, Greece, Sweden, the United Kingdom and the United States.

17. Another argument in support of the view that article 19 was not *lex lata* was the famous statement in the Judgment of the Nürnberg Tribunal that

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[8]

18. It was revealing that, despite the horrors of the deeds perpetrated by the Axis Powers, none of the documents relating to the surrender of Germany and Japan spoke of the criminal responsibility of States.

19. More recently, Additional Protocols I and II to the Geneva Conventions for the protection of war victims of 12 August 1949 elaborated shortly after the fifth report by the Special Rapporteur on State responsibility, Mr. Roberto Ago, on the internationally wrongful act of the State, source of international responsibility,[9] failed to contain any hint of such crimes.

20. The previous Special Rapporteur, Mr. Riphagen, had taken the view that, except in the case of aggression, there was no existing law to suggest the existence of a separate category of State responsibility for crimes.

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[6] Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

[7] *I.C.J. Reports 1951*, p. 15.

[8] *Nazi Conspiracy and Aggression, Opinion and Judgment,* United States Government Printing Office (Washington, D.C., 1947), p. 53. Cited in United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7), p. 41.

[9] *Yearbook... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2.

21. If the existence of qualitatively different categories of breaches of international law was not *lex lata*, could it be said to be *de lege ferenda*?

22. He found it difficult to imagine the possibility of creating categories of breaches that constituted differences in kind without damaging the effectiveness of the concept of *erga omnes* violations, unless all *erga omnes* violations were placed in a category of equally more serious violations.

23. Even assuming that the Commission wanted and was able to create such categories, he thought that it would be unwise to maintain the term "crime". Even a well-informed reader would be likely to assume that what was meant was penal law and that some form of collective punishment or guilt was envisaged by way of consequence.

24. Moreover, the term "crime" suggested the idea of impartial trial and judgement. What the Commission of the 1970s had had in mind in that respect was unclear. Its members had doubtless been aware of the language of Article 36, paragraph 2 (*d*), of the Statute of ICJ, which referred to "reparation ... for the breach of an international obligation". Yet in his fifth report, the Special Rapporteur gave a number of reasons why ICJ was not an answer.

25. If the Commission wanted to draw any distinction, it would therefore seem more straightforward to consider a phrase such as "aggravated or particularly serious delict" and then to set about trying to define it, taking care not to use article 19 as a model. Once an adequate definition had been found, the Commission could proceed to examine the repercussions of the establishment of the new category on parts two and three and decide whether, given those repercussions, the exercise as a whole was justified. In taking a decision, the Commission would have to bear in mind that the regime for aggression was already provided for in the Charter of the United Nations and did not need to be supplemented in the articles and also that, in 1930, the Conference for the Codification of International Law had failed in part because of attempts to include both primary and secondary rules.

26. He, for one, would be surprised if the Commission concluded at the present session that it was useful and prudent to adopt qualitatively different categories of breaches depending on the character thereof. He thought that it would be more likely to conclude that what was involved were acts of increasing degrees of gravity.

27. Mr. BENNOUNA noted that, since everything that could be said on the subject had already been said, what needed to be done now was to establish some order so that the Commission might, either by consensus or by a vote, arrive at a decision that could be adopted at the present session.

28. The question on which the Commission had to take a decision and which determined everything else was that asked by the Special Rapporteur in chapter II of his sixth report: Can the crimes be defined?

29. His own view was that the question should be reworded as follows: "Should a distinction be made in connection with internationally wrongful acts between crimes and delicts?" It was essential to answer that question before tackling the question of the consequences of crimes, but, until now, the Special Rapporteur and the Commission had considered the consequences of internationally wrongful acts in general and had left aside the question of crimes. If the distinction between crimes and delicts were maintained, it would become necessary not only to consider the effect on other articles, but also to reassess the articles already adopted.

30. Recalling the structure of article 19, he said that its paragraph 1 defined a generic category, that of internationally wrongful acts, while paragraph 2 provided a general definition of crimes and paragraph 3 gave a non-exhaustive list of "crimes", thus making that concept basically evolutive in nature. The international "delict" was in a subsidiary category and was not itself defined. What was not a "crime" was a "delict".

31. The situation was thus complex and became even more so in the light of the fact that, at its twenty-eighth session, in 1976, the Commission had refused to identify an obligation whose breach constituted a crime with an obligation established by a peremptory norm.

32. A further element of unnecessary confusion resulted from the Commission's borrowing from the categories of criminal law and thereby implying, despite all its assertions to the contrary, that it had established the criminal responsibility of States.

33. In that connection, he referred to a study by Ms. Marina Spinedi,[10] in which the author stated that the Commission had simply meant to indicate in article 19 that there were two categories of wrongful acts, one being that of wrongful acts recognized by the international community as the most serious because they affected that community's essential interests and, in consequence, entailing a special regime of responsibility and that the difference between crimes and delicts related to the forms of responsibility and the subjects who could engage it. So far as the forms of responsibility for crimes were concerned, the Commission had in fact had in mind the sanctions provided for in the Charter of the United Nations and the reprisals adopted by States. According to the author of the study, that was nothing new: it was *lex lata*.

34. Those comments showed that, far from clarifying the state of positive law with a view to its codification, the distinction between crimes and delicts had helped to create confusion and had drawn the Commission into a debate that was a dead end. In order to get out of that situation, the Commission had to avoid two pitfalls.

35. The first pitfall was the result of the theoretical debate about the existence of State criminal responsibility, in which the Special Rapporteur had tried to involve the Commission. Notwithstanding its theoretical interest,

[10] "Obligations *erga omnes*, international crimes and *jus cogens*: A tentative analysis of three related concepts", *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, J. Weiler, A. Cassese and M. Spinedi, eds. (Berlin-New York, De Gruyter, 1989).

that debate was based on an erroneous assumption because, in 1976, the Commission had not meant to establish State criminal responsibility; and the debate did not help the Commission get ahead in determining the consequences of wrongful acts.

36. He agreed with Mr. Rosenstock that there was no difference of kind, but that there was a question of the degree of State responsibility which justified the use of the expression "continuum" of the wrongful act.

37. After all, if one considered the situation in national criminal law, the same conduct could be characterized as a crime or a delict depending on the circumstances, the motives and whether or not there was wilful intent and, as the Special Rapporteur had rightly pointed out, the Commission had taken no account in the draft of wilful intent and had also not referred to the concept of fault, even though it was inseparable from the concept of crime. Article 19 stressed the degree of gravity of the act which was characterized as a crime, but did not define the threshold of gravity at which a delict became a crime. It also spoke of an "obligation" that was "essential" without defining those terms.

38. If, therefore, the Commission decided to refer to "crimes", it would have to redefine the wrongful act and introduce the concept of fault, which could be more or less serious, grave or aggravated.

39. Secondly, the Commission must avoid the pitfall of allowing itself to become involved in a debate on the interpretation of the Charter of the United Nations and on the powers of the various United Nations organs, and of the Security Council in particular. The Commission was not the proper place for such a debate and was not equipped to enter into it. There was an additional substantive reason in that the Security Council was merely the reflection of power at the world level at any given time. It would therefore be extremely unrealistic for the Commission to embark on the consideration of any revision of the Charter, as some writers recommended, and it might frustrate the whole of the draft on State responsibility.

40. It was necessary to draw a clear distinction, as the Special Rapporteur had done, between what was political and what pertained to the legal realm. The Security Council's prime objective in adopting sanctions was neither to punish crimes nor to determine where responsibility lay; its aim was the maintenance of international peace and security having regard to the balance of power at the time. It made legitimate use of violence at the international level as part of its task of maintaining order.

41. Moreover, the Security Council was very much influenced by its procedure and, in particular, by the right of veto which conferred permanent immunity on at least five States and on a few others. Consequently, it could neither create a court nor effectively recognize responsibility for crime. In both of those cases, however, it was necessary to be realistic and to avoid undue haste and confusion. Of course, he, like Mr. Rosenstock, considered that the articles should not borrow from the provisions of the Charter of the United Nations, but he would none the less be prepared to consider a savings clause with respect to the provisions of the Charter, as the previous Special Rapporteur, Mr. Riphagen, had tried to do. There could be no question of extending the exceptions, under certain provisions which dealt with the consequences of crimes, to a ban on the use of force, as provided for in the Charter.

42. In the last paragraph of his fifth report, the Special Rapporteur had questioned the distinction between "crimes" and "delicts" by asking if it were true that there existed a certain gradation from "ordinary" violations to "international crimes", especially from the point of view of the regime of responsibility which they entailed, and was it in fact appropriate to make a clear-cut distinction between "crimes" and "delicts"? The Commission should endeavour to answer that question during the current session. To do so, it would first of all have to rid itself of the concept of crimes and delicts because that concept carried with it all the liabilities, the whole legal culture, of the crimes inherited from criminal law. Instead, it should stay within the general framework of the definition of "wrongful act" and provide that there were some acts which, by virtue of their degree of gravity and of the obligations violated—which in fact involved peremptory norms—gave rise to a special and more binding regime of responsibility. It would also be necessary to determine the implications from the standpoint of compensation, countermeasures and *locus standi*.

43. The question was who would determine whether there was a "crime" and it arose as soon as there was a violation of international law, since, in the community of States, there were no compulsory courts. In most cases, each State decided the matter for itself; and, in the event of a dispute between States, there was a body for the settlement of disputes.

44. In the case of serious violations of peremptory norms, the only possible course, in his view, was to follow the path laid down in the Vienna Convention on the Law of Treaties and to provide for the compulsory jurisdiction of the Court. It would then be for the State which considered that there had been a serious violation of an essential obligation to refer the matter to the Court; in the event of a challenge by the other State, the Court would rule on its own competence.

45. There was no other possible way and he would warn against any dream of an institutionalized, harmonious and ideal society, because that would be dangerous.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that there was some contradiction in saying that the distinction between crimes and delicts was meaningless and that it was simply a matter of gradation and of different degrees of gravity. Distinguishing between degrees of gravity meant making a distinction on the basis of the nature of the infringed rule, the dimension of the breach and its effects, and/or, most importantly, on the basis of fault, which could be, for instance, slight, very slight or serious, or so serious as to amount to wilful intent, namely *dolus*. The concept of fault had been abandoned, wrongly, in his view, but it still had to be taken into account in establishing a distinction between internationally wrongful acts and their consequences.

47. So far as the Security Council's role was concerned, it was not at all a question of amending the Charter of the United Nations, but of dealing appropriately with the topic of State responsibility. As pointed out by Mr. Bowett (2336th meeting), the Commission should at least consider the problem of the lawfulness of the Council's decisions, not in order to determine whether a given decision was justified, but to make a choice of the most appropriate solutions to be envisaged—*de lege lata* or *de lege ferenda*—within the draft on State responsibility. In any event, he was opposed to any provision which, like article 4 of the draft proposed by the preceding Special Rapporteur, Mr. Riphagen,[11] would subordinate the applicability of the articles on State responsibility to the decisions of the Security Council or divest them of any meaning in certain situations which were dependent on the decision of a political body.

48. It was his view that, instead of concentrating on the purely terminological question of whether it was possible to speak of crimes of States, it would be better to agree that a wrongful act could have degrees of gravity and that that gradation, as well as the problem of the reaction of States or international organizations, should be taken into account in any case—whatever the term used—in regulating the consequences of the act. Accordingly, it would be better to leave aside the first question imprudently listed by himself in chapter II of the sixth report and to consider the various problems raised in the remainder of that report. Those problems would not disappear simply by the deletion of article 19.

49. Mr. ROSENSTOCK said that the deletion of article 19 would not make all the problems disappear, but it would eliminate a large number of them if the issue were perceived as one of a continuum and not of two separate categories of acts. That way of seeing matters did not, of course, guarantee that the Commission could make much more progress in its consideration of the topic, but it did have the advantage of avoiding a statement of the obvious, namely, that some violations were more serious than others, and very probably of showing that the general rules governing, for instance, proportionality and the measure of reparations, which already existed on the basis of the degree of gravity of delicts, would be applicable in all cases, including the most serious acts.

50. Mr. CALERO RODRIGUES said that the debate had started with a very important question: how to explain to States the legal consequences of something whose precise nature was unknown. It was essential that the notion of international crimes of States should be clearly defined so that its legal consequences could be defined. At one point, there had been an inclination, both in the Commission and in the General Assembly, to anticipate the second reading of article 19 so that the Commission could confirm, amend or delete it. That had not happened, however, and, as article 19 was still not under consideration, it certainly seemed that the Commission should proceed as though the concept of crimes of States had not given rise to any problem and attempt to clarify it somewhat by examining the possible legal consequences of such crimes. The main question in that connection—and it also arose with regard to the legal consequences of delicts—was to determine who would decide that there had been a violation of international law, an internationally wrongful act, whether it was a delict or a crime.

51. He had already stressed the need to provide a clear answer to that question when the Commission had considered the problem of countermeasures, with respect to delicts, and he had pointed out that there could be countermeasures only if, first, a State had really committed an internationally wrongful act by which another State had actually been injured. The problem arose even more acutely in the case of the reaction to an international crime, which was distinguishable from a delict by the fact that it was a violation affecting the interests of the international community as a whole. In such a case, and *a fortiori*, it was not for a particular State to determine whether the act constituted a crime within the meaning of article 19 and whether it was entitled to react to that crime. If a well-organized and harmonious international community existed already, the problem would not arise. It could be argued that the problem also did not arise in the case of the crime of aggression, inasmuch as the Security Council was empowered to determine the existence of such a crime. It might even be possible to envisage the extension of the Council's powers with respect to the maintenance of international peace and security to all violations to be covered by article 19, possibly as amended. In the meantime, however, a system should be devised whereby the existence of a crime and the right of States to react to that crime would be determined not by States, but by a body representing the international community. Since the draft being prepared was to become a convention, only the parties to that convention would be bound by it unless there was such a large acceptance by States that it became a part of customary law. Would it not then be possible, for the purposes of such determination, to assimilate the international community to the community of States parties to the convention on State responsibility? He had no decided views on the matter, except that that possibility should be considered.

52. In chapter II, section B, of the fifth report, the Special Rapporteur examined in detail the substantive and instrumental consequences of international crimes of States, as well as the actual concept of international community. He included cessation and reparation among the substantive consequences. Cessation was, for delicts, an obligation independent of any initiative on the part of States and that obligation was even more obvious in the case of crimes. Reparation, in the material sense of the term, was, of course, due to the State which was materially affected, but, in the wider, legal sense of the term, it was due to the international community. The right to reparation was a matter not for States *uti singuli*, but for States acting within the framework of some form of coordination. Such coordination between the States parties to the instrument setting forth the rules on State responsibility would be mandatory in all cases. Furthermore, in the case of delicts, the reparation was subject to three limitations: it must not be excessively onerous, it must not be of a punitive character, and the satisfaction or guarantees of non-repetition must be, as it were,

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

optional. In his view, non of those limitations should be allowed in the case of international crimes.

53. With regard to instrumental consequences, it had to be decided which types of countermeasures were admissible and who would have the right to resort to them. With regard to the first point, the use of force in reaction to a crime should be allowed only in the case contemplated by the Charter of the United Nations, self-defence against armed attack. It should not extend to crimes other than aggression. With regard to the second point, there too he was opposed to a right of reaction for States *uti singuli*. There must be some form or other of reaction by an organization of the international community or, more modestly, by the community of States that were parties to the convention. In practice, that involved the basic question of the imposition of penalties, in the traditional sense and not in the current, wider, sense of the term. Penalties must be decided by the "international community" and applied by it or under its control.

54. The issue of permissible penalties gave rise to a number of problems and clearly was more far-reaching than a simple legal reaction to a failure to respect the provisions of a given instrument. In chapter II of the fifth report, a number of possible penalties were listed. It was therefore somewhat incorrect to say that it was not possible to punish a State because a State could not be imprisoned like an individual. The draft articles could now be made to reflect the idea that, in addition to the types of penalties referred to by the Special Rapporteur, criminal penalties could be applied to individuals, as envisaged in the draft Code of Crimes against the Peace and Security of Mankind or the draft statute for an international criminal court. The other difficult problem raised by the application of penalties to States was the desire not to punish a population that was innocent and in no way responsible for the criminal acts of a State. That problem had to be considered more thoroughly because, in practice, it seemed insoluble. The most important thing was not to give States individually the right to react to a crime. The solution to the problem of the legal consequences of international crimes required some type of international organization: ICJ, the General Assembly, the Security Council, or other body created by the United Nations or a special organ set up by the States parties.

55. In such circumstances, it would be a difficult task to complete the drafting of articles on the legal consequences of international crimes before the current term of office of members of the Commission expired. Some members seemed to believe that the exercise itself was impossible, while others were in favour of abandoning the very idea of crimes of States. He had followed the approach proposed by the Special Rapporteur and given his opinion on the legal consequences that could be envisaged, but he recognized that the task was a difficult one. The Commission might be forced to admit that it was incapable of solving the problem at the present time. One solution, not an ideal one, but a pragmatic one, would be not to take up in detail the consideration of the legal consequences of crimes and, in reporting to the General Assembly on the consideration of the draft articles on first reading, point out that provision had not been made for a chapter on legal consequences because, at the outset, there had been doubts about the applicability of article 19 as it now stood; that many members of the Commission believed it was inappropriate to undertake a task that might prove extremely difficult and, in the final analysis, of no interest, without a clearer definition of the crimes referred to in article 19; and that the Commission reserved the right to introduce a chapter on the legal consequences of crimes on second reading if article 19 was approved or amended on second reading.

56. Mr. MAHIOU noted that chapter II of the fifth report on State responsibility was distinctive and of particular importance, like the issue it dealt with, namely, the consequences of international crimes of States. It raised a number of delicate and complex questions involving the concepts of the international community, the inter-State system, the powers and functions of United Nations bodies, fault, the criminalization of States and possible criminal responsibility, to cite only some of the most crucial. In order to clarify those concepts, however, it might be necessary to determine the legal consequences.

57. The fact that so many questions arose was in no way surprising: dealing with article 19 of part one of the draft articles meant opening the Pandora's box that the Commission had thought it had closed with the adoption of that article in 1976[12] and the deferral of all its unsuspected or unimaginable implications. It was inevitable that the concept of an international crime, as opposed to an international delict, should come up on the Commission's agenda. And it was clearly in respect of the consequences of such crimes that the debate should be resumed in order to flesh out the problems, pinpoint the concepts and give them meaning and content.

58. In his view, there were two components of the concept of an international crime of State: a conceptual one and an operational or functional one. With regard to the conceptual component, he had no difficulty with the identification of a State crime, the imputation of a crime to a State and the attribution of criminal responsibility to a State. The principle of criminal responsibility of States was neither strange nor revolutionary. Of course, criminal responsibility was primarily individual but, as a result of advances in the law, it could also be collective. There might naturally be some reluctance to reopen the discussion on collective responsibility by dealing with legal persons, particularly States. Yet recognition of the criminal responsibility of a legal person in certain conditions and circumstances was more a step forward for the law than a step backwards. Many legal systems were moving in that direction. In France, for example, the Penal Code which had dated from 1810 and had been amended on 1 March 1994 now recognized the criminal responsibility of legal persons. It was therefore entirely feasible to imagine that a legal person, including the State, could be criminally responsible because genocide and aggression were more than wrongful acts—they were crimes in the moral and legal sense.

59. The identification of international crimes of States did not, however, solve all the problems. That was where the operational and functional component of international crimes came into play. Even if a crime could be

[12] See footnote 2 above.

identified, the important thing was its consequences, both substantial and instrumental. In order fully to understand article 19 of part one of the draft and, if necessary, to amend it, the possible consequences of international crimes of States therefore had to be considered first. Only in the light of such consideration could it be determined whether the concept of international crimes of States was relevant or not and he himself believed that it was. From that point of view, chapter II of the sixth report could only make that very complex task easier.

60. The Special Rapporteur's first question—whether the crimes could be defined—was relevant and went back to article 19 of part one of the draft. Taking that article, with its advantages and weaknesses, as a starting-point in order to determine whether the list and the definition of international crimes it contained were satisfactory, he asked who had the power to determine that a crime had been committed. He said he doubted whether one or more definitive answers could be given. Obviously, if international society was organized and, if there were bodies deemed competent to handle all of the crimes covered by the draft articles and capable of acting in such cases, then the task would be an easy one and would involve simply determining ways and means of carrying it out. Unfortunately, however, that was not the case. The Charter of the United Nations normally gave the Security Council the task of determining that the crime of aggression had been committed, but the problem remained unsolved in the case of other crimes, unless they were included in the category of the maintenance of international peace and security, something which could give rise to dangerous juxtapositions, with the attendant blurring of distinctions, debatable conclusions and discussions about bodies responsible for deciding on the powers and functions of the Council. Recent events had shown that there were ambiguities and gaps in the Charter, even in the case of aggression. It was obviously not up to the Commission to fill those gaps or amend the Charter: there were bodies and procedures for that purpose. However, the Commission could suggest ways of implementing the Charter in cases when a crime referred to in article 19 of part one had been committed, as well as means of mobilizing the powers and functions of each organ of the United Nations—and possibly, subject to further consideration, of other institutions called on to decide on certain crimes. In any event, the Council had a role to play in respect of the crime of aggression and perhaps in respect of other crimes as well, but it was not the only player. In that connection, the problem was to determine how to involve other bodies, such as the General Assembly and ICJ with due respect for the Charter and for the balance of powers it had established. He fully agreed with the comments of the Special Rapporteur in that regard; they showed that the determination of crimes other than the crime of aggression and the definition of their consequences were primarily acts of a judicial nature and that it had to be decided which bodies would be empowered to take part in that process.

61. As to who should be responsible for determining that a crime had been committed, he believed that it would be ominous and dangerous to give a role to any State whatever, including the injured State. The Charter set up a system that was neither perfect nor indisputable, but at present, it was the only one available. The only exception to that rule related to self-defence—and it was still necessary to define that term, or, rather, the conditions in which it came into play, in order to avoid any possible excesses or abuses in the use—or, rather, the manipulation—of the concept of collective and individual self-defence. There might, however, be a way of getting around the concept of self-defence through substantive, formal and procedural rules to be determined in the light of the resolutions of the United Nations, the Charter and the entire set of customary and conventional rules. Not all aspects of the problem would be clarified by that approach, since self-defence came into play only in the case of aggression. He did not by any means believe that, for other crimes, such as genocide or serious and massive violations of human rights, a State could invoke the right of self-defence if its own population had been the victim. It must be up to the responsible bodies to determine whether a crime had been committed in such cases.

62. With regard to the possible consequences of international crimes, everything argued in favour of using those envisaged for international delicts: cessation of wrongful conduct, reparation in the form of restitution, compensation, satisfaction and assurances and guarantees of non-repetition, but without the reservations permitted in the case of delicts, which were less serious wrongful acts than crimes. In the case of a delict, for example, satisfaction must not be humiliating, but, when a crime was committed, that restriction was not valid because, in committing a crime, a State had already humiliated itself and there was no reason to spare it further humiliation. Perhaps consequences that differed not only in degree, but also in substance should be envisaged for certain crimes. It must be determined, however, that the State had truly committed a crime and not a delict. That was the crux of the problem involved in characterizing a wrongful act, and the first problem that had to be solved.

63. Referring to the question whether the procedural aspects relating to countermeasures, such as notification and use of dispute settlement machinery, should be respected in the case of crimes, he said that it would be premature to give an answer at the present time, when the Commission had not yet considered or adopted the draft articles sent to the Drafting Committee, namely, articles 11 *et seq.* and, in particular, article 12.[13] He also questioned whether the balance which draft article 12 was intended to establish and which he did not find entirely satisfactory had to be respected in the case of a crime. In order to give the Special Rapporteur guidance, the Commission should explore the possibility of adopting an approach to countermeasures that clearly showed the difference between an international delict and an international crime.

64. He reserved the right to continue his statement at a later meeting.

[13] For the texts of draft articles 5 *bis* and 11 to 14 of part two referred to the Drafting Committee, see *Yearbook . . . 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,[14] A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

65. The CHAIRMAN, reporting on the informal consultations he had held on the procedure to be adopted for the draft articles on the law of the non-navigational uses of international watercourses, said that the consultation group recommended that the Commission should invite the Drafting Committee to proceed with the draft articles, without the amendments introduced by the Special Rapporteur on unrelated confined groundwaters, and to submit suggestions in plenary to it on how it should proceed if it decided to deal with unrelated confined groundwaters in the draft articles.

It was so agreed.

The meeting rose at 1.05 p.m.

[14] Reproduced in *Yearbook ... 1994*, vol. II (Part One).

2340th MEETING

Thursday, 19 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/453 and Add.1-3,[1] A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,[2] A/CN.4/L.501)

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HE, commending the Special Rapporteur on the draft articles submitted to the Commission, said that they made a significant contribution to the development of the law of State responsibility.

2. He had serious doubts about the advisability of retaining the notion of international crimes of States, as set out in article 19 of part one of the draft.[3] His concern was that any attempt to accept the concept of a State crime in the legal sense would lead to many problems which it would be difficult, if not impossible, to resolve from the standpoint of either criminal law or international law. According to the maxim *societas delinquere non potest*, a State, including its people as a whole, could not be a subject of criminal law; according to criminal law principles, it was questionable whether an administrative organ, as a legal person, could be so regarded. Many positive laws, including those of China, made no provision concerning the guilt of legal persons or for corresponding penalties.

3. A criminal act by a State should be an act specifically prohibited under the relevant laws of the international community. Article 19 of part one the draft, however, merely laid down in general terms the main principles with respect to certain prohibited acts. Such a provision could not provide the definitive norms to be observed by States nor the objective criteria by which the international community could judge whether or not the delict of a State amounted to an international crime. Since the provision was uncertain and therefore difficult to put into effect, it did not conform to the criminal law principle *nullum crimen sine lege*.

4. If the concept of State crime were accepted, penalties would have to be imposed upon the criminal State. According to established international practice, such penalties could not be more severe than the punitive measures taken by a vanquishing State to restrict the sovereignty of the vanquished State, such as occupying the latter's territory and taking over its property, for instance. Such measures did not have the characteristics of punishment under criminal law. They were more in the nature of a demand made to a party with respect to liability it had incurred under international law, and between equal subjects of international law.

5. A legal organ with compulsory powers to try and punish States would also have to be set up. But to what extent could the international community accept such an organ? The 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[4] the proposed international criminal court now under discussion, and the draft Code of Crimes against the Peace and Security of Mankind were all directed at individuals. The only permanent judicial organ for the settlement of disputes in the international community was ICJ, however, its jurisdiction was based on voluntary acceptance by States. It was highly improbable that such acceptance would be forth-

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

[2] Reproduced in *Yearbook ... 1994*, vol. II (Part One).

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

[4] Hereinafter referred to as the "International Tribunal". See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.