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Summary record of the 2340th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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.

coming from a State charged with a crime. There was still no basis, therefore, for establishing an international criminal court with compulsory jurisdiction over States.

6. Accordingly, it was difficult to recognize the concept of crimes of State under both criminal law and international law. In a certain sense, a State could be regarded as the instrument used by certain individuals to commit crimes, for instance, the leaders of a State who made use of its territory and resources to commit international delinquencies for their own criminal purposes. Yet an instrument of crime was not to be regarded as a subject of a crime and a crime committed by individuals using the instrument of the State was in fact a crime of an individual. Furthermore, if the concept of State crime were to be accepted, the position of the State as a subject of international law would be undermined and it would be difficult for a realistically-minded international community to accept such a premise.

7. If, on the other hand, the concept of State crime was not accepted, the consequences of State responsibility could be dealt with calmly and there would be no basic difference in substance. The responsibility of the wrongdoing State, under international, though not criminal, law should differ in content, form and degree, in accordance with the gravity of the delict of the author State.

8. The question was not so much whether crimes could be defined—of course they could, in one way or another—but rather who would be in a position to determine that a crime had been committed. The various possibilities outlined in chapter II of the Special Rapporteur's sixth report (A/CN.4/461 and Add.1-3) were not likely to meet the requirements. Mention had been made of the Security Council's role in determining aggression, for instance, and in resorting to countermeasures. The Security Council, however, was a political organ with powers under Chapter VII of the Charter of the United Nations to determine the existence of, for example, a threat to peace or a breach of peace and to take such measures as the use or non-use of armed force with a view to maintaining and restoring international peace and security. Its competence did not extend to determining the crime of a State in the legal sense. As the Special Rapporteur pointed out in his sixth report, thus far the Council had never characterized a State as an aggressor, let alone determined the commission of a crime of a State within the meaning of article 19 of part one of the draft.[5] It was not the Council's constitutional function, nor did the Council have the technical means, to determine the existence or consequences of any wrongful act, including the other crimes covered by article 19. Its competence in that connection was confined to the purposes set out in Chapter VII of the Charter.

9. In his fifth report (A/CN.4/453 and Add.1-3), the Special Rapporteur had raised the question whether there might have been an evolution in the Security Council's competence, having regard to the organized reaction to such serious international breaches as were reflected in Security Council resolution 687 (1991) of 3 April 1991, requiring Iraq to make reparation for war damage, Council resolution 748 (1992) of 31 March 1992, taking measures against the Libyan Arab Jamahiriya for failing to extradite the alleged perpetrators of the Lockerbie terrorist act, and Council resolution 808 (1993), on the establishment of an international tribunal. Each of those resolutions dealt with the maintenance of the peace and security of mankind and clearly fell within the competence of the Council. Whether or not there had been an evolution in the competence of the Council, however, was a question of interpretation of the Charter of the United Nations and fell outside the Commission's mandate. In any event, no convincing argument had been adduced to show that, as a result of that practice, the Security Council's competence in the field of State responsibility for so-called "crimes of State" had developed.

10. If the concept of State crime could not be established, the work on international responsibility could be dealt with from the standpoint of State responsibility for international delinquencies, on the one hand, and of the criminal responsibility of individuals for serious crimes, on the other. Progress had been made on the draft Code of Crimes against the Peace and Security of Mankind on the assumption that the Code should be directed only at crimes by individuals, though the individual concerned would have ties with the State. In the circumstances, he would advocate caution: it would be unwise to embark hastily on deliberation of the consequences of State crimes before the whole concept had been reconsidered and further guidance sought from the Sixth Committee.

11. Mr. de SARAM expressed his thanks to the Special Rapporteur for his learned reports, which examined the various issues that would, in his view, need to be considered by the Commission in determining how it might, in part two and possibly also in part three of the draft, give effect to the provisions of article 19 of part one of the draft which had been formulated by the Commission in 1976.[6]

12. It seemed clear, in his view, that there were certain basic understandings within the Commission as to the "crime-delict" distinction made in article 19. There were, of course, various "internationally wrongful acts" (breaches of international obligations) in the field of State responsibility that were attributable to a State. They differed in magnitude, according to the subject-matter of the obligation breached; the significance the international community attached to the obligation; the bilateral or other scope of the obligation; the circumstances in which the breach of obligation occurred. When the wrongful act was of a violent nature, involving injury to person or damage to property, particularly on a scale large enough to bestir the "conscience of humanity", the use of the word "crime" to convey revulsion and condemnation was usual in day-to-day parlance, as well as in political and other non-legal contexts. The use of the word "crime" in that sense was not, of course, what the Commission had had in mind when it had formulated article 19. Nor had it been the intention of the Commission to transplant the concept of "crime" as it was commonly understood in national criminal justice systems to the inter-State level.

[5] See footnote 3 above.

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

13. The Commission's purpose had been, as it would appear from article 19, paragraph 2, that a breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole would be treated in the draft articles in a way that was in keeping with the fundamental importance of the international obligation breached and in a way that would be distinguishable from the treatment of breaches of lesser international obligations, for which the Commission, in article 19, employed the term "international delicts".

14. As the Special Rapporteur had rightly observed, a number of questions arose when one considered how the concept of "crime", as expressed in the definition in article 19, paragraph 2, could be implemented in the provisions of part two, and possibly part three of the draft. They might cause some difficulties, given the general terms in which paragraph 2 of the article was couched—difficulties that the Commission had apparently also encountered in 1976, as was apparent both from the non-exhaustive, even illustrative, nature of the four categories of internationally wrongful acts listed in paragraph 3 and from the traces of subjectivity remaining in the language of that paragraph.

15. He was mindful of the note of caution expressed by the Chairman that it might be conducive to a more orderly discussion of matters in the Commission at that stage if, in the present plenary debate, decisions that were reached by the Commission in 1976 were not reopened and if the Commission were to concentrate, rather, on how, having regard to the provisions of article 19 in their present form, one might in part two, and possibly part three, give effect to the "crime-delict" distinction in terms of the appropriate substantive and instrumental consequences. Yet the issues raised by the Special Rapporteur in chapter II, section A, of his sixth report and the observations by members called for brief comment on the appropriateness of the introduction of the concept of "crime" in article 19.

16. First, and as to the principle question that clearly arose, he shared the view that the introduction of the concept of "crime" in article 19, paragraph 2, seemed to make difficult provisions even still more difficult to apply. The concept of "crime" was fraught with national criminal law connotations. The elaborate language of paragraph 2 stemmed in large part from the rather circuitous compromise terminology of the *jus cogens* provisions of article 53 of the Vienna Convention on the Law of Treaties.

17. Secondly, there appeared to be an intrinsic flaw in the notion, expressed in article 19, that a State could be guilty of a crime. Crimes were committed by individuals. There was the *mens rea* requirement, which was essential for a finding that a crime had in fact been committed by the individual accused. That requirement was unlike, and should be distinguished from, the procedure for the "attribution of responsibility"—the legal fiction through which, for purposes of ensuring that there should be adequate compensation for damage caused, a superior was not permitted to escape responsibility for compensation. *Mens rea* was not, naturally or logically, transferable. It was not possible, naturally or logically, to attribute the *mens rea* of one individual to another, still less from an individual to a legal entity such as a State.

18. Thirdly, it seemed unreasonable, and unjustifiable, to cast the shadow of criminality over an entire people of a State for the acts of the few individuals responsible for the commission of a crime.

19. Thus, considering matters, at least from a purely technical point of view, he did not believe that the introduction of the crime-delict distinction was necessary or appropriate in the articles on State responsibility, the purpose of which was not to punish States but to require them to compensate for damage caused. Moreover, as already pointed out, the introduction of such a distinction might tend to detract from, rather than enhance, the possibility of the widest possible acceptance of the draft articles.

20. The question had been raised earlier by another member as to whether substitution of a more appropriate expression for the term "crime", in article 19, might not possibly remove the difficulties which the introduction of such an expression appeared to cause. He was not altogether certain whether there was any other descriptive term that could successfully be substituted for the term "crime" in article 19 in order to remove the difficulties. It seemed to him that the intention in seeking to make the crime-delict distinction was not simply to convey a difference of degree but one of "species".

21. It seemed to him that there was a related question to be considered, namely, why was it considered necessary to use the term "crime", or any other descriptive term, in order to do what was sought to be done in article 19: to introduce into the articles on State responsibility the concept of *jus cogens* obligations; and then to distinguish a breach of a *jus cogens* obligation from other lesser international wrongful acts? If such was the aim, the use of the term "crime" or any other descriptive term was unnecessary. All that would seem to be required was: (*a*) to follow closely, and limit oneself to, the language of the *jus cogens* provision in article 53 of the Vienna Convention on the Law of Treaties, without using any additional accompanying descriptive term—and without introducing any illustrative list of examples for which there might not be adequate *lex lata* support; and (*b*) to indicate what remedies a breach of a *jus cogens* type of obligation would entail, in addition to those required for other wrongful acts.

22. The second principle question that seemed to arise, from the introduction of the concept of crime in article 19, was the question to which chapter II, section B, of the sixth report of the Special Rapporteur referred. The question was whether there were at that time at the inter-State level, or would there be in the foreseeable future, the institutional arrangements necessary for the implementation of the provisions of article 19, paragraphs 2 and 3. He said that viewing matters in that light, a virtually insuperable difficulty presented itself: central to such institutional arrangements would be the requirement that there should be a body responsible for making the very serious, and very difficult, determination as to whether on the facts of a case which could be complex and disputed, a State had in fact committed a

crime. It was a judicial determination, to be made by a judicial body; and neither the Security Council nor the General Assembly—having regard to the authority vested in them under the Charter of the United Nations or to the manner of their proceedings—appeared to be the appropriate bodies. The only existing judicial body that might perhaps be appropriate—ICJ—might not, because of the consensual basis of its competence, have the necessary jurisdiction over a particular case. Thus it seemed to him that it was difficult to be hopeful that the institutional arrangements necessary for giving effect to the provisions of article 19 would be in place, at least for many years to come. If a determination had to be made as to whether a State had committed a crime, it would be important for the determination to be made by a judicial body whose jurisdiction was widely accepted, to which such cases were uniformly referred, and, eventually, which made its determination on the basis of a consistent body of jurisprudence. For those reasons, it would be many years before the necessary institutional arrangements for giving effect to the provisions of article 19 were in place.

23. If, however, provisions of the *jus cogens* type were included in the draft articles without the accompanying conclusion that a breach of a *jus cogens* obligation would constitute a crime, the difficulties in establishing the appropriate determination-making procedures would be considerably reduced.

24. Finally, as to the question of what ought to be the special consequences of an international crime (the question raised in chapter II, section C, of the sixth report of the Special Rapporteur), it seemed to him that as far as the "substantive consequences" were concerned, it might be a relatively easy matter to resolve: cessation, restitution in kind (to the greatest extent materially feasible and, thus, without limitation), trial of the individuals responsible, and non-recognition of the consequences as legal. Where more than one State was injured, there would, of course, have to be the necessary coordination in the submission of claims. Ad hoc procedures for the submission and consideration of claims might also prove necessary.

25. However, problems clearly arose in the area of what the Special Rapporteur termed "instrumental consequences": the imposition of sanctions under the Charter of the United Nations, and perhaps under other applicable treaties as well, the provisions of the Charter, of course, being paramount; and the difficult question of the entitlement to take countermeasures.

26. Yet, it seemed to him that the necessary distinction to be made, when considering the question of countermeasures in the present context, was not between countermeasures permissible in cases of "crimes" (or other cases of *jus cogens* breach) and cases where there was no "crime" (or other *jus cogens* breach); but, rather, the distinction between, on the one hand, countermeasures that were permissible where there was an applicable multilateral, or even bilateral, treaty regime (the Charter or otherwise) and, on the other, cases where there was no such applicable treaty regime.

27. It should be kept in mind that what was of relevance under an applicable treaty regime was, of course, not merely the question of permissible countermeasures but also the provisions on the peaceful settlement of disputes.

28. Furthermore, where no treaty regime (the Charter, or other multilateral, or bilateral treaty) applied, regulation or coordination of permissible countermeasures in the event of an obligation breach would surely be necessary—if chaos were not to result from the taking by individual States of countermeasures in an uncoordinated manner.

29. Mr. PAMBOU-TCHIVOUNDA drew attention to the contrast between the brilliant erudition displayed in the Special Rapporteur's fifth and sixth reports and the relative prudence, not to say modesty, of his proposals. In chapter II of the sixth report, members of the Commission were invited to comment on a number of questions pertaining to the consequences of State crimes, in particular to reflect on how to remedy the harmful consequences arising from the commission by a State of an internationally wrongful act of a criminal nature whose consequences affected the fundamental interests of the international community. The object of the exercise, as he saw it, was to elaborate a legal regime that would be applicable in such cases.

30. Article 19 of part one of the draft, adopted by the Commission in 1976,[7] had divided the victims of internationally wrongful acts into two categories: in the case of an international delict, the victim could be one or more States; in the case of an international crime, the victim was the international community of States as a distinct legal entity. Thus the nature of the victim was the touchstone for determining whether the internationally wrongful act concerned constituted a delict or a crime. In that way, the codification exercise had helped to promote the international community to the status of, as it were, a quasi-public legal authority. The concept of international crimes reflected in that approach had the merit of being dynamic rather than static.

31. With regard to chapter II, section A, of the sixth report, the Special Rapporteur himself was scarcely able to disguise his doubts about the appropriateness of the definition set out in article 19. In his own view, the Commission would find itself in a blind alley if it insisted on maintaining that definition at all costs.

32. So far as the consequences of internationally wrongful acts were concerned, the international community was clearly under an obligation to show active solidarity with any State whose existence as such was threatened by the actions of another State, as well as the related obligation not to recognize the consequences of those actions as legal. To his mind, a threat to a State's existence constituted a threat to the international community as a whole and called for collective self-defence. Recent developments in that regard showed a welcome trend towards elevating the concept of the international community from the realm of abstraction or myth into that of experience and history. In that connection, the role of non-governmental organizations in loosening the grip of the concept of national sovereignty on matters of

[7] Ibid.

elementary humanity deserved note and commendation. Another sign of the times were the current developments towards a renewal of the United Nations through changes in the permanent membership of the Security Council. A more balanced representation of various regional groups, served by a more equitable distribution of permanent seats, would enhance the Council's credibility in identifying certain international crimes and in authorizing collective punitive or self-defence operations on behalf of the international community.

33. Authorization of punitive action by the Security Council had, however, to be preceded by the identification of the internationally wrongful act as a criminal act. The Commission might well consider recommending a review of the Charter of the United Nations and of the Statute of ICJ in that respect, as well as a number of other institutional innovations that would prove necessary to implement certain ground rules applicable to international crimes of States. Among the points to be considered he would suggest the following: (*a*) whether the identification of the crime should be based on general international law, and whether the principle of *nullum crimen sine lege* had to be observed; (*b*) whether State responsibility should be subject to the statute of limitations; (*c*) whether responsibility had to be limited to the chief perpetrator or could it be extended to possible accomplices, and in either case, whether individuals could be charged as well as States; and (*d*) whether punitive operations could be undertaken at regional level and, if so, whether it was necessary to devise a decentralized executive mechanism.

34. Mr. VILLAGRÁN KRAMER said the new balance of power following the end of the cold war cast a new light on the Commission's work relating to international crimes and delicts. The fundamental notion of *lex lata* could be used to facilitate analysis of that question, but if the Commission ventured into the area of *lex ferenda*, it would be opening a Pandora's box of options that would be difficult to circumscribe.

35. The latest contributions by the Special Rapporteur to the material on State responsibility were extremely useful in terms of the treatment of the general subject of international crimes and could be used to advance the discussion in academic circles and in the United Nations. Unfortunately, they proposed no new articles on State responsibility in respect of international crimes. They also left open to question what was to be done with article 19 of part one: rejection, amendment or strengthening? He sometimes had the impression that the Special Rapporteur wanted to be free of article 19, and particularly, of *lex lata*, which was too limiting for his taste.

36. The fundamental issue was not what general theory should be applied by the Security Council or other United Nations organs in regard to international crimes. No matter what instrument the Commission produced, the Charter of the United Nations would remain the ultimate regulator of the behaviour of States. Some representatives in the Sixth Committee had spoken of a de facto revision of the Charter. That might be true in political terms: the operations ordered by the Security Council in Lebanon and Kuwait did amount to a new role for that organ—a new interpretation of international law, an expansion of the sanctions regime. For juridical purposes, however, the Charter could not be regarded as having been revised by such actions.

37. The Special Rapporteur's work on crimes and delicts reflected the remarkable ability of jurists from his country to identify the fine points of legal subject-matter. The need now, however, was to identify criteria rooted in international practice. The Commission did not need to concern itself with defining an international crime. In general terms, the components of an international crime emerged from jurisprudence, the practice of States and the rulings of international tribunals. Specific examples of what constituted an international crime could be found in the work of the Nürnberg and Tokyo Tribunals and of ICJ in the *Barcelona Traction, Light and Power Company, Limited* case.[8]

38. The Commission itself, in adopting article 19 of part one in 1976,[9] had clearly indicated its reasoning on what should be considered crimes in specific circumstances. The recent book by Weiler, Cassese and Spinedi,[10] showed that there was basic agreement among jurists on what a crime was and what a delict was and that the distinction between the two depended on the attribution of international responsibility, not on the criminal effects. ICJ indicated that in making rules on a right or a duty, it was necessary to keep in mind the peremptory norms of law, sometimes called *jus cogens*. It should be kept in mind that a violation of *jus cogens* could be considered an international crime.

39. What the Commission could do now was to incorporate components of the definitions of international crimes—for example, crimes against humanity—in the draft Code of Crimes against the Peace and Security of Mankind or the draft statute for an international criminal court. It must also specify whether there was a distinction to be drawn between international crimes and international delicts. And finally, it must analyse the legal consequences of international crimes in the context of State responsibility.

40. The Special Rapporteur had raised the question of whether the consequences of crimes should be the same as those of delicts, and if not, how they should be handled. It was illuminating in that context to look at the commentary to article 19, drafted in 1976.[11] It showed that the Commission had not intended the article to establish a single, rigid system for responsibility for crimes and delicts: significant variations were to be allowed for within that system. At the current session, the Commission was working on a draft statute for an international criminal court and on the draft Code of Crimes against the Peace and Security of Mankind. In so doing, it was dealing with various categories of crimes, exploring the ramifications of aggression, genocide, apartheid, and so on. If categories were being established in crimi-

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

[9] See footnote 6 above.

[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).

[11] See footnote 6 above.

nal matters, why should that not be the case with State responsibility for international crimes? There was nothing in international law to compel the Commission to restrict itself to a single, rigid formula for the consequences of acts incurring State responsibility. It would be entirely appropriate, for example, to pinpoint international effects in terms both of responsibility and of penalties for crimes.

41. The Special Rapporteur's approach to the international responsibility of States had the disadvantage of freezing the discussion. There were no new proposals that might bring the Commission closer to completing its work on parts two or three, and the suggestion had been made that part one should be revised. He greatly feared that the Commission would not be able to complete the draft on State responsibility in the five-year time-frame accorded to it—and it had already been at work for many, many years now. It must really make every effort to push through to completion of its task.

42. The consequences of delicts had already been defined; the thing to do now was to determine responsibility for crimes. In that connection he would point out that responsibility for crimes could vary, depending on the crime. In international law at the present time, there was no difficulty in establishing different and specific levels of responsibility for various crimes. At the same time, the Special Rapporteur's approach to determining a general level of responsibility was a good one: what were the circumstances that increased the responsibility of a wrongdoing State, and what restrictions on reprisals would no longer apply for various crimes? In respect of the circumstances, the Special Rapporteur had gone right to the heart of the matter by positing two that were confirmed by the jurisprudence of the Security Council and the practice of States: non-recognition of rights and failure to cooperate with the Council. Non-application of restrictions on reprisals would be relevant only in cases involving *jus cogens*.

43. It was also important that, in dealing with the consequences of crimes, concerns about responsibility *stricto jure* should be separated from institutional penalties that might be envisaged in the context of *lex lata*. In Articles 39 and 41 of the Charter of the United Nations, very clear guidelines were established for the adoption of measures by the Security Council. The range of situations covered in those articles shed light on the approach the Commission should use regarding penalties.

44. The Special Rapporteur had asked for guidance from the Commission regarding reprisals and the use of force. At the forty-fourth session, the Commission had had a very useful discussion in which it had determined that the use of force could be condoned only as a response to aggression or in exercise of the right to self-defence, and in the very exceptional cases of self-help authorized by the Charter of the United Nations. There were also instruments like the Inter-American Treaty for Reciprocal Assistance that identified cases in which Latin American States could apply sanctions involving the use of force, as long as the Security Council had approved such actions. States could thus respond, either in the context of the United Nations or at the regional level, in the event of international crimes. Clearly, any reprisals must be carried out not with the use of weapons, but by peaceful means, and must not impinge on existing prohibitions under *jus cogens*. They could be applied unilaterally by States only if they were acting to facilitate the implementation of a Council resolution or a decision of a regional body competent to apply sanctions. The Special Rapporteur was right to say that States must not be unduly generous in considering and adopting collective sanctions: the regime of *lex lata*, which allowed for a certain degree of flexibility, should be applied.

45. The subject of collective sanctions led into a very new and complex area, namely the right of humanitarian intervention, a concept that had attracted criticism and raised controversy. But the records showed that the international community had been constrained to act, in defence of human beings, but did not acknowledge the legitimacy of humanitarian intervention. Unilateral humanitarian action was prohibited, yet collective efforts, though feasible, were rarely mobilized. The case of Rwanda hardly needed to be mentioned in that context. It was not enough to resolve the problem *de lege ferenda*; it was *lex lata* that would legitimize collective humanitarian action taken under the auspices of an institution.

46. As to who could bring responsibility for crimes into play, according to the theory of State responsibility, that could only be done by the affected State, or States in the case of a multilateral treaty. As Eduardo Jiménez de Aréchaga had rightly pointed out, one of the characteristics of an international crime was that all States could act, not only the victim.[12] But act in what framework? The voluminous footnotes provided by the Special Rapporteur illuminated the concept of the organized international community, the institutional structure encompassing the community and the scope of its powers. Nearly all writers on the subject believed that the use of force and the application of specific measures in the event of an international crime was permissible only with the approval of the international community, as represented by the United Nations. Accordingly, the Commission could not depart from the existing structure of the United Nations when dealing with the consequences of crimes.

47. As to the Security Council's competence, a problem existed from the juridical standpoint because there was no control mechanism to determine if and when the Council overstepped or abused its authority. On the other hand, the risk that the Council might adopt a patently illegal decision was minimized, in his view, by the system of checks and balances built into the international community as currently organized, namely, the requirement of action by consensus in the Council. It was true, however, that in the General Assembly, the Group of 77 had on occasion abused the sheer power of its numbers, virtually precipitating a constitutional crisis in the case of the resolution on South Africa in 1975,[13] one which, from a purely political standpoint, had certainly been justified.

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[12] "Crimes of State, *Ius Standi*, and Third States", *International Crimes of State* . . ., op. cit., p. 255.

[13] General Assembly resolution 3411 (XXX).

48. The Commission's progress on the topic of State responsibility was such that its drafting work on part two could be completed very soon: a few additional proposals from the Special Rapporteur would suffice. He would like to see a final draft of part two before the end of the present session, and appealed to the Special Rapporteur to engage in elaborating a text which, while it might not satisfy all expectations, at least would achieve the Commission's goal in the current exercise.

49. Mr. PELLET said that he could not imagine that an ordinary breach of a bilateral agreement could be placed on an equal footing with genocide. That simple fact would appear to dispose of the underlying issue raised both by the Special Rapporteur and in the course of the debate. The question was not complicated: was the concept of an internationally wrongful act unambiguous or was it not? Notwithstanding the defence put forward by Mr. Rosenstock (2339th meeting) and Mr. He, the answer could only be an incontestable no. A breach of an air transport agreement, on the one hand, and an act of aggression, on the other, could not and were not part of a single legal regime. He did not rule out that the two internationally wrongful acts might have points in common. In both cases, they incurred the responsibility of the State that had committed the act, and they also shared some of the ensuing legal consequences: an obligation to compensate and, in particular, an obligation of cessation. That the two offences, as different as they might be, were the subject of the same draft articles on State responsibility was therefore justified.

50. But the similarities ended there. To give a hypothetical example, the fact that France, disregarding a bilateral agreement, refused to allow British planes to land at Orly Airport had nothing in common with the holocaust committed by the Nazi State. The systematic extermination of a people had few similarities with the violation, regrettable as it might be, of the basic human rights of an Algerian national detained in a French police station, even if it cost the Algerian his life.

51. The difference between the two categories of internationally wrongful acts was obvious: in one case, which he would provisionally call "crimes", the international community as a whole was concerned. Genocide and aggression were basic infringements of the international public order that enabled States to tolerate each other despite their individuality, their differences and their divergent standpoints. France breached an air agreement and Great Britain could complain, but it was no more than an episode: the fundamental principles upon which international society was based, namely the coexistence of sovereign States, were not threatened in any way. The same would be true if a foreigner were beaten up at a police station in France. On the other hand, if South Africa made apartheid an integral part of its political system, or Yugoslavia (Serbia and Montenegro) carried out "ethnic cleansing" with a view to creating ethnically homogeneous territories, or if Iraq invaded a sovereign State, it was something that shook the very foundations of international society. Fortunately, such cases were rarer, but they gave rise to different and stronger reactions than did simple delicts.

52. With all due respect to the Special Rapporteur and to Mr. Calero Rodrigues (2339th meeting), who had argued along the same lines, he did not agree with the emphasis placed upon the question of who determined that a "crime" had been committed (chapter II, section B, of the sixth report), because such a question did not constitute a prerequisite. As he understood it, the topic of State responsibility had long been divided into three parts: part one, on the origin of State responsibility; part two, on its content, form and degree (where it would be more accurate to say that that concerned the consequences of responsibility); and part three, on the settlement of disputes and the implementation (*mise en œuvre*) of international responsibility. The question of who determined that a "crime" had been committed fell solely in part three.

53. If the Commission was to base itself on existing law, *lex lata*, the reply would be that it was for each State to assess whether international law had been breached. That might appear to be unfortunate to some people. He too would find it more reassuring if an international body, instead of States, had jurisdiction and determined whether international law had been violated. But that was far removed from the reality of today's society. In saying so, he did not wish to minimize the enormous progress made in the Organization since the beginning. The General Assembly, the Security Council and ICJ were not without influence, especially when it came to matters relating to the use of armed force. That was quite an improvement over the previous situation, when freedom of interpretation, action and reaction had been totally unfettered. In that sense, it might be fair to speak of the organized international community, an expression that the Special Rapporteur had often employed. The General Assembly could take a decision on just about everything, and it made the most of that opportunity. Yet in regard to a reaction to a wrongful act, as in all others, it had no power of decision: it could only recommend. That was not as insignificant as was often thought. The very fact that it made recommendations meant that the Assembly allowed and authorized something that could have a considerable impact in matters pertaining to the issue under consideration. For example, in many resolutions the Assembly had declared that peoples subjected to colonial or foreign domination—a crime under article 19, paragraph 3, of part one of the draft—could use all means to combat such domination. That implied even the use of armed force.

54. The problem was different in the case of the Security Council, which could sanction and punish on the basis of mandatory obligations, but its action was narrowly confined to its main responsibility: the maintenance of international peace and security. That was very important in the case of aggression, which was plainly an example of a "crime". Yet, and there he agreed with the Special Rapporteur in his fifth report, that was a special regime and it would be dangerous to conclude that the Security Council could characterize all crimes, even if the current trend was towards a considerable broadening of the concept of a threat to peace. The trend itself had its own limits and an exaggerated extension of the concept of a threat to peace was probably not very sound. In that regard, Mr. Bennouna (2339th meeting) had probably gone too far in asserting that the Security

Council's recent practice was of no concern to the Commission. It was, but Mr. Bennouna was right inasmuch as that practice did not form the basis for a general regime of international responsibility, even for international crimes. Moreover, even in cases of aggression, States had the power to assess the situation for themselves, because Article 51 of the Charter of the United Nations said that States retained the possibility of a first reaction, that is the inherent right of individual or collective self-defence.

55. As to ICJ for which he had enormous respect, the "State" deadlock was even more obvious. The Court could give an opinion on the existence of all breaches of international law, including the existence of a crime, and it could draw the necessary conclusions. Referral to the Court, however, depended entirely on the willingness of States, and thus the Court was only a very exceptional substitute for the determination by the State itself of a wrong. It was not satisfying, but it was the reality. States remained for the most part the judges of their own cause, which meant that, if they regarded themselves as the victims of an offence, it was for them to decide. If they decided that non-compliance with international law was a crime, it was for them to say so. Safety nets were none the less available in the form of two principles: the prohibition on the use of force in international relations and the obligation to settle international disputes peacefully.

56. So much for *lex lata*. He did not think that it was unreasonable to go further, and Mr. Calero Rodrigues (ibid.) was probably correct in saying that an international body should be given the power of determination. Yet the Commission's task was not to legislate, but to codify. It should say what the law was and should develop it progressively; it should not start a revolution. It must resist the temptation to rewrite all international law. The Commission did not have the power to confer a new jurisdiction upon the United Nations and its organs or to amend the Charter of the United Nations. At most, it could suggest that a legal mechanism might be set up in cases of disagreement as to whether a crime had occurred, for example, as envisaged in the Vienna Convention on the Law of Treaties with regard to *jus cogens*, but it would be wise to contemplate that possibility only as part of an optional protocol. It might also be useful to ask the Sixth Committee whether it was prepared to accept mandatory jurisdiction in connection with such questions.

57. It none the less had to be borne in mind that a determination of whether a crime had been committed could only be made after the fact: no State preparing to commit aggression would wait to see whether ICJ ruled that the planned act was a crime. In any event, that was something relating to part three of the draft. But the hardly realistic nature of any institutional mechanism for determining a crime did not release the Commission from the need to indicate the consequences of the concept defined in part two.

58. He had been surprised earlier to hear that several colleagues were opposed to the very concept of crime. He was surprised for two reasons. First, the difference between "ordinary" offences in international law and much more serious acts was a basic fact in international life. Secondly, the Commission had provided a definition of crimes in article 19 and it would not be wise to undo that work. Although part one was not gospel, he agreed with the Special Rapporteur that article 19 had been drafted with great care after lengthy discussion and the Commission should therefore consider it carefully before deciding to change it. He concurred with Mr. Mahiou (ibid.) that article 19 should be amended only if the Commission concluded that the definition adopted on first reading did not square with the consequences of the concept of crime as revealed by actual observations. Subjective personal opinion should be discarded. The definition could be changed if, in the end, it was found that it failed to make a clear distinction between crimes and delicts.

59. Unlike Mr. Rosenstock (ibid.) and Mr. He, who regrettably were against both the word "crime" and crime itself, Mr. Bennouna (ibid.) had expressed opposition to the use of the word, arguing that it was wrong to talk of "crimes" of the State, because that would be tantamount to a criminal law concept of responsibility, something that was out of place in international law. Like it or not, the word crime existed; article 19 had given rise to abundant commentaries on it, and it was in common use. Moreover, it had the psychological advantage of stressing the exceptional seriousness of non-compliance, in contrast to delicts, which were ordinary offences. The word also had a tradition; for example, it had been used in the Convention on the Prevention and Punishment of the Crime of Genocide, and the Commission was soon scheduled to examine the draft Code of Crimes against the Peace and Security of Mankind. There were many other examples. Admittedly, the draft Code concerned individuals, not States, but one of the consequences of the very concept of international crime was that it tore through the veil of States and, once a State crime existed, that crime was indissolubly linked to crimes of individuals. The determination of the existence of a State crime was the condition for the incrimination of an individual. However, must it be deduced from the word "crime" that the responsibility of the State committing it was necessarily criminal? He saw no disadvantage in the concept of the criminal responsibility of States. Nazi Germany had been a criminal State, and there was no reason not to say it loud and clear.

60. However, in his opinion the discussion would not lead very far. The international community was not identical with national society, and international law was not the same as national law. The State was not the individual, and State responsibility in international law was neither criminal nor civil; it was, very simply, international, different and specific. International responsibility was a concept unique to international law. The Commission must go beyond domestic law. It should retain the word "crime" and drop the misleading analogies in domestic law. However, if the word "crime" had such a strong emotional connotation, a more neutral replacement should be found, for example "internationally wrongful acts of an exceptional gravity" (*faits internationalement illicites d'une exceptionnelle gravité*).

61. Article 19, paragraph 2, did not deserve the criticism it had attracted. On the other hand, paragraph 3, which contained a list of examples, was questionable as

far as the very principle was concerned. First, it was bad legal technique to give examples in an instrument of codification instead of in the commentary, which was where they belonged. Secondly, the list was subject to the changing views of the times and would quickly become outdated; indeed it already was in part. Thirdly, contrary to the approach established by the Commission for the topic, paragraph 3 was a sudden intrusion of primary norms in a subject devoted to the codification of secondary rules. He was therefore in favour of deleting it, something which could be done on second reading.

62. Alongside the usual breaches of international law, there were others which were fundamentally repugnant to the conscience of the day, and that was precisely what article 19, paragraph 2 stated. A simple delict concerned one State alone, whereas a crime went beyond bilateral relations. It might be said that that was tautological, but it was no more tautological than the concept of *jus cogens*. Nor was it any more extraordinary than the universally accepted definition of custom, a general practice accepted as being law. No one contended that, because international law did not define "general" or "accepted", the concept of custom did not exist. The same was true of crimes. It was vague, but for that very reason it was realistic. The law was full of undefined concepts which altered with the times, with the subject concerned and with the changes in outlook. He had in mind such examples as "good conduct", the principle of proportionality or the concept of "reasonableness". The Commission had not been asked to draft a code of international crimes, but simply to define what it meant by that expression, and article 19, paragraph 2, did so in a sufficiently vague manner as to be able to adapt to the evolution of international society and in a sufficiently precise manner as to permit a distinction to be drawn between the two categories of internationally wrongful act: crime and delict.

63. Mr. de Saram, and perhaps Mr. Pambou-Tchivounda, had been opposed to the use of the word "crime" and had appeared to suggest that crimes should merely be regarded as violations of *jus cogens*. Although it was a tempting approach, he was not sure, for reasons adduced at the time by Mr. Ago,[14] whether it was valid. Whereas all crimes were violations of rules of *jus cogens*, the contrary did not hold. He had in mind, for example, *pacta sunt servanda*, a fundamental norm that he would gladly place in *jus cogens*. But it was also clear that not all violations of *pacta sunt servanda* were "crimes". The definition in article 19 was thus more suitable.

The meeting rose at 1.05 p.m.

[14] See, in particular, *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233.

2341st MEETING

Friday, 20 May 1994, at 10.05 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. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, 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. PELLET said that he had little to add to his earlier comments (2340th meeting). He very much doubted whether it was advisable to go into the question of the institution that would be competent to determine whether a crime had been committed; in any event, it could only be a somewhat pointless *de lege ferenda* question. That did not mean the Commission would not have to find a definition of crime. The definition proposed in article 19 of part one of the draft[3] appeared to be satisfactory provided, first, that, if the definition did not seem to be suitable, having regard to the consequences determined by the Commission, there would always be time to change it and, secondly, that, if the word "crime" gave rise to concern, if national law procedures were too entrenched in people's attitudes and if, inevitably, the word "crime" referred to criminal law, that word could simply be replaced by another. It would, however, be quite impossible, in his view, to discard the idea behind article 19 because the differentiation between ordinary internationally wrongful acts and those that were particularly serious for the international community as a whole was, quite simply, a reality that was rooted in positive law.

2. It had often been said that the difference between crimes and delicts was one of kind, not degree; and, since the transition from one category to the other was imperceptible and gradual, there had been talk of gradation. He was among those who favoured "relative normativity", but, in the case of crimes, he did not think that that was the right approach. There were, indeed, crimes, on the one hand, and delicts, on the other. Other terms could be found, but there was a distinction

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

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

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