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Summary record of the 2342nd meeting

Topic:
State responsibility

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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).

3. There was a fundamental flaw in the thinking on the delicate concept of "crimes" in international relations, about which Mr. Pellet (ibid.) had rightly sounded a warning. In his very thorough study, the Special Rapporteur had taken a position against unilateral reactions; that was the proper approach for the international community. In the opinion of the Special Rapporteur, an individual State should not even make a unilateral determination about the existence of a crime. Actually, that was consistent with the logic of the concept of "crime", but in reality the decision was not often taken at the level of the international community. When a State found that it was in a crisis, it had to react.

4. Thus, the Commission was facing a conceptual dilemma. Could it go beyond the provisions of Chapter VII of the Charter of the United Nations and find a solution as far as the consequences of "crimes" were concerned? There appeared to be general agreement that there should be different consequences for different "crimes". As Mr. Calero Rodrigues had noted (2339th meeting), beyond the context of Chapter VII of the Charter and the Security Council it was the decision of the international community that would help the Commission in determining the consequences and, wherever an international treaty was involved, the decision of the parties to such an instrument could likewise provide guidance.

5. It was essential to examine the question of to what extent the "crimes" of a State, as committed by the State's leaders or officials, should be attributed to the State and should a condemnation of the State mean condemnation of all nationals of that State? He saw a need for time-limits, flexibility, moderation, proportionality and swift remedies for the victim State, but it was also important to avoid alienating the accused State, which could not simply be excommunicated from the international community. The wrongdoing State and its population would continue to be part of international society. The Special Rapporteur had discussed the question whether conclusions could be reached from recent practice. In his opinion, they could not, and he agreed in that context with the points made by Mr. Rosenstock and Mr. Mahiou (ibid.). Every case must be treated on its own merits, hasty conclusions must be avoided.

6. The root causes of crime, namely social systems, indifference to long-standing injustice, inequalities, the impossibility of attaining a decent standard of living and respect for human dignity, were the reasons why an isolated concept of crime would not help in resolving problems facing the international society when it was confronted with grave or serious breaches of international law or "crimes". Crime was too broad a notion. The maintenance of a minimum public order called for examination of the core issues he had mentioned. Human rights, it was said, was an area in which the international community should react in the event of serious violations. Surely, everyone who believed in democracy could not fail to agree that human rights must be respected. But what did the concept of human rights mean? Essentially, it was a people's own perception of what was good for it, provided the standards set by a community were promotional in nature. If standards existed, they must be applied uniformly. Different communities must be allowed to have different answers in terms of their customs, beliefs and other personal matters, provided public policy was respected. Any consequences established for internationally wrongful acts characterized as "crimes" must be universally applied, so that States knew what to expect if they acted in a certain fashion. If consequences were selective they would not be convincing or help to promote an optimum world public order. Plainly, universal participation in decision-making was essential to make sure that a system for the consequences of "crimes" was universally acceptable and enforceable.

7. Mr. BENNOUNA, referring first to the question of who determined that a "crime" had been committed, said there was general agreement that it could only be a matter for an international judicial body and that it was impossible to confer the right to make such a determination on a political body, unless the goal was to reinforce the power of a handful of States in the international arena. Nor could it be conferred upon the State itself, except as an interim measure. From that point of view, was the distinction between crime and delict relevant? When an international obligation was breached it was always for an impartial judicial body to determine responsibility, in the absence of any prior agreement. But if there was a judicial control, what would be the jurisdiction for determining the crime? Some members had spoken of an ad hoc body, something he himself opposed. Others had said that ICJ could fulfil that role. Perhaps, but what would its jurisdiction be? That came back to the same problem of an international criminal jurisdiction.

8. Was the jurisdiction to be optional, thus giving criminals the choice of whether or not to appear in court? On the other hand, compulsory jurisdiction would be tantamount to a real revolution in international law, as Mr. Pellet had already pointed out (2341st meeting).

9. As to the Security Council, it did not have the power to determine a crime, and Chapter VII of the Charter of the United Nations only gave the Council powers to adopt measures in connection with its peace-keeping role. The Council was not a judge and did not apply the law, it was a political body and it had political powers. The Charter did not confer upon it the power to decide on the judicial responsibility of a State. When the Council took such a decision, it did so *ultra vires*.

10. Concerning the possible consequences of a finding of crime, and more particularly the remedies available, the Special Rapporteur, focusing on the problem of cessation, had begun by saying, in chapter II of his sixth report (A/CN.4/461 and Add.1-3) that it did not seem that crimes presented any special character in comparison with "ordinary" wrongful acts. Thus, the Special Rapporteur himself did not seem to think that making a distinction between a crime and a delict would have any consequences in that context. The Special Rapporteur had then proceeded to emphasize that the distinction between a crime and a delict would have no effect on restitution in kind in article 7.[3] He agreed that there

[3] For the texts of the draft articles of part two provisionally adopted so far by the Commission, see *Yearbook ... 1993*, vol. II (Part Two), pp. 53-54.

would be no impact on subparagraph (*a*) of the article: it was not possible, even in the case of a crime, to impose something that was materially impossible. Again, there was no difference in the case of subparagraph (*b*): a peremptory norm of international law could not be breached in order to react to another breach of a peremptory norm. Subparagraphs (*c*) and (*d*), however, could pose a number of problems. The Special Rapporteur gave the example of South Africa's efforts to wipe out the effects of the apartheid system in his fifth report (A/CN.4/453 and Add.1-3). It was a bad example, however, because no compensation for apartheid was possible. It was not a question of restitution or reparation, but of cessation of the apartheid regime, and that led back to article 6 (Cessation of wrongful conduct).[4]

11. The Special Rapporteur also cited the conflict between Iraq and Kuwait, but that example showed that the crime/delict distinction had no impact, because the Security Council itself had provided for reparations through compensation. As an example in connection with article 7, paragraph (*d*), the Special Rapporteur had referred to the indemnity paid by the Federal Republic of Germany to Israel, in his fifth report, but he did not see how such indemnity was humiliating for Germany or how it had jeopardized its "political independence" or "economic stability". That example too, was poorly chosen.

12. The Special Rapporteur had also cited the case of the obligations imposed on Iraq by Security Council resolution 687 (1991) of 3 April 1991 relating to the destruction of weapons. That, again, was a bad example, because the destruction of arms fell in the category of guarantees of non-repetition in article 10 *bis*:[5] the obligation to destroy its armaments had been imposed on Iraq to prevent it from engaging in aggressive acts against its neighbours.

13. In another example, the Special Rapporteur had criticized the powers conferred on the Security Council to draw the border between Iraq and Kuwait. But that was not relevant. He had spoken of the territorial amputations of a number of States at the end of the Second World War. Yet under the terms of article 7, subparagraph (*b*), restitution in kind must not "involve a breach of an obligation arising from a peremptory norm of general international law". If part of a State's territory was amputated, that meant that certain rules had been violated: the right to territorial integrity and, by the transfer of part of the population of one State to another without consulting it, violation of the right of peoples to self-determination. A further example might be added: that of a long-standing embargo which, imposed for political reasons, for example on Iraq, forced sacrifices on the most vulnerable part of the population, the children. If an embargo went on too long, it might well be asked whether it was compatible with basic human rights, and in particular the rights of children. Those issues all showed that the distinction between crime and delict was not relevant in regard to restitution in kind.

14. In article 10 (Satisfaction),[6] paragraph 2 (*d*) contained a provision to punish officials for serious misconduct or criminal conduct. In that connection, the Special Rapporteur asked whether a ban on demands for satisfaction that would impair the dignity of the State which had committed the internationally wrongful act should apply in the case of crimes. But, surely, there could be no greater infringement of the dignity of the State than that involved in the conviction and punishment of its leaders for a crime. The problem, therefore, had already been resolved, in his view.

15. With regard to assurances and guarantees of non-repetition dealt with in article 10 *bis*, the Special Rapporteur referred, in his fifth report, to guarantees against repetition which strongly affected the area of the domestic jurisdiction of the wrongdoing State. That was not reflected in article 10 *bis* and he would be grateful for the Special Rapporteur's clarification. Once again, he failed to see the relevance of any crime/delict distinction.

16. The Special Rapporteur raised the important question whether non-victim States were entitled to seek remedies on their own initiative or upon a decision of the Security Council. It was a surprising question because the Special Rapporteur had already raised it in regard to delicts—and it was indeed answered in the Commission's report on its forty-third session, which stated:

> in respect of article 19 on international crimes and of violations of obligations *erga omnes* (where a multitude of injured States were involved) it had soon been understood that the problem arose also with regard to delicts.[7]

Hence there was no need to ponder the matter further. In the same report, it was also stated that "the question arose not just with regard to countermeasures but also with regard to the substantive consequences" and that "the uniqueness of the position of so-called indirectly injured States was probably only a matter of degree with regard to both reparation and countermeasures". In other words, the situation of such States should be determined *in concreto* or on a case-by-case basis. His own view was that the same applied to crimes. Were it otherwise, one might have to contemplate a situation in which some 180 States all sought a remedy against one criminal State: that was clearly absurd. It had been suggested that the General Assembly or Security Council could seek a remedy on behalf of all States, but the Charter of the United Nations did not provide for such a remedy. A remedy did, however, exist within the context of the European Union as exemplified by a recent case in which Greece had decided to impose an embargo on Macedonia and the European Commission had decided to seek a remedy before the international court. It was regrettable that that kind of situation was not covered by the Charter. It was not the function of the Commission, however, to revise the Charter and in any event it would not be desirable for experts to do so, as they might not have all the necessary elements. The possibility of the Assembly or the Council seeking an advisory opinion could perhaps be envisaged, but in that case it would no longer be a question of a judicial remedy.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] *Yearbook . . . 1991*, vol. II (Part Two), para. 319.

17. The Commission was also asked to reflect on the *faculté* of resort to countermeasures. His answer to the first question raised—whether all States became "injured States" for the purposes of article 11[8]—was in the negative. As to the second question—whether the restrictions imposed under article 12[9] would apply to crimes—it seemed, having regard to article 12, paragraphs 2 (*b*) and 2 (*c*), that self-defence could be treated as an interim measure of protection in that it was designed to protect rights and to provide a defence pending a decision by the Security Council. Consequently, there too, the crime/delict distinction was not relevant.

18. The third point concerned the principle of proportionality, which was dealt with in article 13[10] and should, in his view, apply to crimes. In the case of the occupation of Kuwait by Iraq, for example, the mandate of the international force had ceased when Kuwait had been liberated. There had been no question of occupying Iraq, though some might have wished to do so. Instead, the rule of proportionality had applied. In that case too, therefore, he saw no distinction between crimes and delicts.

19. With regard to the fourth point concerning prohibited countermeasures, which was dealt with in article 14,[11] the use of force should not be permitted even for crimes, apart from cases of self-defence. No further pretexts for using force should be added to those already invoked in the past. The main thing was to abide by all the provisions of the Charter of the United Nations without exception. Article 14 provided essentially that the rights of other States should be respected, and that applied equally to delicts and to crimes. Again, no distinction could be drawn between the two.

20. The Special Rapporteur's next question concerned conditions under which all States, and not only the actual victim, might in the case of a crime, be allowed to seek remedies or to resort to countermeasures. That question had been answered in connection with the problem of a plurality of injured States—a problem that arose in the case of both crimes and delicts.

21. Another question was the possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness. With regard to consent, dealt with in article 29 of part one of the draft,[12] it was not possible to agree to a breach of a peremptory norm of international law and, indeed, paragraph 2 of that article so provided. Accordingly, in the case of consent the problem had already been settled. He did not see how *force majeure*, which was covered by article 31,[13] could apply to crimes, since a crime involved a premeditated act. Consequently where there was *force majeure*, there could be no crime. Paragraph 2 (*a*) of article 33 (State of necessity)[14] likewise made an exception in the case of a peremptory norm of general international law. Once again, therefore, the problem was already settled and he saw no point in the crime/delict distinction.

22. The Special Rapporteur's next point related to the general obligation not to recognize the consequences of a crime, in which connection he referred in particular to the obligation not to recognize as legal any territorial acquisition resulting from the use of force. That, however, was another way of saying that it was the rule prohibiting the use of force against territorial integrity and against the rights of peoples which applied. In fact, that meant a return to the primary rule. The main problem seemed to be that the Commission was becoming involved with primary rules. If one followed the Special Rapporteur's reasoning, it seemed as though the use of force in all international relations was going to be regulated. That would be entering the realm of primary rules of law and departing from that of State responsibility.

23. The general obligation not to aid the "criminal" State and to render aid to the victim—the fifth question raised in the Special Rapporteur's report—likewise involved a matter of primary law. The general obligation not to aid the criminal State was a matter of complicity. It was a general rule of law that anyone who helped another to violate the law participated in that violation himself. On the other hand, there was no obligation, in his view, either *de lege lata* or *de lege ferenda*, to render aid to the victim of a crime.

24. It was a case of much ado about nothing. That remark was not addressed to the Special Rapporteur, however, and he did not believe that the Special Rapporteur endorsed the observations that he placed before the Commission. Rather, he simply wished to point out the difficulties. As for his own modest analysis, it was addressed to the question of a distinction in the case of crimes and their possible consequences—consequences that should not be dealt with in the context of State responsibility.

25. He also wished to correct a misunderstanding. He had not meant to suggest that the concept of crime did not exist in international law: it did and there was, for example, the International Convention on the Suppression and Punishment of the Crime of Apartheid, which spoke of crime. Whether or not that concept should be dealt with in connection with State responsibility was another matter. In that connection, he would refer members to an article by François Rigaux on State crime,[15] according to which three requirements would have to be met if article 19 of part one[16] was to be effective. The first requirement was legality. The acts characterized as crimes and the penalties for those acts would first have to be incorporated in a norm of positive law in keeping with the principle *nullum crimen sine lege*. In the case with which the Commission was concerned, there was no such prior law. In any event, it was not in that context but rather at the primary norm level that the notion of crime should be dealt with. To that end, the Commission

[8] *Yearbook... 1992*, vol. II (Part Two), p. 25, footnote 56.

[9] Ibid., p. 27, footnote 61.

[10] Ibid., p. 30, footnote 67.

[11] Ibid., p. 31, footnote 69.

[12] 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.*

[13] Ibid.

[14] Ibid.

[15] "Le crime d'État. Réflexions sur l'article 19 du projet d'articles sur la responsabilité des États", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Milan, Giuffrè), vol. III (1987), pp. 301-325, at p. 318, para. 19.

[16] See footnote 12 above.

should propose to the General Assembly that a topic of State crimes should be created and assigned to another special rapporteur. The topic could then be studied at the same time as the topic of State responsibility and, in that way, it should be possible to determine whether the law governing State crime could be codified.

26. The second requirement mentioned by Rigaux was the application of the penalty by an impartial judge, something which, in his opinion, posed enormous difficulties in international law. The third requirement was that the penalty should be in keeping with the gravity of the crime and the personality of the criminal, or in the case in point, with the actual nature of the State. As those three requirements were not met in the present instance, it was not possible for it to proceed further with the matter. The most prudent course would be not to try to decide the question during the current quinquennium but rather to review article 19 of part one on second reading and perhaps propose that it should form a topic for the codification of international law.

27. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Bennouna's interesting statement was indicative of the kind of debate he wanted from the Commission. He trusted, however, that members would understand the questions he had raised, notwithstanding the somewhat imprecise wording used in some of his reports, due in part to his imperfect English and in part, sometimes, to the translations into the other languages. For example, Mr. Bennouna had mentioned the expression *autorité interne*, used presumably in the French version of the report: that was simply a poor translation of the expression "domestic jurisdiction".

28. He had raised the question of the rule of proportionality to make it clear that, in the case of crime, the application of that rule would operate to the detriment of the criminal State. Failure to apply the rule could mean that the State responsible for a crime was not treated as severely as it should be.

29. He was grateful, in a sense, to Mr. Bennouna for suggesting that the Commission should ask the General Assembly whether there should be a separate topic and special rapporteur. From the very outset, the subject of crimes and article 19 had caused him considerable difficulty, though he had endeavoured to pay his debt to the Commission in that respect. He had of course felt duty bound, in his report, to express all his doubts and perplexities with regard to the matter, rather than favour unconditionally the implementation of article 19. At all events, he retained an open mind on the matter and was ready to do his best to submit constructive proposals provided that the Commission showed that it so wished.

30. From the remarks made by several speakers—including perhaps Mr. Bennouna—regarding the relevance of the circumstances precluding wrongfulness, which were referred to under the heading "Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness" in chapter II, section C, of his sixth report, he realized that it was indispensable to correct the false impression created by the unfortunate drafting of that portion of the report. His intention had been to draw attention to the obvious distinction suggested in chapter II, section B, of his fifth report, where, in discussing the admissibility of the use of force in response to an international crime, he had distinguished between the lawfulness of such a reaction by injured States in response to a crime, on the one hand, and the lawfulness of resort to force by States in the face of a "state of necessity" or "distress", on the other. While circumstances such as "necessity" or "distress" possibly precluded wrongfulness of resort to force, unlike self-defence, they did not authorize a direct reaction against the State perpetrating the crime. In other words, "necessity" and "distress", *de lege lata* or *de lege ferenda*, fell beyond the scope of the specific regime governing reactions to internationally wrongful acts or to international crimes of States in particular. His faulty drafting had failed to make that distinction clear in chapter II, section C, of his sixth report: as presently formulated, it appeared to address the different issue of whether an international crime could be justified, to any extent, by the presence of circumstances precluding wrongfulness, such as necessity, distress, consent or *force majeure*. He apologized for the confusion he had created and hoped that the attention of readers of his sixth report in its final printed form would be drawn to the clarification he had given.

31. Mr. CRAWFORD said that, as the Special Rapporteur had clearly demonstrated in his reports, the Commission faced considerable difficulties with regard to article 19 of part one of the draft.[17]

32. As far as definitions were concerned, the existing wording of article 19 was rather unsatisfactory, not so much in its recognition of a category of State crimes as in its attempt to spell out those crimes. Paragraph 3 of the article, in particular, was defective in a number of ways. First of all, it did not actually say what it appeared to say. It appeared to say that the matters listed and examples given actually constituted State crimes. It was, however, prefaced by the phrase "Subject to paragraph 2, and on the basis of the rules of international law in force". Accordingly, the test provided for in paragraph 2 still had to be applied and the rules of international law in force still had to be determined. The second difficulty was that paragraph 3 contained a non-exhaustive list which none the less set out a number of categories. Presumably, the intention was to lay down the most important categories, but it was very difficult to do so until the question of State crimes had been thoroughly explored. Rather unusually, the draft gave examples whereas one would have thought that the function was not to illustrate by example but rather to specify the intent.

33. Again, the draft also seemed to encroach on the line between primary and secondary rules of responsibility. Unlike the Special Rapporteur, he favoured the distinction between primary and secondary rules, which he regarded as essential to maintain the integrity of the draft and to limit it to the matters with which the Commission should deal. If paragraph 3 was anything more than indicative and exemplary, then it overstepped the line; and, if it was merely indicative and exemplary, it was unnecessary. He therefore favoured relegating it to the commentary.

[17] Ibid.

34. The rest of the definition stated, in effect, that an act was an international crime if it was universally recognized as such. There was a time-honoured precedent for a definition of that character, one whose truth could not be denied. The question, however, was whether there was such a thing as a category of international crimes. The Special Rapporteur affirmed that there was, though he affirmed very little else about the law relating to State crimes, primarily on the doctrinal ground that States were factual, collective entities rather than *personnes morales* of national law and, as such, were just as capable of committing crimes as anyone else. He was not sure that one had to be committed to the Special Rapporteur's view of the State in order to accept that States might commit crimes. There had been examples where States had been regarded as committing acts that were criminal in character. None the less, there was an important distinction between crimes that could be committed at the international level by whomsoever—individuals, corporations or States—and crimes that could be committed only by a State.

35. There were only a few examples of crimes that could be committed exclusively by a State: for example, aggression, which was widely acknowledged to be a crime, and intervention, which did not, in his view, have the characteristics of an international crime, though it was an internationally wrongful act. As a matter of general international law, it might well be that it was only the crime of aggression that could be committed exclusively by a State. By reason of the powers and responsibilities of the Security Council under Chapter VII of the Charter of the United Nations, aggression was in a special category, however.

36. There were also a number of crimes—terrorism and genocide, for example—that could be committed by State officials, and under normal rules of imputability they could be considered State crimes. But some of them, genocide for example, were committed typically against the population of the official's own country, not against other States. That raised the organizational difficulty of how to impute to the State—the organized manifestation of a human community—a crime of which that community was the primary victim. A classic illustration was to be seen in the Cambodian genocide.

37. On the question of whether there were any consequences specific to State crimes, as opposed to consequences that all internationally wrongful acts shared, it was possible to distinguish seven categories. Referring to the fifth report, he noted that, in respect of cessation of a breach of international law, there was no distinction between international crimes and internationally wrongful acts. As to reparation, there might be differences in degree of gravity, but a category of State crimes was not needed in order to reflect those differences.

38. The third category was punitive damages, which must be accepted as being distinct, in respect of State crimes, from the punitive damages sometimes envisaged for internationally wrongful acts: it would be an aberration to say that State crimes existed but there were no punitive damages for them. Yet the implementation of such a regime would pose significant problems, especially when the principal victim of the State crime was the population.

39. The fourth category of consequences was the use of force in reaction to a State crime. Although various forms of forceful reaction might be appropriate, it was the Charter of the United Nations, and not the category of the crime, that would ultimately justify or invalidate such a reaction. The interpretation of the Charter provisions on the use of force was controversial, particularly with regard to humanitarian intervention, but where it had been determined that such intervention was permissible, the category of the crime involved had not been used as the defining element. The Commission should resist the temptation to amend the Charter, leaving that task to the bodies specifically empowered to look into that issue.

40. Regarding non-forcible countermeasures, the fifth category, the Special Rapporteur had rightly pointed out that they might be exacerbated, compared with those applicable to delictual responsibility, but was vague on exactly what such measures might entail. In the fifth report, it was suggested that the prosecution of individuals might be a form of aggravated countermeasure, but that was wholly inadmissible on the grounds of due process. The guilt or innocence of an individual was distinct from that of the State and had to be judged independently. The impact on third States of sanctions or other measures taken in response to crimes might well be greater than in cases of delictual responsibility, but the relevant provision was concerned with rights, not with indirect consequences, so there was no need for specific regulation on that point. There was, finally, the general category of other punitive measures, which could not be excluded from the regime, any more than punitive damages could be. However, very little progress had been made in elaborating what they might be.

41. The sixth category was that of an obligation incumbent on other States to react to a State crime. The international community could no doubt impose such an obligation. On the other hand, it was difficult to find State practice, or provisions in contemporary international law, in support of the thesis that there was an affirmative obligation on States to respond to State crimes.

42. The seventh, and most disputable category was that of an obligation of non-recognition. The problem was that any such obligation in international law was not limited exclusively to State crimes. The normal illustration of the obligation related to the acquisition of territory, but in State practice the conduct in question need not be classed as a State crime. A further problem with non-recognition and the associated duty of non-assistance was that most crimes were concerned not with questions of legal validity, but with questions of fact. Most criminal conduct was criminal by reason of its consequences in fact, and there was no point in not recognizing facts.

43. In short, there were a number of consequences that could be attached to State crimes: punitive damages, the aggravation of certain countermeasures, the obligation to react and the possible indirect obligation of non-recognition. Yet he saw a number of reasons why the

articles on State responsibility were not the place to elaborate the consequences that might flow from State crimes. First, such an effort would inevitably involve the elaboration of primary rules of responsibility, which was inconsistent with the foundation on which the draft had been built so far. Secondly, a satisfactory regime for crimes could not be devised without substantial measures of implementation to accompany it. It had been said that States would not be deterred from committing crimes by the threat of punishment. However that might be, they certainly would not be deterred by the threat of a crime being labelled as a crime. That was, roughly, what the draft articles as now worded did. Thirdly, most of the consequences that might derive from State crimes were closely bound up with the functioning of the Charter of the United Nations. Most examples given by the Special Rapporteur were drawn from Security Council resolutions, but the Charter regime operated independently from that of the draft articles, and the Commission could hardly amend it. The fourth reason why the Commission should not seek to elaborate a full-scale regime of State responsibility for international crimes was that it would be a distraction from the very important task of developing a satisfactory regime dealing with general issues of State responsibility. State crimes were, fortunately, a minor—though often tragic—aspect of the general regime.

44. What conclusions, then, should be drawn about the draft articles in their current form? Internationally wrongful acts, as a category, covered any conduct that constituted a State crime: hence, all the consequences attaching to internationally wrongful acts applied to State crimes as well. The question was what additional consequences should derive from State crimes, and where should such consequences be elaborated. He was inclined to think that article 19 of part one,[18] with the amendments he had suggested earlier, should be retained in order to reflect the category of State crimes that existed in international law, in a limited number of cases. There should also be a clause, probably in part two, saying that the draft articles applied to cases constituting crimes as defined in article 19 with such modifications as might be required, but that those articles were without prejudice to the further consequences that could flow from a state crime, in accordance either with the Charter of the United Nations or with general international law. Care should be taken to ensure that the rules in part two were adapted to deal with State crimes in their manifestation as internationally wrongful acts, but nothing more than this was required.

45. The question remained as to whether the Commission should take up a new and separate topic of "State crimes". Given its current workload, the Commission should not actively seek such an assignment, although it could no doubt flag the issue in reporting to the General Assembly on its work on State responsibility.

46. Mr. AL-BAHARNA said the major issue now facing the Commission was whether the draft articles on State responsibility should deal with the consequences of crimes of States. An answer to that question depended, first, on whether the Commission's mandate warranted the consideration of matters relating to the criminal, as distinct from the civil, responsibility of States; and secondly, on whether the Commission should continue to discuss criminal responsibility of States when the topic of crimes by States had been ruled out in connection with the draft Code of Crimes against the Peace and Security of Mankind. In regard to the first question, he believed that the Commission's mandate did not preclude criminal responsibility from being discussed in the context of State responsibility. On the second question, his preference would be to adopt the same approach as for the draft Code of Crimes against the Peace and Security of Mankind, although he had nothing against exploring the consequences of State crimes as part of the development of the norms of State responsibility.

47. Paragraph 299 of the Commission's report on its forty-fifth session[19] reflected a number of issues raised by the Special Rapporteur. As to whether United Nations organs were empowered to determine the existence, attribution and consequences of the wrongful acts contemplated in article 19 of part one,[20] his own opinion was that, notwithstanding its principles and purposes, the United Nations was not a supra State endowed, on a higher plane, with powers comparable to those of a State at the national level. The United Nations could not be expected to exercise the full panoply of powers of a nation State: it could not, for example, impose sanctions for breaches of the law. Admittedly, in certain circumstances the Security Council could impose obligations on Member States that might affect their conduct: such had been the case with regard to Iraq. But that example, which was a special case, could not be used as the basis for the general conclusion that the United Nations could prescribe consequences for the international crimes enumerated in article 19. It should also be borne in mind that enforcement action under Chapter VII of the Charter of the United Nations was specifically geared to the objectives of Article 39, namely, of maintaining or restoring international peace and security. It certainly could not be said that Chapter VII operated as a sanctions mechanism in international relations. There were only four instances in which the United Nations had determined that there had been a breach of the peace within the meaning of Article 39: under the Security Council decisions relating to the Korean war, the Falklands Islands, the Iran-Iraq conflict and the Iraqi invasion of Kuwait. Mandatory sanctions under Chapter VII had been adopted in only two instances: against Rhodesia in 1966 and against Iraq in 1990.

48. The Special Rapporteur's second question was whether the existing powers of United Nations organs should be legally adapted to the tasks that would have to be performed by the United Nations under article 19 of part one of the draft on State responsibility. In the present political and economic climate of the international community, it was doubtful whether that could be achieved. Any attempt at adaptation of the United Nations system would involve an examination of the primary rules of international law, especially the nature and scope of the use of force, self-defence and collective

[18] Ibid.

[19] *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10.

[20] See footnote 12 above.

self-defence, enforcement measures, and so on. Such an inquiry might be open to objection on the grounds that the Commission was going beyond its mandate.

49. The third question was to what extent the powers of United Nations organs affected the rights and obligations of States to react to internationally wrongful acts. It was conceivable that, in certain situations, a State's actions might coincide with international measures proposed by the Security Council under Chapter VII of the Charter of the United Nations. Colonel Green, Counsel to the Chairman of the Joint Chiefs of Staff of the United Nations, had said that the use of force against Iraq had been pursuant to a Council authorization and in exercise of the right of collective self-defence. A truer explanation was probably that, in the Gulf war, the Security Council had seized the opportunity to give the coalition a legal seal of approval for the projected use of force against Iraq. The coincidence of enforcement measures and collective self-defence could plausibly be interpreted to say that the actions of the United Nations necessarily affected the obligations of States in respect of international crimes of States. But that coincidence might be more fortuitous than the result of a conviction that the United Nations represented the organized community of nations.

50. There might yet be situations—first, in relation to acts or threats of aggression, and secondly, in relation to genocide and apartheid—for which the Commission must articulate norms dealing with the consequences. It might therefore consider including in the draft provisions on the responsibility of States arising from acts of aggression, genocide and apartheid.

51. With regard to the issues raised in chapter II of the Special Rapporteur's sixth report, the first question was whether the list of crimes in article 19 was the most satisfactory one. He agreed with the Special Rapporteur that the definition set out in article 19 was somewhat circular. Moreover, the crimes listed in paragraph 3 (*b*) and paragraph 3 (*d*), dealing respectively with colonial domination and massive pollution of the atmosphere or of the sea, were outdated in one case, and controversial in the other. The Commission should tread carefully in enumerating State crimes, and must remain satisfied with prescribing the consequences of crimes agreed by the entire international community.

52. It was only logical that the victim State should have the right to decide that a crime had been committed. In his view, the State's decision was not provisional, but it did entail a risk of its own. Under Article 39 of the Charter of the United Nations, the Security Council had the power to decide the issue of aggression, but its competence was confined to the restoration or maintenance of international peace and security. Further investigation of that point was required, and he would reserve his position. The crimes of genocide and apartheid gave rise to somewhat different considerations, but the Council could be presumed to have the competence to determine that they had been committed in cases where, for example, they entailed a breach of the peace within the meaning of Article 39 of the Charter.

53. The answer to the question of whether any State other than the victim State was entitled to seek remedies or resort to countermeasures was in the negative. Such a possibility was likely to give rise to abuses. The legal position would, of course, be different if there were a Security Council decision specifying the legal consequences arising out of acts of aggression, genocide or apartheid. Under Article 25 of the Charter, a decision of that kind would be binding on all Member States.

54. The general obligation of non-recognition of the consequences of crimes of aggression arose from a normative decision by the Security Council. The position was the same with regard to the general obligation not to aid one criminal State and to render assistance to the victim State.

55. In conclusion, he would suggest that the draft be confined for the present to the formulation of norms concerning the consequences of aggression, genocide and apartheid. Care should be taken not to engage in a definition of the primary rules of international law relating to those crimes or to overstep the Commission's mandate.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that reference had been made more than once in the debate thus far to the concept of an "organized international community" as something either espoused by him or as having been put forward by him in one of his reports. True, he had often had occasion to mention that concept in his reports by referring to what most international lawyers indicated by the term. He wished to place on record, however, that from the earliest days of his study of international law he had thought and written that there was no such thing as an organized international community, far less a properly or decently organized one. That was the view he continued to hold today, nothing having occurred in the meanwhile to change his mind. To complete the picture, he would add that he was far from sure whether an international legal community, whether organized or not, existed at all; indeed, at the risk of blaspheming, he would confess to daily doubts as to the existence of a system of international law in any sense comparable, however imperfect, to the legal systems of interrelated societies. A statement much to the same effect by a former high official in the United States Administration had recently appeared in the press, showing that the view was not only held by theoreticians such as himself but was shared by men who had been substantially involved in the practice of international relations.

57. Mr. FOMBA said that, far from being a purely intellectual construct, the concept of an international State crime had both a political and a legal foundation. The political foundation was self-evident inasmuch as the contemporary history of international life was, unfortunately, full of examples of criminal acts directly or indirectly imputable to the State. The legal foundation was provided by *lex lata*, as embodied in particular in the Convention on the Prevention and Punishment of the Crime of Genocide, which used the term "crime" in the title and in articles I, IV and IX, and also in the International Convention on the Suppression and Punishment of the Crime of Apartheid, which also used the term in the title and in articles I, III and X.

58. With regard to the doctrinal debate on the concept of the State as a legal entity capable of being held responsible for its actions, he remarked that the distinction between individual and legal entities was not always clear-cut, and referred in that connection to the concepts of *faute personnelle* and *faute de service* in French administrative law and also to relevant passages of the judgment of ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[21]

59. In an article on the international community and genocide published in 1991, Judge Antonio Cassese discussed the *lex lata* relating to the crime of genocide and went on to examine the international community's reaction in various cases where genocide had actually occurred. Of particular interest in that connection was the history of the savage massacre of the Balubas perpetrated during the Congo crisis in 1960. On that occasion, the then Secretary-General had initially stated that the acts involved bore the characteristics of the crime of genocide. After contentions that he wanted United Nations troops to intervene, he had been compelled to tone down the terms of the accusation, saying that the perpetrators no longer formed part of the Congolese army and were acting as individuals. The Security Council had ignored his words and nothing had been done. At the current time, 34 years later, it might well be asked whether the "organized international community" possessed ways and means of achieving greater credibility in its role as the guarantor of international public order.

60. The late twentieth century's most serious case of genocide was currently taking place in Rwanda. What was the international community doing about the situation, and what ought it to be doing? The Security Council, in its resolution 918 (1994) of 17 May 1994, was concerned that the situation in Rwanda constituted a humanitarian crisis of enormous proportions, expressed alarm at continuing reports of systematic, widespread and flagrant violations of international humanitarian law in Rwanda, recalled that the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constituted a crime punishable under international law, and was concerned that the continuation of the situation in Rwanda constituted a threat to peace and security in the region. The Council demanded that all parties to the conflict immediately cease hostilities, agree to a cease-fire and bring an end to the mindless violence and carnage engulfing Rwanda. It decided to expand the mandate of the United Nations Assistance Mission for Rwanda and recognized that the Mission might be required to take action in self-defence, and, in that context, authorized an expansion of the Mission's force level up to 5,500 troops. It did not, however, authorize the use of force by United Nations troops with a view to disarming the parties to the conflict. While invoking Chapter VII of the Charter of the United Nations, the Council did not seem inclined to apply it with full rigour. The question of the prosecution and punishment of the presumed perpetrators of acts of genocide was not directly or openly touched upon, and, notwithstanding the request addressed to the Secretary-General to present a report as soon as possible on the investigation of serious violations of international humanitarian law committed in Rwanda during the conflict, it was to be feared that the 1960 scenario of silence and vacillation would be re-enacted. Nor was it by any means certain that much significant case-law would be forthcoming from 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.[22] All those unanswered questions should inspire the Commission in its search for ways and means of proclaiming the *lex lata*, clarifying it and, possibly, proposing new rules.

61. Mr. AL-KHASAWNEH said that the distinction drawn by the Commission in 1976 between ordinary wrongful acts—delicts—and a special class of serious wrongful acts that breached the fundamental interests of the international community—international crimes—was not the only solution to the problem of differentiating between regimes of responsibility. It was possible, for example, to argue in favour of a continuum within a single regime of responsibility extending from minor breaches at one end of the spectrum to exceptionally serious breaches at the other end, a continuum marked by an essentially quantitative difference. No system of classification was perfect, and the debate between the proponents of the continuum theory and those who wished the draft to include a distinct category for exceptionally serious wrongful acts was likely to be never-ending, since quantitative differences could, beyond a certain threshold, turn into qualitative ones. In his opinion, the distinction drawn in article 19 of part one,[23] while not sacrosanct, was none the less valid and useful for the purposes of ascertaining the consequences of a wide range of wrongful acts covered by the draft articles.

62. It would be idle to pretend that the use of the term "crime" had not contributed to the controversy surrounding article 19. Without pressing for the term to be maintained at any price, he would point out that its use might have a deterrent effect on the conduct of States. Besides, it had been decided to speak of crimes, rather than offences, in the draft Code of Crimes against the Peace and Security of Mankind currently under preparation in the Commission. He was, of course, not oblivious of the fact that the point at issue in that topic was the criminal responsibility of individuals, not States, but it was also true that conduct which would be labelled criminal under that topic corresponded closely, *ratione materiae*, to breaches of obligations in the present draft which had been termed international crimes. Therefore, if only for the sake of uniformity of terminology, the Commission should not replace the term "international crimes" by the more serpentine and, it might be added, more obscure term "exceptionally serious wrongful acts".

63. Beyond that relatively minor point, he had some difficulty with the definition of crimes contained in paragraph 2 and the non-exhaustive list contained in paragraph 3 of article 19. Paragraph 2 required the breach to be recognized as a crime by the international commu-

[21] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

[22] See Security Council resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993.

[23] See footnote 12 above.

nity. Yet criminal law was steeped in subjectivity; the reprobation aroused in the public conscience by the commission of an act, no matter how heinous, was never uniform, even in a national society sharing the same values. In a culturally heterogeneous international society the element of subjectivity was even more marked. The question might well be asked, if only from a moral point of view, why a "small aggression" which caused relatively minor destruction of property and the death of few innocent people should entail additional consequences in terms of authorized armed countermeasures when such countermeasures would presumably not be allowed in the case of wide-scale genocide. A similar point could be made in connection with the choice of crimes included in the list in paragraph 3, as Mr. Ago pointed out in an article he wrote,[24] and to which reference was made in the Special Rapporteur's fifth report. He was not suggesting that paragraph 3 (*d*) be dropped but simply pointing out the unavoidable subjectivity inherent in including in the list acts on the basis of moral revulsion felt by the Commission at the time of codification.

64. His answer to the question whether the list was still satisfactory 18 years after the adoption of article 19 on first reading was generally in the affirmative. Some drafting changes should perhaps be made in paragraph 3 (*b*), relating to the establishment or maintenance by force of colonial domination, so as to bring the text into line with the realities of modern international relations, especially after the end of classical colonialism and the belated decolonization of the Soviet Empire. Attempts at expanding the list of crimes should, in his opinion, be resisted, if only in the interests of quality control.

65. In the case of a crime such as aggression, the determination should not be left to the victim State, the maxim *nemo judex in sua causa* being applicable in the case of aggression as in that of other crimes. The determination could be made by the Security Council, although it was true that the Council had never as yet characterized a State as an aggressor. He was not unaware of the difficulties and dangers of leaving such a determination to a political body, which was prone to act neither consistently nor impartially, and for that reason he thought that the Council's determination should take the form of a presumption rather than a definitive determination. However, there was no way round the need for an ultimate judicial determination as to whether a crime had been committed. If that was so with regard to the crime of aggression, it would be even more important to ensure that the hypotheses of the kind described in paragraph 3, subparagraphs (*b*) to (*d*) of article 19 were met, at least *de lege ferenda*, by judicial means.

66. As to the substantive and instrumental consequences of international crimes, cessation presented no special problems. With regard to *restitutio*, the limitation of excessive onerousness should not, in his opinion, be derogated from in the case of crimes. Unlike punitive damages, which could be disguised as guarantees of non-repetition, the limitation of excessive onerousness could be measured with reasonable accuracy and should be maintained in order to spare the inhabitants of the criminal State excessive suffering.

67. Regarding the question whether the prohibition of punitive measures might be derogated from in the case of crimes, in the third report,[25] as a matter of *lex lata*, there could be no doubt that punitive measures had traditionally played a part in the responsibility relationship. It was argued that such measures were a thing of the past and had no place in a modern codification of State responsibility. The truth was, however, that the tendency in recent years had been not to abandon punitive measures but to disguise them as *restitutio* or guarantees against repetition. In that connection, he pointed to certain aspects of the obligations imposed on Iraq in Security Council resolution 687 (1991) of 3 April 1991. If the Commission's intention was to ensure that innocent people were, as far as possible, to be spared the consequences of measures amounting to collective punishments, it should recognize that, in the hard political realities of today, that was not achieved by pretending measures such as those imposed on Iraq carried no punitive implications. Rather, the aim was achieved by careful regulation of punitive damages, first, through a judicial review of decisions taken by international bodies, and second, through objective criteria relating to proportionality and non-derogation from the excessive onerousness requirement. Consideration should also be given to the guarantees proposed by the Special Rapporteur in respect of countermeasures, for example the effect on third parties and the protection of the human person, as well as to Mr. Bennouna's suggestion concerning an express prohibition of punitive consequences even in the case of crimes threatening the territorial integrity of States.

68. At a time when severe measures were taken on the basis of the "organic reaction" of the world community against a State committing a crime, and when it was claimed that a reaction of that kind lay outside the responsibility regime, the Commission should ask itself whether it ought to accept the unfettered exercise of power to conceal a severe punitive intent in the regime of the maintenance of international peace and security.

69. With regard to the *faculté* of resort to countermeasures in the sixth report, procedurally there was no reason why the preliminary requirements of prior notification and resort to peaceful settlement of disputes should be abandoned. In the fifth report, the Special Rapporteur referred to the case of Iraq, when no less than 15 States had adopted economic measures on their own a few days after the invasion of Kuwait before any attempt had been made to resolve the question by means of dispute settlement mechanisms. It was at least possible that, had there been no hasty condemnations and economic countermeasures designed to escalate the dispute, a peaceful but principled solution to the conflict might have been found.

70. In the sixth report, the Special Rapporteur asked whether proportionality, as provided in draft article 13,

[24] "Remarks on some classes of crimes by States", *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).

[25] *Yearbook... 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1

applied to crimes. The answer, of course, was that it did, and it was gratifying to hear the Special Rapporteur's confirmation of that point.

71. As to the general obligation not to recognize the consequences of a crime mentioned in the sixth report, in his view, the duty not to recognize was a consequence not only of crimes but also of delicts. Furthermore, the obligation should not be confined exclusively to acquisitions of territory resulting from wars of aggression. Acquisition of territory resulting from a war waged in exercise of self-defence, although not a crime, was still a wrongful act to which the duty of non-recognition should apply. An authoritative statement not only by the Security Council but also by the General Assembly might trigger the recognition of the duty not to recognize in such a case. Again, such a statement by the Council or the Assembly would be absolutely necessary in order to trigger the general obligation not to aid the criminal State and to render aid to the victim. He agreed with Mr. Crawford that the passive duty of non-recognition was confined to certain classes of wrongful acts when the validity of the measure taken was at issue; but the duty of non-assistance to the offending State, which also covered delicts as well as crimes, was not confined to acts where validity was at issue.

The meeting rose at 1.20 p.m.

2343rd MEETING

Thursday, 26 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, 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. Villagrán Kramer.

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. MIKULKA said that, in adopting article 19 of part one of the draft articles on State responsibility,[3] the Commission was engaged in both the codification and the progressive development of international law. Those two elements were present in the distinction drawn by the Commission between crimes and delicts on the grounds that the content of State responsibility was not identical in the two cases. The debate should not be reopened now on article 19 *per se*; instead, the consequences of the two categories of internationally wrongful acts should be investigated so that, during the second reading of part one, the Commission would have the necessary information to determine the validity of the distinction established at the outset. The study of the consequences of crimes must maintain the balance between codification and progressive development and not be limited to an analysis of positive law—the existence or absence in State practice of a specific regime of responsibility for crimes—but must consider the relevant literature and the possibilities for the development of practice that it offered. The use of the term "crime" in article 19 had given rise to an unnecessary debate, since there was no analogy between the meaning of the term as used in the draft articles and as used in internal law. The use of the term in no way prejudged the question of the content of responsibility for an international crime. "Crime" as defined in article 19, paragraph 2, meant only a "breach by a State of an international obligation ... essential for the protection of fundamental interests of the international community". Crimes were accordingly particularly serious breaches of peremptory norms of international law and were thus always violations of *jus cogens*, even though the opposite was not always true. To look into the consequences of international crimes thus meant considering the consequences of violations of *jus cogens*. Since the obligations of States under *jus cogens* were obligations *erga omnes*, there could be no derogation by agreement *inter partes* from the secondary rules governing State responsibility for crimes.

2. Could State crimes be defined? In the case of aggression or genocide, that was virtually a foregone conclusion, in that the international community as a whole viewed them as jeopardizing its fundamental interests and characterized them as crimes. However, there was absolutely no consensus on whether serious breaches of an international obligation relating to the protection and preservation of the environment would constitute crimes. Article 19 did not contain a real definition of international crimes; it gave only their general characteristics. The draft articles were intended to set out secondary rules and the definition of specific crimes would have to be dealt with in other instruments. The identification of the consequences of crimes was all the more difficult owing to the lack of agreement on which internationally wrongful acts should be characterized as crimes, but that did not mean that the task was impossible. The list given in article 19, which was not exhaustive because it referred to a changing reality, gave enough of a basis for analysis.

3. Who was to determine that a crime had been committed? Some members of the Commission believed that question to be of essential importance. On the grounds that the international community was not yet sufficiently organized and that there was no mechanism with compulsory jurisdiction to determine that a crime had been

[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.*