Document:-
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Summary record of the 2341st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

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 Secondly, the list was subject to the changing views of the times and would quickly become outdated; indeed it already was in part.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.*

between ordinary internationally wrongful acts and particularly grave acts; that was a fact, and article 19 laid down a fairly clear criterion in that connection. Where a wrongful act affected the fundamental interests of the international community, it was a crime; in other cases, it was a delict. A delict was the norm, a crime being quite exceptional. The international community, unlike a nation, was not sufficiently integrated for numerous rules to be considered so essential to it that a breach of them would have to be elevated to a crime. That would come about "perhaps" and it was also why a flexible definition like that contained in article 19 was satisfactory. For the time being, crimes could only be acts that were very rare.

3. He had in the past voiced somewhat forcefully his disagreement with the Special Rapporteur's approach and had done so in particular with respect to the rules applicable to countermeasures and the inclusion of the concept of fault in international responsibility. A lot of misunderstanding would have been avoided if the Commission had held earlier the discussion it was now having on international crimes. He continued to have many reservations about opening the door too wide to countermeasures in the case of delicts, but equally, it seemed to him that countermeasures were far more justified in the case of crimes. As much as the concepts of fault and punishment should, in his view, be banished from the ordinary law of international responsibility, the concept of fault did not seem to him to be out of place, subject to further discussion, in the case of crimes. Nor did it concern the concept of international crime, rather the consequences of crimes, an issue on which he would comment later on.

4. Mr. EIRIKSSON said that, to start with, he had no conceptual difficulties with the idea of State responsibility for crimes. It was perfectly possible to envisage the equivalent of *mens rea* in the case of acts of States. In any event, one could follow developments in the criminal liability of legal persons under national law which related more directly to the regime of strict liability.

5. As to the use of the term "crime", while he was somewhat partial to calling forth some of the emotive and psychological elements embodied in that term, he would not allow those more peripheral considerations to stand in the way of a consensus. Indeed, attaching too much importance to how that category of acts was named might be seen as a sign of weakness when it came to substance.

6. He agreed with Mr. Pellet that crimes were different in kind from other wrongful acts and that it was not just a matter of degree. The question was how to define them. He was not entirely satisfied with the existing wording of article 19 and would question in particular the list set forth in paragraph 3. In his view, apart from the case of aggression, none of the sub-categories referred to in the article should be the subject of separate treatment. There was less need for specificity in the draft articles before the Commission than in the draft Code of Crimes against the Peace and Security of Mankind or the draft statute for an international criminal court. Any adjustments to article 19 could be left until the second reading. The object of the exercise in which the Commission was engaged was to complete part two of the draft and, thus, the first reading of the draft articles. He would come to part three later.

7. As for the work still to be done on part two, he could envisage three scenarios. First, the Commission could conclude that the matter was too complicated for the time being and could revert to it on second reading. In that event, the following two situations could arise: either the future members of the Commission would be better able to tackle the problems and to complete the job or they too would abandon the exercise and would revert to part one, deleting article 19 and giving the draft articles the title "State responsibility for all but the most serious unlawful acts".

8. Secondly, the Commission could decide that the consequences of crimes did not in fact differ from those of other wrongful acts. The question whether article 19 should be retained would then arise. Even in that case, arguments for its retention on ideological or symbolic grounds might be invoked. For instance, Mr. Villagrán Kramer (2340th meeting) had referred to the Civil Code as being for the rich and the Penal Code as being for the poor. He, for his part, was opposed in principle to colouring legal texts in that way. Even if the Commission concluded that there were no differences in the consequences of the various wrongful acts, however, it should not take any decision on article 19 at the current stage.

9. In any event, a third scenario was more likely, namely, that the Commission would identify relevant differences in the consequences of the acts in question, based on an acceptance of article 19. The question of who would determine that a crime had been committed prompted the same answer as in the case of other wrongful acts, except in certain exceptional cases: it was for the injured State itself to decide.

10. With regard to part three, as he had indicated at the forty-fifth session, he was ready to study the Special Rapporteur's proposals which one member of the Commission had described as "revolutionary".[4] But he did not think that developing a comprehensive system for the settlement of disputes was essential to the draft under consideration if that would delay the completion of the first reading. That could always be agreed in the final stages of the adoption of the draft articles, for example, at a diplomatic conference.

11. So far as the "acceptability criterion" was concerned, the Commission had tried in many areas to assess the extent to which the results of its work would be acceptable to States. The Commission must combine its forward-looking role with a measure of realism. It must be realistic and pragmatic, but must never forget that it was not laying down an unappealable ruling, like a supreme court. Its work would be examined by the competent bodies of States that would be able to represent their own interests.

12. Referring to the consequences of crimes, the most obvious, being *erga omnes* in character, required separate treatment of the concept of "injured State" . The

[4] *Yearbook ... 1993*, vol. I, 2310th meeting.

previous Special Rapporteur had already addressed that point. Furthermore, in his view, some of the safeguards laid down in part two were not applicable to crimes. It would be disloyal to the Drafting Committee if he restated too forcefully his opinion that some of them should not only not be made applicable to "ordinary" wrongful acts, but also that they certainly should not apply to crimes. The applicability to crimes of the defences provided for in part one should also be studied more carefully.

13. The Commission might identify remedies that applied to crimes in addition to those already contained in the draft articles of part two. The Special Rapporteur had already identified a number of them on a preliminary basis, particularly in chapter II of his fifth report (A/CN.4/453 and Add.1-3), where he quoted a writer who sought to distinguish political measures from legal penalties. In that connection, Mr. Pellet had commented (2331st meeting) on the academic nature of the distinction in international law between law and politics.

14. He urged the Special Rapporteur to guide the Commission, as soon as possible, along that third avenue so that it could complete the first reading of the draft articles before the end of the quinquennium.

15. Mr. YAMADA said that he welcomed the initiative taken by the Special Rapporteur in summarizing the main issues to be considered in connection with the consequences of internationally wrongful acts characterized as crimes within the meaning of article 19 of part one of the draft in his sixth report (A/CN.4/461 and Add.1-3) and would encourage other members of the Commission to adopt that approach.

16. First of all, when discussing questions of State responsibility, the real question that had to be faced was the conflict between reality and the ideal. It was necessary to pursue the ideal, but if it was too far from reality, its pursuit might be meaningless. On the other hand, extreme realism would not enhance the progressive development of international law. It was clear that a consensus on the need to deal with the crimes of States had not yet been reached by the Commission. In chapter II, section A, of the sixth report, the Special Rapporteur himself admitted that the question whether the very notion of international crimes of States should be retained was likely to arise. He himself therefore believed that the Commission must proceed in its work with great care in order to find a balance between reality and the ideal and to complete a set of draft articles that would be accepted by a large number of States.

17. Secondly, concerning the introduction of the idea of criminal responsibility in international law, he recalled that a previous Special Rapporteur, Mr. Ago, had affirmed that a survey of the practice of a large number of States revealed that a serious breach of essential international obligations brought about consequences different from those arising from other breaches of international obligations.[5] If that analysis was accepted, it could be said that there was a consensus on the fact that there were certain international rules whose breach entailed specific legal consequences. The next question was what kind of regime of responsibility could be established in international law, taking fully into account the reality of the international community. In examining that question, the Commission should not stick to considering the analogy of the idea of criminal responsibility in internal law. No new regime of responsibility could function effectively unless it was accompanied by an institutional mechanism, meaning systems and procedures for determining that a crime had been committed, assigning and implementing responsibility and settling disputes.

18. Thirdly, there was no doubt that the question of the introduction in international law of a new regime on responsibility for the crimes of States was very significant from the standpoint of jurisprudence. However, the Commission must provide a clear definition of crimes and limit the scope of the discussion in order to have a useful and fruitful examination of the topic from the standpoint of codification of the law on State responsibility. The rules on State responsibility had been considered to be secondary ones, namely, rules concerning legal consequences brought about by a breach of primary rules, as explained by Mr. Ago.[6] That standpoint had to be maintained in considering the question of crimes of States.

19. As to the definition of crimes of States, it must first be considered whether and how they could be defined within the scope of secondary rules. The Commission had already had occasion to classify international obligations in part one of the draft articles in the context of secondary rules and had also already considered the modalities of breaches and the object of primary obligations in examining the legal consequences arising from breaches of such obligations. The Commission should keep in mind those lines of thinking in seeking to define crimes of States and to establish a new regime of responsibility from the standpoint of secondary rules.

20. Turning to specific comments on questions raised by the Special Rapporteur, he said he agreed with him that the definition had to be tackled first. It was necessary to define carefully the general notion of crimes rather than to try to give a list of crimes. The Special Rapporteur had been right to describe crimes of States, in chapter II of the fifth report, by comparison with breaches of obligations *erga omnes*. In other words, the notion of crime must be the basis justifying a regime of responsibility that differed from the regime applied to the breach of other obligations.

21. Concerning the determination of a crime, it must be made clear whether the word "determination" meant the final determination that a crime had been committed or a procedural requirement that justified certain countermeasures. The Special Rapporteur also used the word "finding" and that needed clarification in comparison with the word "determination". If "determination" meant final determination, then ICJ was the most appropriate body for carrying out such a function. ICJ had certain limits, however, which were inevitable in the current situation of the international community. As to the possible role of United Nations bodies, there was some doubt about the appropriateness of a *de lege*

[5] *Yearbook... 1970*, vol. II, p. 177, document A/CN.4/233.

[6] Ibid., para. 11.

ferenda approach. Even from the standpoint of *de lege lata*, it was quite doubtful whether a determination of aggression by the Security Council could be considered a legal decision justifying the application of a special regime of responsibility for crimes under the Charter of the United Nations.

22. As to the possible consequences of a finding that a crime had been committed, he believed that questions concerning remedies and conditions to limit the countermeasures applied to such crimes must be considered in the light of the definition of the crimes. If the definition prescribed in article 19 was maintained, the issue would have to be considered by clarifying the concrete meaning of that definition.

23. A new regime of State responsibility could work effectively only if an institutional and procedural mechanism was well established. Otherwise, some countries might misuse the results of the efforts made by the Commission intended to benefit the international community as a whole in order to justify unilateral acts carried out in their interests alone.

24. Mr. KABATSI said there could hardly be a more stimulating subject for scholars than the one under consideration, but, in practical terms, the problems it posed were enormous. The Special Rapporteur appeared to be satisfied that article 19 defined crimes capable of being committed by States as breaches recognized as crimes by the international community. Paragraph 3 of the article gave examples of four categories of extremely serious breaches that offended the conscience of all mankind. But who committed such criminal acts? That question must be answered as a matter of priority. Individuals could commit crimes, including those listed in article 19, but he was not persuaded that the same could be said of States. In speaking of crimes of States, it was impossible to escape the normal definition of crimes and their consequences, as understood in internal law. If the same terms were used, then the meanings must also be as close as possible. He would therefore warn the Commission against using the word "crime" for lack of a better term. Particularly serious breaches of international obligations by States must *ipso facto* entail serious consequences quite different from those that flowed from ordinary breaches, as the Special Rapporteur had tried to show.

25. He entirely agreed with the views expressed by Mr. He and Mr. de Saram (2340th meeting), *inter alia*, to the effect that the attempt to "criminalize" States as provided for in draft article 19 should be abandoned. A State was more than its Government or the handful of persons who at any given moment might be in charge of its affairs. Should the current Government of the Republic of South Africa be burdened with the abhorrent breaches committed during the apartheid regime simply because the country had not yet atoned for such breaches?

26. As far as the definition in article 19 was concerned, he therefore believed that, at present, the idea of a State crime could not be justified from the legal standpoint. Once that was accepted, the questions of who could determine that a crime had been committed and of the possible consequences of such a decision would no longer arise. There were ways of dealing with serious breaches such as those considered crimes under Article 51 and other provisions of Chapter VII of the Charter of the United Nations and under the general provisions of the regime of State responsibility. There were also provisions on the criminal responsibility of individuals having committed acts described as crimes in the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. It was in that direction that the Commission should proceed with its work.

27. Mr. YANKOV thanked the Special Rapporteur for his excellent reports on State responsibility, particularly chapter II of the sixth report, which helped a great deal to organize the debate on the subject by identifying the principal issues to be focused on in the discussion of crimes and by analysing various solutions to problems raised by the distinction between State crimes and State delicts. The Special Rapporteur's approach of raising direct questions for the Commission's consideration had proven to be very fruitful.

28. With regard to the definition of a crime and the resulting consequences, a number of elements had to be taken into consideration. In the first place, there was the magnitude of the obligation that had been violated: an assessment must be made of the seriousness of the act or the aggravating circumstances on the basis of the distinction between State crimes and State delicts and especially the substantive and instrumental consequences of crimes as opposed to delicts. Article 19, though not the ideal solution, gave an indication of the three main criteria to be applied in defining a crime. First, there must have been a breach of an international obligation essential for the protection of fundamental interests of the international community; and, secondly, the breach must have been a serious one, the magnitude being assessed according to both quantitative and qualitative criteria, meaning on the basis of the extent of the material or moral damage done and of the threat posed by the wrongful act, either directly or indirectly, to legal and moral values that were essential for the protection of fundamental interests of the international community. Those two factors were extremely important, for they showed that the distinction between crimes and delicts was not merely quantitative, but also qualitative. Account also had to be taken of the concept of intent or *dolus* and of fault on the part of the State responsible. The third criterion was that the breach of the international obligation must be recognized as a crime by the international community as a whole, as stipulated in article 19, paragraph 2. Experience and jurisprudence, of which there was very little in that area, except in respect of aggression, should of course be brought to bear.

29. As indicated in the commentary to article 19,[7] the distinction between crimes and delicts made it necessary to envisage separate regimes of responsibility, for the legal consequences of a crime were naturally more severe than those of a delict. Some substantive consequences could apply both to delicts and to crimes—for example, reparation—but the same was not true of countermeasures. Substantive consequences were thus an important factor in determining the difference between the two types of wrongful acts. The same was true

[7] See footnote 3 above.

of instrumental consequences, particularly of measures involving the using of force, which would not be appropriate in the case of a delict, but would be entirely legitimate for a crime of aggression in view of the natural right of individual or collective self-defence in order to preserve the essential interests of the international community. Article 19 thus had its merits and he thought it should not be rejected outright at the present stage of the Commission's work. He was not wedded to the current wording of the article, but he would be prepared to accept it in a spirit of compromise, even though international law had developed considerably over the years. The line of demarcation between public international law and private international law was very fluid, for example, and new ideas, such as environmental law, that did not fall into any established legal category were constantly emerging.

30. As Mr. Yamada had said, it was not sufficient to define State crimes: a viable institutional framework for applying that legal notion must also be envisaged. The Special Rapporteur's analysis of the powers and functions of the General Assembly, the Security Council and ICJ showed that, at present, the international community was not equipped to deal with the international crimes of States, but that did not mean that the Commission should not make suggestions or proposals for the reform of the current system until an ideal solution had been found.

31. Like many of the speakers that had preceded him, he believed that the Commission must not be put off by the difficulties it faced. Cooperation between the Commission and external experts could be very useful for making progress on the subject. Any such progress that the Commission made on the draft articles would help to strengthen the primacy of the law in international relations, to prevent conflicts and to facilitate the settlement of disputes.

32. Mr. THIAM said that the expression "State crime" was confusing. It did not mean a crime committed by a State because States were not natural persons and thus could not commit crimes. Only individuals could do so, even if they made use of the State apparatus to that end. Hence, States could not be criminally responsible for a crime, even if they were responsible at the international level for the consequences of the crime which they were bound to repair. A term should be employed that was better suited to the reality the Commission was trying to describe. That mistake was probably the result of the fact that international law always sought to borrow terms peculiar to internal law. Thus, although he agreed with the content of article 19, the terms used in it were unfortunate. It had to be revised before the debate on the rest of the subject began. Earlier remarks notwithstanding, article 19 had not been adopted unanimously 18 years previously. He himself had not been present when it had been adopted and he had formulated reservations on it at several seminars. It was not advisable to introduce new and revolutionary ideas that did not have any serious legal foundation.

33. Mr. BOWETT said that Mr. Thiam had raised the fundamental question whether a State, as opposed to individuals in charge of the policy-making of that State, could commit a crime. In his view, it could. Today, a State could cause such damage to the international community as a whole that a society should not be allowed to shift the responsibility for crimes committed in its name onto mere individuals. He therefore had no moral scruples about accepting the concept of State crime, even if the collective sanctions against the State in question to which that crime might lead could well be prejudicial to all members of that State and not affect only its leaders.

34. The essential question was whether international crimes could be defined and, on that point, he did not think that the elements provided by article 19 in that regard were sufficient. The article contained only a list of various categories of obligation whose breach might give rise to a certain type of criminal responsibility. It did not propose a real definition of crime and the usefulness of the concept of a serious breach was all the more questionable in that it had never been applied in past years, not even against Iraq.

35. Assuming, however, that the concept was clearly defined in other norms of international law, it was still not clear how it was to be implemented, for instance, who would determine that a crime had been committed. There were three possibilities. The first would be for the State that was a direct victim of the wrongful act to determine itself that a crime had occurred. He was not in favour of that solution because of the consequences that might ensue, particularly the punitive measures that might be adopted not only by the victim State, but also by other States. The second possibility would be to let the Security Council decide whether a crime had been committed by virtue of the powers conferred on it under Chapter VII of the Charter of the United Nations. There was no reason for Council not to be able to do so and to decide what sanctions to impose if the alleged act was one of those referred to in Article 39 of the Charter. The third possibility, which might well be considered in the future, would be to create an impartial and independent judicial body, either ad hoc or permanent, with jurisdiction for defining certain acts as crimes. Needless to say, if such a body was created, the draft articles would have to be reviewed.

36. As to the consequences of a finding of international crime, if it were the Security Council that determined that a crime had been committed, it would also have to decide on the sanctions to be imposed on those responsible, within the framework of the powers conferred on it under Chapter VII of the Charter. If, on the other hand, it was a judicial body that determined that a crime had been committed, either it provided for sanctions and those sanctions were in fact imposed or it was unable to decide what sanctions to impose or the planned sanction could not be imposed on the alleged State, in which case it would be for the members of the international community to draw conclusions from that finding of crime in their own relations with the State in question. It might then perhaps be necessary to give thought to identifying in a draft article the various consequences that might stem from such a system for States in general and to make it very clear that *lex ferenda* was involved.

37. Mr. BENNOUNA asked Mr. Bowett for some additional information. As Mr. Bowett had just said that the first possibility, that of the Security Council, was

already *de lege lata* and that the Council could determine that a crime had been committed under Chapter VII of the Charter of the United Nations and could also determine the consequences of crimes in the framework of a resolution, as it had done, for example in the case of the Gulf war by going so far as to establish a system of responsibility through the Compensation Commission, did he really think that that was possible *de lege lata* under the Charter as it existed?

38. Mr. BOWETT said that there was no question that the Security Council had the power to determine that an act of aggression had been committed; assuming that aggression was a crime, it followed that the Council was empowered to determine that a crime had been committed. As to the consequences of that finding, his disagreement with Mr. Bennouna involved whether, in formulating sanctions against the aggressor State, the Council must confine itself to measures that fell short of punitive measures or whether it could go beyond that and take punitive measures appropriate for criminal conduct. Admittedly, to date, the Council had never done so precisely because it had never had the courage to decide that a crime had been committed. It had never even determined that an aggression had occurred. Nevertheless, the Charter of the United Nations allowed the Council to conclude, once it had found that a crime of aggression had been committed, that the collective sanctions embraced punitive measures which were appropriate for a crime. However, that was a possible development for the future that was not yet a practice applied by the Council.

39. Mr. Sreenivasa RAO, referring to Mr. Bowett's assertion as to the possibility of imagining State crimes and, consequently, collective sanctions that might affect society as a whole, said that that theory took little account of other considerations, notably those of a humanitarian nature. In his opinion, even if a crime was committed by the leaders of a State, that was not a justification for the State, including its people, its resources and other areas, to suffer discrimination through the consequences, whether in the form of reparations, sanctions, means of deterrence or punishment. Even within the framework of the Charter of the United Nations, when speaking of sanctions decided by the Security Council, it was essential to take into consideration the economic and other consequences of those sanctions for other States and peoples and to provide for the means of guaranteeing that those consequences did not affect the people disproportionately.

40. The long-term repercussions of that kind of "absolutist" theory were illustrated, according to certain analyses, by the situation at the end of the First World War, which a few years later had led to the Second World War. Such an absolutist point of view was not acceptable in the United Nations, particularly in the General Assembly, where no sanctions could be decided before their repercussions had been considered. The human rights defenders must be heard and no one could claim to be unacquainted with the long-term impact of sanctions on the people of the aggressor State itself. He was thinking in particular of the case of Iraq.

41. Mr. TOMUSCHAT, referring to the question of the gap between the jurisdiction of the Security Council and the scope of article 19, said that the latter related to situations in which the essential interests of the international community were affected, whereas the Security Council's only role was to maintain international peace and security. It might be tempting to broaden the meaning of the expression "international peace and security" to make it coincide with the scope of article 19, but that would be a daring exercise, particularly since article 19 also covered environmental questions.

42. It was therefore impossible to rely solely on the Security Council and, in the circumstances, one had to fall back on the individual action of States, while recognizing that preference must be given to collective action in cases where a crime as defined in article 19 had been committed.

43. He concluded that it might be necessary to institute a two-step regime in which a preference for collective action would be recognized while maintaining the freedom of States to act individually. The Commission was faced with a real dilemma and it had no other way out because it must draft law that could be applied immediately and not rules for the distant future.

44. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had no doubt about the first comment made by Mr. Bowett, that is the possibility that States committed crimes.

45. He was pleased that, apart from a few exceptions, the observations on article 19 were not likely to lead to its deletion.

46. As to Mr. Bowett's remarks, he hoped that he would explain in greater detail the *lex lata* aspect of his proposal, namely, the competence of United Nations organs, particularly that of the Security Council, and the role which, it was to be hoped, he called on it to play with regard to the *de lege ferenda* solution that he proposed—the establishment of a new court.

47. It was only a hypothesis, but it might be possible to envisage that, as soon as the Security Council found that an aggression had been committed, which would promptly be characterized as a crime by the community as a whole and the media, its decision could be challenged under a rule to be inserted in the draft if article 19 were retained, by virtue of which the State characterized as an "aggressor" could refer the matter to a judicial body, perhaps ICJ. The previous Special Rapporteur, Mr. Riphagen, had contemplated a solution of that kind and that was one of the directions that future discussion might take.

48. Mr. ROSENSTOCK said he thought that the debate highlighted the magnitude of the risks entailed by retaining any provision vaguely resembling article 19. For example, was it realistic to characterize a category of acts as a crime when it was obvious that, in today's international society and for some time to come, States would be free to draw their own conclusions about such acts? Concerning the authority of the Security Council, there was quite a difference between empowering it to take the necessary measures to restore and maintain the

status quo ante or international peace and security and the idea of punishment as such. The risks existed even if, to bring the terms of article 19 into harmony with those of the Charter of the United Nations with regard to the Council's jurisdiction, article 19 was to be recast to speak of "conduct which, in and of itself, threatens international peace and security".

49. As to the possible reference to the so-called criminal conduct of a given State in the 1930s, he considered it to be totally irrelevant from a legal standpoint. He referred in that context to his earlier statement (2339th meeting) emphasizing that the States involved had not been determined to have been guilty of crimes, the individuals had.

50. The Commission should put aside article 19 and all its baggage and focus on the question of violations of *erga omnes* obligations from the point of view of consequences. That was an infinitely more realistic approach than that of basing a system on the idea that some fine day there might be a court with competence for solving all problems.

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wanted to take up Mr. Rosenstock's observation that it was not legally relevant to characterize the conduct of three States in the 1930s and at the beginning of the 1940s which might have set a precedent. From the legal point of view, the Commission did not have to take any decision in that regard, but decisions had been taken at the time and thereafter and constituted precedents and part of *lex lata*. Those three States had been very severely punished in a manner that had affected their territories, their peoples and their armed forces.

52. Distinctions must be made and care must be taken if, in future, sanctions were to be envisaged against States that were responsible for a crime, whether characterized as a crime or as just a very serious breach, and an effort must naturally be made, to the extent possible, to differentiate between the various strata of the people, regions, degree of education and ability to participate. It was important to be cautious and to hit where it was necessary. However, it was also true that there were limits to the non-liability of the people. People had to know what they were doing when they voted, allowed themselves to be deprived of the right to vote or hailed dictators who waged wars of aggression.

53. It would therefore be regrettable for the Commission to provide for the total immunity of the people from the outset. An effort must be made to ensure that sanctions were imposed only where they had to be, but that could not be reduced to numbers of persons. Punishment was part of the game of international politics, international relations and, possibly, international law. There was thus no point in saying that that was not *lex lata*: a *lex lata* to be determined, to be codified and where necessary modified by way of progressive development.

54. Mr. TOMUSCHAT noted that there was a clear division of views in the Commission between members. There were those who advocated a semantic change consisting in the replacement of the word "crime" by a term describing a particularly serious breach of an international obligation, of whom he was one, and those who, like the Special Rapporteur, believed that the concept of crime indisputably had a penal connotation in the sense that any State which had committed a crime could be punished.

55. In his own view, the essential value of the concept of crime or of a particularly serious breach was that it provided a means of abandoning the traditional framework of bilateralism. Under the rules of State responsibility, the commission of an internationally wrongful act normally established a link between the State having committed that act and the victim State and no third party was entitled to take action in defence of the rights of the victim State. That was especially regrettable in the case of particularly serious breaches, where the international community clearly ought to have the right to intervene in order to defend the rights and interests of the victim State. The value of article 19 was therefore that it expanded the circle of States empowered to react to an internationally wrongful act.

56. On the subject of punishment, however, he disagreed with the Special Rapporteur. The Commission was trying to establish rules designed essentially to govern relations between individual States. It was not establishing a new organization that would punish such claims as might arise from an internationally wrongful act. Moreover, it was completely or mostly disregarding the existence of international institutions capable of intervening to some extent. A punishment could be inflicted only by a court on an individual and could not be ordered against a State unless a specific institution and specific procedural guarantees existed. It was inconceivable to recognize the right of any coalition of States to impose a punishment on another State alleged to have committed a crime. In that connection, he was of the opinion that the striking difference between the treatment given to Iraq and that given to the Axis Powers after the Second World War offered no grounds for the assertion that punishment formed part of existing law. The events of 1945, in particular the expulsion of millions of people from their ancestral lands, could not be a model.

57. If the Commission decided to provide for the possibility of punishing States, it would, at the same time, have to establish institutions and procedures governed by the principle of legality. A punitive sentence could not be pronounced lightly. There was, of course, the Security Council, which, to some extent, could have authority to punish, but that was all.

58. Article 19 was therefore useful because it opened up the "cage" of bilateralism by indicating that, in certain cases of particularly serious breaches, the international community, acting either within the framework of institutions or through individual States, had the right to intervene and that the State which was the victim of the crime could count on the international community's support. Article 19 should therefore not be dropped, but should be understood in that limited sense.

59. Mr. ROSENSTOCK said that, if it was deemed necessary to let the international community out of the "cage" of bilateralism, article 19 or any similar article was neither necessary nor sufficient. It was not necessary because there was no justification for going so far as the

idea of the punitive result inevitably connected with the idea of a crime and it was not sufficient because it failed to settle the issue of the category of *erga omnes* violations as a whole.

60. With regard to the assertion that punishment was *lex lata*, he said that, in 1945, it had been the winners of a war who had imposed conditions by right of conquest which the Charter of the United Nations had mostly ruled out for the future. That was clearly demonstrated by the fact that Article 107 of the Charter made an express reservation for the case of the conditions imposed at the end of the Second World War. Similarly, existing instruments providing, *inter alia*, that territory could not be acquired by force and that the exercise of the right of self-defence could not lead to the acquisition of territory made it clear that there was no *lex lata* authorizing punishment in such circumstances, i.e. in consequence of an aggression.

61. In order to break out of the "cage" of bilateralism, the Commission should focus on the consideration of *erga omnes* violations, possibly within the context of part two of the draft, without resorting to a concept such as that embodied in article 19 of part one.

62. Mr. PELLET said that, from a historical point of view, the intention of 1945 had indeed been to punish States responsible for crimes—criminal States—and that the precedent indisputably contributed to *lex lata*. In 1945, however, there had also been a completely new development, the establishment of the United Nations. Article 107 of the Charter of the United Nations clearly showed that what had happened previously could not have happened if a United Nations had existed. Today, the Organization was the most convincing embodiment of what the Special Rapporteur called the "organized international community" and the normal instrument for responding to certain crimes. However, the jurisdiction of the Security Council was confined to threats to the peace, breaches of the peace and acts of aggression. That jurisdiction could conceivably be expanded, but not indefinitely. At what point did a crime begin to constitute a threat to the peace? Something was unquestionably missing in that area, but could the gap be filled by a kind of inter-State criminal court that could hardly be anything but an abstract rationalization? At a stretch, ICJ could perform that function to the extent that the decision whether or not a crime had been committed was a problem of general international law. In fact, however, the question of countermeasures—the question of what reactions by States to wrongful acts were permissible—was more interesting.

63. He was not absolutely opposed to the idea of dropping the word "crime" if it was really true that, paradoxically, the concept of crime was not extended beyond the limits of the reasonable by the assumption that a crime was completely identical with a breach of an *erga omnes* obligation. He was by no means sure that all *erga omnes* obligations were so essential to the international community that their violation necessarily constituted a crime. As to the question of sparing the people when punishing the State, the Special Rapporteur was right to recall that peoples were not necessarily entirely guiltless. There again, a balance had to be found and the Charter perhaps provided the beginnings of an answer, since, in Chapter VII, it took great care to avoid hurting the innocent. The prohibition on the use of force was a second safety net in that regard and it should not be eliminated by a right of spontaneous recourse to the use of force in the event of a crime.

64. Mr. Sreenivasa RAO said that the debate on whether the concept of State crime formed part of *lex lata* was essentially academic. Some thought that the concept had no legal foundation and was, moreover, neither necessary nor desirable. Others found that, although "crimes" were constantly referred to in international law and in State practice, their constituent elements were never made clear. Still others rightly stressed the need not to copy the concept or extrapolate it from the concept of crime in internal law. But while there was disagreement about the concept, there could be none about the fact: everyone agreed that serious breaches could be committed by States and which might affect all States, so that it was up to the community of States as a whole to respond to them. Proceeding on the basis of that idea, article 19 gave a general definition of "crimes" but it was too general to be of any practical use in a given case. It nevertheless had the merit of identifying certain forms of conduct which had the basic characteristic of affecting the international community as a whole, although the illustrations given therein required review.

65. In his attempt to pinpoint some of the consequences of such crimes, the Special Rapporteur had focused on the most important among them, aggression, necessarily drawing the debate towards the regime of the Charter of the United Nations, but was that regime really helpful in responding to all situations of serious violations of international law? It was also true that not all breaches of an *erga omnes* obligation were necessarily crimes or necessarily affected everyone. But then how were the consequences of "crimes" to be identified in a strictly legal as well as in a technical manner—the real world being what it was, without any centralized institutions and procedures, which also had to be taken into consideration? In the case of other articles on State responsibility, the consequences were clear and States could accept or refuse the Commission's conclusions, but, in the case of State responsibility for "crimes", the situation was evolving. In the case of delicts, some members felt that, in the absence of appropriate institutions and procedures of the international community, its work would amount essentially to legitimizing existing relationships of force. That fundamental weakness was still more acute in the case of "crimes", especially when views diverged so widely on the very idea that States could commit "crimes".

66. Any elaboration of a regime to govern the consequences of "crimes" should not lead the Commission to reopen the debate on a subject as delicate and vital to the international community as the regime of the Charter of the United Nations, whose application gave rise on several occasions to enormous difficulties for certain countries which were not permanent members of the Security Council. Indiscriminate recourse to the Council was, in reality, an easy solution but which could one day burden the Council itself and the advocates of such recourse. The Charter contained provisions other than those of

Chapter VII which could, within the constraints of their powers, provide a legal basis for the elaboration of the regime of the consequences of "crimes". Articles 10 and 34, for example, gave the General Assembly the authority to come to conclusions and make recommendations, even in the area of dealing with the consequences of "crimes" or serious breaches attributed to States. Even if endowed only with recommendatory powers it was the General Assembly, not the Council, that represented the conscience of the international community. The Council had well-defined, exceptional powers, intended for specific purposes. The articles relating to the Assembly were subject to the doctrine of implied powers and it was doubtful whether that doctrine could be extended with equal facility to the powers of the Council which are essentially of a delegated nature. Moreover, it is a political organ, some of whose members had veto power, which, by their own admission, they would use to defend essentially their own interests rather than as trustees of the interests of the international community as commonly assessed or as could perhaps be assessed. It could therefore not be denied that the Charter regime involved fundamental difficulties so far as the establishment of a legal regime for the consequences of "crimes" was concerned.

67. The distinction between crimes and delicts also raised another problem of logic, namely, the problem that, in the case of a delict, the affected State could react of its own accord, whereas, in the situations covered by article 19, except for purposes of self-defence in the event of armed attack, the victim State had to await the coordinated reaction of the international community. The affected State was therefore in a weaker position quite ironically in the case of violations which were more serious. The punishment must fit the crime, even if it might perhaps be necessary to envisage introducing the principle of proportionality in that area as well. There were thus many questions to which the Commission still had no answer and the subject had certainly not matured to a point where solutions could be found with clarity and consensus.

The meeting rose at 1 p.m.

2342nd MEETING

Tuesday, 24 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, 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. Thiam, Mr. Tomuschat, 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. Sreenivasa RAO stressed the need not to keep open the way in which the concept of "crime" had been viewed on first reading. Any decision in that regard could be taken on second reading. In matters involving aggression, there was no easy way, outside the context of the Security Council, to deal with the consequences of that crime. As to the Council's role, he was of the same view as Mr. Rosenstock (2341st meeting) and other members that it would be unwise to reopen the debate on the doctrinal differences of opinion of States with regard to the Charter of the United Nations while attempting to establish a regime of consequences for "crimes" as part of State responsibility. The matter was too complex. It was essential to be responsive to the impact of any such consequences on the interests of the international community. The consequences of a "crime" could not be based on a State's unilateral desire "to teach a lesson" or "to punish", over and above the international community's own need to do so. The international community must treat the victim State with a certain consideration in respect of reparations, available remedies and cessation of the crime as part of the consequences of the crime. Obviously, it was important not to minimize the desirability of the international community's coming promptly to the victim's aid and to ensure a return to the situation which existed prior to the commission of the "crime", to the extent possible.

2. As to the State alleged to have committed the "crime", it was unrealistic and even wrong to adopt an approach that drew on the experience prevalent in dealing with crimes in national systems. There were enormous differences, as noted also by others, between national systems and a proposed international criminal system. Even in the context of national systems, the concept of crime had changed enormously over the years. Sociologists currently talked about the causes of crime, and criminologists no longer spoke of retribution, but of reform. At the national level, there were centralized institutions, well accepted codes of criminal law existed and there were uniform standards for investigation, prosecution and punishment. Yet crimes, far from diminishing, were on the rise and were becoming more complex. Why was that so? The Commission must reflect those issues which might be of greater value to the exercise the Commission had undertaken. There was room for a philosophical approach, notpurely and simply a clinical one. It was difficult to establish a new concept in an international system and States would be very troubled about the illogical conclusions that might be drawn from it. At the national level, individuals could not take the law into their own hands. The same must hold true at the international level.

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

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