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Summary record of the 2343rd meeting

Topic:
State responsibility

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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.*

committed, they questioned the idea that there could be a specific regime for State responsibility for crimes and even the category of crime. However, that argument could equally well be applied to a finding that a delict had been committed. Should it therefore be concluded that delicts did not exist? Except in the case of aggression, there was no doubt that such a gap existed, but it did not justify the Commission's reluctance to define the consequences of crimes.

4. What were the possible consequences of a finding that a crime had been committed? That should be the focus of the debate. In terms of the cessation of wrongful conduct, there was no difference between delict and crime, but the same was not true for reparation *lato sensu*. Because a crime was harmful to the international community as a whole, it was a breach of a peremptory norm of international law and its consequences could not be recognized, restitution in kind took on particular importance and could not be subjected to the restrictions contained in article 7, subparagraphs (*c*) and (*d*), of part two.[4] A direct victim of a crime must not have to choose, as in the case of a delict, between restitution in kind or compensation, unless the first option was materially impossible or entailed a breach of *jus cogens*. Satisfaction must encompass the criminal prosecution of individuals who had taken part in the preparation or commission of the crime, but, contrary to the provisions of article 10, paragraph 2,[5] prosecution in such cases must be possible without the consent of the State that had committed the international crime.

5. In the case of the so-called instrumental consequences of State crimes, priority should be given to the collective response of the international community, with countermeasures coming into play only in the absence of such a response. Thus, unlike several other members of the Commission, he held the view that there were two separate regimes for responsibility, depending on whether crimes or delicts were involved, and that it was possible and desirable for the Commission to establish the regime of responsibility for State crimes in the context of the topic under consideration.

6. Mr. GÜNEY said that the limited options for the progressive development of the law on State crimes within the meaning of article 19 of part one[6] had forced the Special Rapporteur to adopt a pragmatic approach focusing on the problems that needed to be analysed in detail. In view of the distinction which had been made at the outset between delicts and crimes and which required a special regime for crimes and because of the difficulties and controversies involved in defining the concept of crime, the Special Rapporteur was using that term for acts which the international community as a whole considered to be serious breaches of obligations essential for the protection of its fundamental interests. The concepts of criminal responsibility of States and of fault established a link between crimes and their consequences and the response of the organized international community. In general terms, the ideas of international crimes and responsibility for such crimes did not give rise to conceptual problems as long as precise criteria and objectives were set for the evaluation of the damage sustained by the injured State and of the magnitude of the responsibility of the wrongdoing State. The idea of crime already existed in international law for conduct such as aggression or apartheid, although aggression alone could be committed by a State, while all the other crimes could be committed by individuals. A crime was a serious breach of an obligation *erga omnes* to which the injured State was entitled to react. For an international crime, the right of reaction was collective in nature. In the case of aggression, for example, the Security Council stepped in to make a finding that a crime had been committed, even if it was more a presumption than a finding. International practice was currently moving towards adoption of sanctions to be applied by international organizations. The Commission should refrain from entering into a debate on the competence of the Security Council or the concept of self-defence; the objective should be to find ways of preventing States from evading the consequences of crimes committed by their agents. As it now stood, article 19 was only descriptive in nature.

7. With regard to the link between dispute settlement and State responsibility, the Commission must take account of the reluctance of States to submit to binding third-party settlement procedures. The principle of free choice of methods must be central to any future mechanism. States increasingly tended to reserve the right to specify whether or not they agreed to be bound by dispute settlement provisions and to insist on the option of withdrawing from or modifying such provisions. It would therefore be better to try to strike a balance between what was feasible and what was desirable and to leave the task of deciding on appropriate machinery to a future diplomatic conference. Perhaps dispute settlement machinery could be made applicable only to certain parts of the draft articles, as had been the case of the Vienna Convention on the Law of Treaties.

8. Mr. TOMUSCHAT said the Commission absolutely had to try to complete its consideration on first reading of the entire set of draft articles on State responsibility in 1996. The Special Rapporteur's stimulating and thought-provoking sixth report (A/CN.4/461 and Add.1-3) was a good basis for doing so. The Special Rapporteur asked whether the crimes could be defined. The answer was indisputably yes, but it was not necessary to create an itemized list of offences, because the principle *nullum crimen sine lege* did not apply. He could envisage a fairly simple definition of an international crime: a particularly serious breach of an international obligation whose impact went beyond the bilateral relationship between the wrongdoing State and the injured State and affected the international community as a whole. There was thus no need to create a new topic for the Commission. A formula must be found which would, like the phrase defining the jurisdiction of the Security Council, leave enough room for adjustment to future developments. The technique used in article 19 of part one,[7] consisting of a general clause with a non-exhaustive list of examples, was of some interest, even though the word-

[4] 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.

[5] Ibid.

[6] See footnote 3 above.

[7] Ibid.

ing of the general clause might warrant a fresh look. In any event, article 19 simply reflected a fact of life, namely, that most breaches could be dealt with in the bilateral relationship between the two States directly concerned, while others were of such gravity that the international community must intervene.

9. The objective was therefore not to establish the criminal responsibility of the State, but to codify the classical rules of State responsibility as they applied in a legal framework made up of sovereign States. Of course, alongside that traditional configuration of coordination between entities that were legally equal, a new and more progressive constitution of the international community had evolved, but, since the "Ago era", the Commission's mandate under the heading of State responsibility had been understood as aimed at codifying the traditional law of the traditional society of States, while taking account of such new elements as had emerged since 1945. The Commission had rightly refrained from undertaking the task of paramount political importance of defining a new layer of worldwide institutions responsible for issues of State responsibility. Within that framework, it was obvious that every State made its own determination as to whether a delict or a crime had been committed. From the legal standpoint, that held true for aggression as well, in the sense that every State had the right of self-defence independently of a finding by the Security Council to that effect, as it did for collective self-defence. The basic features of the present-day international community could not be ignored, especially as the power of individual States to make such findings was always open to challenge by the aggrieved party. That power would seem odd or unacceptable only if the notion of crime was filled with criminal characteristics. As long as the definition of crime was confined to a finding that a particularly serious wrongful act had been committed, there was nothing strange about States having the ability to evaluate the legal position as they viewed it.

10. The main consequence of the commission of a crime was that the international community had a role to play and it would be preferable that that community should act through the collective institutions it had established. As there was no such institution with competence in all instances where the vital interests of the international community were affected, he was very much in favour of a broad interpretation of the powers of the Security Council under Chapter VII of the Charter of the United Nations, but even the rather loose formula "international peace and security" had certain limits. As a substitute for truly collective action, authorization should therefore be given to third States not directly affected to take measures for the defence of community interests. In addition to the right to make representations, which they already enjoyed, they should be given the right to take countermeasures, since the prohibition of the use of force served as a safeguard against a penalty's being out of all proportion to the crime. In the case of genocide, for example, there would be no harm in 140 States adopting countermeasures. The draft articles must, however, emphasize that the first remedy should be a collective one and that third States had a standing that was essentially one of *defensores legis*. It was only the State directly affected that must be entitled to adopt all appropriate measures for its defence, but always within the limits of Article 51 of the Charter.

11. For the Special Rapporteur, the consequences sustained by the defeated Powers at the end of the Second World War were part of positive international law and it was thus legitimate to punish aggressor States. For his part, he had already warned against the temptation of introducing the idea of the punishment of States without careful consideration. The punishment of those guilty presupposed the existence of an authority duly vested with the power to sanction in accordance with a well-established procedure. Yet there was no such institution at the international or the regional level. The Security Council had essentially been entrusted with police functions and its jurisdiction might at most have a preventive character, but under no circumstances that of a court of law. The international community had not seen fit to create an institution empowered to judge State conduct and impose punitive sanctions.

12. What about the measures taken against the Axis Powers after the Second World War? Could they serve as a model for the draft under consideration? He had serious doubts in that regard. Was it really possible to subscribe to the proposition that a coalition of victorious Powers might unilaterally, at their political discretion, annex parts of the territory of an aggressor State, expelling the population living there? It was patently clear that all the horrors and atrocities committed by a criminal regime could not serve as a justification for subjecting the population living under such a regime to similar treatment—to do so would ignore the basic principles of humanitarian law and human rights. He was not at all against the idea of imposing sanctions against a State whose leadership had led its people into crime, war and tragedy, but then a carefully conceived procedure must be established and, in particular, the rights of the people concerned must be respected. A pronouncement of collective guilt was to some extent inevitable, but on no account should innocent people be made to suffer. Thus, he could only caution against attempts to open the door to arbitrary action that disregarded due process of law. Indeed, the best way to punish was first and foremost to punish the leaders responsible and to insist on reparation, and nothing but reparation. As the case of Iraq had shown, that was most difficult to achieve. In all probability, Iraq would never be able to provide compensation for all the damage that it had caused. Putting an end to a conflict required a great deal of statesmanship. If retribution and revenge were the sole objectives, tension would only be perpetuated. From the seventeenth to the nineteenth century in Europe, the art of achieving comprehensive peace settlements had been highly developed. Inevitably, two things must be reconciled: just reparation and satisfaction for the victim, but also reconciliation with a view to building a durable foundation for a peaceful future.

13. Lastly, he wondered whether the Commission would undermine the powers of the Security Council if it did not recognize that the commission of a crime entailed particularly harsh consequences. In fact, the Council did not have the power to invent new laws: it was bound to apply the law within the limits of its mandate and the rules under consideration would not affect its functioning in any manner whatsoever. As he had

already pointed out, the Council had primarily a police function. In order to restore the peace or put an end to an act of aggression, it could even set the conditions that an aggressor State must meet to make good the harm it had caused. That derived from the specific mandate of the Council under Chapter VII of the Charter. The Council's powers were in no way conditioned by the rules on State responsibility.

14. It would be wrong for the Commission to engage in a debate on the scope of the powers of the General Assembly and the Security Council. Likewise, it should refrain from redefining the scope of self-defence under Article 51 of the Charter. It was not called on to invent new instances of the legitimate use of armed force. The parameters were quite clear and should be left as they stood: it was the Council that might order the use of armed force under Article 42 of the Charter and Article 51 provided for the right of self-defence. That was all. The task of the international community was to strengthen its possibilities of action with a view to counteracting serious human rights violations, such as genocide. However, it could not be left to individual States to use military means to combat and stop atrocities from being committed.

15. Drawing attention to another possible consequence of the commission of one particular category of international crime, namely, serious human rights violations, he said that a person who committed such crimes might lose immunity not only for the purpose of criminal prosecution, but also with regard to a civil action to obtain compensation.

16. Although he agreed that article 19 of part one of the draft was useful, he was open to a change of terminology, since the ambiguity of the word "crime", which inevitably implied a criminal flavour, was rather infelicitous.

17. In closing, he thanked the Special Rapporteur for his brilliant report, which had stimulated a rich debate.

18. Mr. MAHIOU said that he would first expound on the reaction of States other than the victim State in the event of aggression. The States not directly concerned could be divided into two categories, depending on the type of legal relations they had with the victim State. First, there were the States that were linked to the victim State through a defence agreement, a military alliance treaty usually providing that any attack on one party was regarded as an attack on the other. The question then arose whether, although not directly and concretely affected by the aggression, they were nevertheless injured legally and, consequently, whether they could not resort to countermeasures, including armed force. That was the whole problem of collective self-defence, the conditions of form and substance and the instrumental circumstances in which they could be invoked under the Charter of the United Nations. Clearly, it was impossible to steer clear of the debate simply in order to avoid the dangers of excessively invoking collective self-defence, which might serve as an excuse to sidestep the control of the international community or to violate the rules of *jus cogens*. The other States, being those that had no legal ties with the victim State, did not, of course, have the right to invoke self-defence and use armed force in order to come to the aid of the victim. The use of armed force in that case must be part of the collective mechanisms currently provided for in the Charter and must therefore take place under the authority of the competent United Nations bodies, in particular, the Security Council, which alone could request other States, if necessary, to use force in circumstances that it defined.

19. In the case of crimes other than aggression, it was more difficult to determine which States could react and the conditions under which they could do so and the manner of intervention. In actual fact, solutions could be only case by case. With genocide, for example, it was necessary to distinguish between at least two situations. First, there was that of a State which attacked its own population, stirring the conscience of other States, but not directly injuring any of them. Was it logical to conclude that those States must consider that they were not concerned and must simply leave the matter to collective mechanisms or, on the contrary, that each of them was entitled to demand that the killing should stop and, in the event of a refusal, to take countermeasures to be determined, with the exception of armed force? He felt that, in such a case, several reactions were possible, for instance, decreeing an embargo on the supply of weapons to the State responsible for the crime of genocide, it being understood that such reactions must take place under the authority and control of collective mechanisms, in the current state of affairs, under the auspices of the United Nations and the Security Council. It could then very well be asked whether the international community could go farther and use armed force for a humanitarian intervention. The Commission must give thought to that problem and define when it could arise and how to respond to it.

20. The second case was that of a State which committed genocide not only against its own population, but also against the population of one or more other States, which were thus directly injured and could not help but react. What forms could the reaction of those States take or what could the States rightfully demand? Could they contemplate humanitarian intervention such as the use of armed force? The Commission must reflect on that question; otherwise, it would leave it to States themselves to ask such questions and perhaps to reply to them as they saw fit and thus allow them full freedom to invoke that concept, which was still vague, and to determine subjectively the conditions under which they could do so.

21. As to the consequences of international crimes compared to those of international delicts, he wondered whether the limits, admissible in certain cases, to the substantive and instrumental consequences of delicts should be ruled out for crimes, whether crimes should have the same instrumental consequences as delicts and, lastly, whether it would not be advisable to recognize that crimes incurred special consequences. First, in the case of international delicts, the Commission had for example provided that the wrongdoing State should not be subjected to excessive obligations or humiliation. Were those restrictions justified in the case of an international crime? The question was a sensitive one, but it must be asked. There was probably no universal response, but a separate one for each crime. Secondly, he thought that, generally speaking, given the desire for

equity and justice, the injured State should be able to react more easily in the case of a crime than in the case of a delict, the aim being to discourage any escalation. It was for the Special Rapporteur to explore the conditions in which that reaction might take place. In any event, the principle of proportionality, one of the most important in international law, must prevail for crimes and delicts alike, regardless of the circumstances. Lastly, contrary to what had been envisaged for delicts, punitive sanctions could be taken against a State that committed an international crime such as aggression, for example a prohibition on the manufacture of certain weapons, the dismantling of certain weapons factories or the obligation to pay punitive damages. Could those measures, which were understandable and even justified in the case of aggression, be applied in the case of other crimes? He simply raised the question, to which he hoped that the Special Rapporteur would have a reply.

22. With regard to the consequences of a given sanction, a serious difficulty remained that had been raised by the Special Rapporteur in his fifth report (A/CN.4/453 and Add.1-3), in which he asked whether it could be assumed in any circumstances that a people could be totally exempt from guilt—and liability—for an act of aggression conducted by the obviously despotic regime of a dictator enthusiastically applauded prior to, during and after the act. That question was at the heart of the most sensitive and complex problem of the consequences that might attach to the crimes. The temptation was great to reply that, obviously, if the people had applauded the crime committed, it must suffer the consequences at the same time as the persons who were punished individually pursuant to the draft Code of Crimes against the Peace and Security of Mankind. It was, however, no secret that despotic regimes had ways to arouse and, indeed, manipulate the enthusiasm of their peoples, which, with a despotic power at home and the possibility of sanctions being imposed from abroad, were caught between the devil and the deep blue sea. Even a democratic country was not immune to such a misfortune and that was even more serious because, if a country freely allowed an aggression to be committed, its people was then more responsible than in a case in which it was governed despotically. The fact was that those who suffered first from sanctions in a number of cases were often innocent people, including women and children. To react or not to react was a tragic dilemma. It was perhaps not possible, when imposing sanctions for a crime, to spare the population, which was usually not to blame. The Commission could not afford not to discuss that issue. It must analyse all the implications of the sanctions that might be imposed on a wrongdoing State and determine how far it was possible to go. He was interested in hearing the Special Rapporteur's viewpoint on that serious and difficult problem.

23. Mr. THIAM, referring to the prohibition on the manufacture of certain weapons or the dismantling of weapons factories mentioned as possible sanctions by Mr. Mahiou, said that he wondered whether such sanctions fell within the scope of State responsibility. Until now, sanctions imposed on States had been political sanctions taken by victors. No international court had assumed responsibility for ordering political measures. Was it conceivable that an international court called on to apply the law of State responsibility would do so? Political sanctions were the responsibility of political organs.

24. Mr. MAHIOU pointed out that he had not specified which organs would take the sanctions. The fact was that, in the event of aggression, the Security Council, a political organ, was empowered to take political measures. In the case of other crimes, the problem was still unsolved.

25. The difficulty with the current debate was that, because of the link with article 19 of part one of the draft, it touched not only on primary rules, but also on secondary rules.

26. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had understood Mr. Mahiou to have spoken only of the dismantling of weapons factories and the prohibition on the manufacture of certain weapons, not of territorial changes or population transfers. Such sanctions would not affect the people of the State against which they were directed, but would constitute a form of punishment whose effect would be to prevent that State from committing another act of aggression.

27. It was possible to imagine a punitive measure against a State which in no way harmed the population of that State and, indeed, even protected it. For example, it was possible to envisage imposing international control on a State where disturbances were taking place, even if that meant encroaching on its sovereignty. He saw no difficulty in agreeing to such a measure, which could be taken either by the victor States acting in self-defence or by judges or a court such as ICJ. There might be some situations which, at a particular time, called for a restriction of the absolute sovereignty normally enjoyed by every State precisely as a means of defending other States and the international community, as well as the population of the State concerned. Disarmament and control were, in his view, entirely consistent with full respect for the interests of populations.

28. He agreed in principle with the distinction Mr. Thiam had drawn between the position of a State, especially a victor State, and that of a judge, who did not have the same powers. This did not imply, however, that no role whatsoever should be envisaged, *de lege ferenda*, for the judge in the determination of the existence, attribution and consequences of a crime, including, for example, a crime of aggression.

29. Mr. KUSUMA-ATMADJA said that the concept of State crime did not exist in *lex lata*. It was true that there had been many new developments since 1945 and article 19 of part one of the draft articles[8] reflected that new situation. That did not mean that the article was entirely satisfactory. In the first place, the understandable and acceptable distinction it established between crimes and delicts gave rise to a problem, if only with regard to the distinction between different categories of internationally wrongful acts depending on their gravity. The problem was perhaps only one of terminology that could be solved later.

[8] Ibid.

30. With regard to the question of the definition of crimes, it was obvious that certain criminal acts such as aggression, apartheid, genocide and the maintenance by force of colonial domination could be committed only by States. He was therefore prepared to agree that such acts should be considered State crimes, while being aware of the problems that doing so might create and the consequences it might have, for example, in connection with succession of States or collective guilt. He had more serious reservations about the fourth category of breaches referred to in article 19, paragraph 3 (*d*). It was difficult to believe that massive pollution of the atmosphere or of the seas could occur without any measure being taken, if only at the regional level, before mankind as a whole was affected. Taking account of such a situation was not very realistic. Furthermore, defining pollution of the atmosphere or of the seas as a crime was somewhat premature, considering that acts of transboundary pollution were only just beginning to be regarded as internationally wrongful acts. It should not be forgotten that treaties existed in that regard, such as the ASEAN Agreement on the Conservation of Nature and Natural Resources which had been concluded by the countries of ASEAN in 1985,[9] and whose articles 19 and 20 dealt precisely with that question. Defining a wrongful act as a crime would hardly encourage the States parties to such treaties to abide by them.

31. As to the consequences, they were clear in the case of aggression and mechanisms for responding to aggression existed on the basis of the provisions of Chapter VII of the Charter of the United Nations. The question was, rather, whether States not directly victims of aggression could exercise a right of collective self-defence. In his view, the answer was yes. It was particularly important not to place too many restrictions on that right, since aggression at the present time could assume many different forms. To prevent the neighbouring States of a State that was the victim of aggression from helping that State would be unrealistic and inconsistent with the current situation.

32. He was also prepared to agree to recourse to countermeasures if they were properly regulated so as to avoid any abuses. Thus, in the case of transboundary pollution, considered to be an internationally wrongful act, if the relevant treaty provided only for consultations and a dispute settlement procedure which might well be ineffective, it should be possible to apply countermeasures. Generally speaking, flexibility was called for in that field, especially if wrongful acts were not classified in two categories, that of crimes and that of mere delicts. If that distinction was made, however, the consequences attaching to each category of wrongful acts would have to be specified. There again, everything depended on the point of view the Commission decided to adopt, *de lege lata* or *de lege ferenda*. The Commission was engaged not only in the codification of international law, but also in its progressive development.

33. Mr. IDRIS said that, for a variety of reasons, he associated himself with the arguments put forward against the more philosophical than legal concept of State crime defined in article 19 of part one of the draft. First of all, as it now stood and bearing in mind its history, article 19 also appeared to cover the question of the succession of States in respect of international crimes. That meant that a State would continue to suffer the legal consequences of an international crime committed earlier even if the political, social or human circumstances in which that international crime had been committed had ceased to exist. Secondly, when an international crime was committed, the criminal responsibility of certain individuals was also involved. Thus, in actual fact, there were two crimes—a crime of the State and a crime of individuals and the draft should take that fact into account. Thirdly, it should not be overlooked that a crime of the State would give rise to sanctions that would affect the population of that State without distinction, including those members of society who had, individually or collectively, been opposed to the crime, not to mention innocent people. Fourthly, the idea that a State was responsible for an international crime was far too simplistic and totally failed to take account of the many different relationships that existed within a particular State or between States in general. Fifthly, there were at present no legal means or mechanisms that would make it realistically possible to apply article 19. Existing political organs such as the General Assembly and the Security Council were not empowered to punish crimes corresponding to the definition in article 19 and ICJ could act only with the consent of States. Like Mr. Thiam (2338th meeting) and Mr. Rosenstock (2339th meeting), he therefore considered that crimes were committed not by States as such, but by individuals who used the apparatus of the State for that purpose. He did not believe that using a term other than "crime" would help to find a lasting solution to the problem. He was not in favour of Mr. Bennouna's suggestion (2342nd meeting) that the General Assembly should be asked whether the question of State crimes ought not to be dealt with separately; the General Assembly was certainly not better equipped than the Commission to answer that question. Lastly, he endorsed most of the comments made by Mr. Tomuschat.

34. Mr. PELLET recalled having said (2340th meeting) that the distinction between two categories of wrongful acts under international law was self-evident, whether the two categories were called crimes and delicts or whether different terminology was found; that the crimes were prima facie correctly defined in article 19, paragraph 2; and that he believed that the difference between crimes and delicts was one of kind rather than simply one of degree, as some members had suggested. Those were, however, only convictions—intuitions unconfirmed by any proof. In order for those intuitions to be confirmed, the distinction had to have concrete effects *de lege lata* or, in other words, a different regime had to apply to crimes, on the one hand, and to delicts, on the other. With that in mind, he would try to answer the questions asked by the Special Rapporteur in chapter III of his sixth report.

35. First of all, he disagreed with the heading of section C: "What are the possible consequences of a finding of crime?" In his view, the question of a finding was an entirely separate problem that would best be dealt with in part three of the draft, since the existence of a crime was in fact entirely independent from its determi-

[9] Adopted at Kuala Lumpur on 9 July 1985.

nation. It would certainly be better if the existence of a crime was determined by an impartial organ, but no such organ existed in modern-day international society. Much had been said about the Security Council in that connection, but he did not think that bringing charges formed part of the Council's functions. It was not for the Council to determine whether a particular action was or was not a crime. Under the Charter of the United Nations, it could, of course, determine the existence of at least one crime, aggression, but it was not required to define it as a crime. As far as the other crimes were concerned, its jurisdiction could, at best, only be derived. Moreover, the Council's *faculté* of reaction was limited to restoring international peace and security and it was only to that end that it could apply what were known as "sanctions". However, contrary to what had been said, the power to sanction derived not from the finding that a crime had been committed, but from the actual text of Chapter VII of the Charter. Its foundation was to be found in the Council's primary responsibility in the field of the maintenance of international peace and security and it could be exercised only after the Council had made the determinations referred to in Article 39. Moreover, even in the event of aggression, the Council's power to find that aggression had occurred left intact the parallel and even previous rights of the victim State, as Article 51 demonstrated.

36. There were two resulting consequences. On the one hand, the Charter regime should be set aside for the topic under consideration. The Charter established a special mechanism which could come into operation in the case of a reaction to a wrongful act, but that was not the Charter's main purpose and he suggested that the Special Rapporteur might include a provision stating, for example that these draft articles shall be without prejudice to any powers that may be vested in the United Nations or certain regional bodies in the event of a threat to the peace, a breach of the peace or an act of aggression. On the other hand, such setting aside in no way meant that the Commission did not have to consider the consequences of a crime in the context of inter-State society, which Professor René-Jean Dupuy had called the "relational society" and which was the fundamental reality of the present time. In that respect, the Special Rapporteur's fifth report and the summary of it contained in the sixth report were valuable guides, despite some gaps.

37. First, it seemed obvious to him that a crime was, above all, an internationally wrongful act. Consequently, the obligations already agreed on with regard to all internationally wrongful acts applied to crimes, particularly, the obligation of cessation of the wrongful conduct, the obligation of reparation and, where applicable, the obligation to give assurances or guarantees of non-repetition. If the special regime for crimes existed—and he believed that it did—it was not opposed to that of simple delicts, but added to it. The very essence of the definition of a crime contained in article 19 was that a crime constituted a breach of an international obligation essential for the protection of fundamental interests of the international community. There were two fundamental consequences of that definition: on the one hand, the concept of the injured State did not disappear, but was watered down; and, on the other, the seriousness of the breach called for more energetic and more radical reactions.

38. It might well be that one or more States would be more injured than others, that they might be the direct victims of a crime. In every case, however, in addition to such direct injury, there was an injury to the fundamental interests of the international community, which was therefore entitled to react. Thus, in the case of the crime of genocide, all States could react even if they were not directly affected. By way of proof, he referred to the famous judgment of ICJ in the *Barcelona Traction, Light and Power Company, Limited* case,[10] in which the Court spoke of the essential distinction between the obligations of a State towards the international community as a whole and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former were the concern of all States. In view of the importance of the rights involved, all States could be held to have a legal interest in their protection. The obligations in that category were obligations *erga omnes*. The Court did not, it was true, speak of crimes. In 1970, the term "international crime" had not yet been adopted by the Commission, which would begin to use it only in 1976. However, the Court did not refer only to *erga omnes* obligations, but also stressed the importance of the rights involved. The point at issue was thus not the breach of just any rules *erga omnes*, but of particularly serious breaches of certain rules of *jus cogens*. The examples which the Court gave in the *Barcelona Traction* case were aggression, genocide, and the infringement of the basic rights of the human person. Those were not "ordinary delicts", as would be, for example, the infringement of the right of transit passage through an international strait, although that, too, placed an *erga omnes* obligation on the coastal State. There was therefore a difference between a breach of an *erga omnes* obligation and a crime.

39. Admittedly, it could be argued that that would establish only the existence of a purely procedural right before the Court. But, in the first place, that was not altogether an insignificant matter. For instance, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought before the Court by Bosnia and Herzegovina on 20 March 1993,[11] the *actio popularis* principle could be of very real and significant importance, on the one hand, because any State could join Bosnia and Herzegovina and its legal interest would be established and, on the other, because Bosnia and Herzegovina could charge the defendant, Yugoslavia (Serbia and Montenegro), with violations committed not only against Bosnian nationals and on the territory of Bosnia and Herzegovina, but also with any act of genocide committed against non-Bosnians and on Yugoslav territory itself or elsewhere. That element was very characteristic of the special legal regime applicable to crimes.

40. Secondly, that element was not, in his view, the only consequence of the commission of a crime. It was quite clear from the Special Rapporteur's very detailed

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

[11] *Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3.

fifth report that that kind of internationally wrongful act had special implications for international law and for the international community. First of all, the *faculté* of resort to countermeasures was considerably enlarged. In the case of delicts, it was acknowledged that certain principles had to be observed, such as the principle of proportionality whereby only the State which had suffered damage directly could react, if it were able to do so and subject to strict conditions, and perhaps, the principle of the exhaustion of prior remedies. The position was different in the case of crimes. In the case of genocide, for instance, not only could all States react; they could also not be asked to wait until the State suspected of genocide had agreed to abide by the decision of an impartial third party.

41. As to the means used, they must be such as to put an end to the crime. That, however, involved a very serious problem which was considered by the Special Rapporteur in his fifth report in connection with the subjective-institutional aspects of the problem of reaction, namely, the use of force. In that connection, it was his firm belief that the principle of the prohibition of the use of force, even in the context of an individual or collective reaction to a crime, represented a boundary that must not be crossed, at any rate, in inter-State relations, in the context of the "relational society".

42. In more general terms, it appeared to be out of the question that the individual reactions of States to a crime could result in violations of the rules of *jus cogens*, in other words, of norms the international community as a whole accepted and recognized as peremptory. Recognition of the concept of crime therefore did not necessarily involve recognition of an absolute and unlimited right of riposte or of *lex talionis*, a fact that would perhaps reassure certain members of the Commission. There was little precedent, but reference could none the less be made by way of example to Viet Nam's intervention against the Khmer Rouge, the consequences of which had never been legally recognized by the international community because, in order to put a stop to the crimes of the Khmer Rouge, Viet Nam had in turn violated a peremptory rule of general international law, namely, the rule prohibiting any use of force in the absence of a decision by the Security Council.

43. In addition to those main elements of the special legal regime applicable to crime, there were others, including the obligation not to recognize the consequences of a crime and not to give aid to the perpetrator, as well as the obligation to render assistance to the victim and the non-application to crimes of circumstances precluding wrongfulness.

44. Among the other problems which arose was that connected with the obligation of the State which committed a crime to compensate for the damage it had caused. So far as delicts were concerned, he had considerable reservations about the concepts of fault and punishment in the field of international responsibility, but he did not rule out the possibility of aggravated or punitive damages in the case of crimes. There was judicial practice to that effect which the Special Rapporteur had referred to earlier, and which pointed to certain trends that supported the award of aggravated or punitive damages to a State directly injured by a crime.

45. Unless he was mistaken, there was a lacuna in the fifth report. In the title to section C, the Special Rapporteur raised the question whether international criminal liability was that of States, of individuals or of both. The ensuing discussion, however, actually dealt with a different matter, namely, whether the responsibility of the State could be criminal and with the very delicate problem of collective responsibility; the question asked in the title of section C, however, remained unanswered. That problem had in fact been broached by Mr. Thiam, who wondered whether, in the final analysis, what was termed "international crime of the State" was not in fact the crime of natural persons. It was an important question because, if the answer was in the affirmative, it was a matter that would be covered solely by the Code of Crimes against the Peace and Security of Mankind. It was, however, his firm belief that the reply was not in the affirmative and that there was a logical and consistent category of internationally wrongful acts, which was based on a clear if not precise criterion, that gave rise to special legal consequences, and such acts were indeed violations of international law attributable to the State itself. It was hard to conceive of such acts unless they came within the framework of the State and had the support of the machinery of the State. If, as Mr. Thiam had said, it was individuals who made use of the State, then they were individuals who were indissociable from the State, like Hitler, as Chancellor of the Reich, and Saddam Hussein, as President of Iraq. What they did was binding on the State itself. If that argument were rejected, then, to be a true follower of Scelle, the reasoning would have to be followed through to its conclusion so that there would be no interest in the legal superstructure, the sole concern being the underlying social structure. That, however, was tantamount to disregarding the unquestionable legal reality which the State represented, and it was in any event outside the competence of the members of the Commission.

46. On the other hand, one of the consequences of the concept of international crime of the State, in his view, was that it lifted the veil of the State. In the case of delicts, of "ordinary" internationally wrongful acts, the organs of the State bound the State and the State alone; in the case of crime, their own individual responsibility was also incurred and they could not shelter behind the immunities which their duties conferred on them. That was another element in the special legal regime applicable to international crimes.

47. Lastly, he would make an appeal to members of the Commission. The debate, which had started well with chapter II of the fifth report, had been rich and useful, but some members of the Commission had stopped short at the word "crime", because of an internal law and criminal law approach, and had rejected the very concept of particularly serious internationally wrongful acts, though it seemed perfectly obvious. That would be tantamount to throwing out the baby—a baby who, admittedly, had been born 18 years earlier, but who was still no more than a puny adolescent—with the bath water. Certainly, not everything was clear, but care should be taken not to "throw out" the highly valuable and indispensable concept of "crime". It was a matter of *lex lata* and it was for the Commission to determine its implications, with moderation, from the standpoint

either of *lex lata* or of the codification or progressive development of the law.

48. Mr. THIAM said that he did not deny the existence of international crimes, but he did reject the notion that the proposition he put forward was based on a purely internal law approach. If one faced facts, it could not be denied that the crimes of the Second World War and earlier wars had been committed by individuals holding responsibility who had committed them by making use of the machinery of the State. That did not mean the State was not responsible, but its responsibility was subsidiary. An individual who held a post of responsibility in a State and who committed a crime was criminally responsible, but the State incurred international responsibility deriving therefrom. Also, the draft Code of Crimes against the Peace and Security of Mankind, which was before the Commission,[12] contained an article 5 which provided that prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it.

49. He only regretted that a term had been used in article 19 of part one of the draft articles which created confusion and which, at the time when the "baby" had been born, had not been generally accepted because there had been some talk even then of a "little loved child", precisely because the term with which it had been submitted had been unsuitable. So long as the Commission used the word "crime", it would not be doing article 19 any service. He noted in that regard that Mr. de Saram had proposed (2340th meeting) that the word "crime" should be replaced by a reference to a wrongful act of a violent nature. In any event, an expression which would command unanimous support would certainly have to be found.

50. Mr. RAZAFINDRALAMBO said that he would confine his comments to a few problems raised in the report which, in his view, were of particular importance.

51. The Special Rapporteur's fifth report was based on a complete inventory of the problems involved in the proposal for a special regime of responsibility for crimes, as noted by the Commission, by the Sixth Committee and by doctrine. His study was supported by numerous examples which had been drawn from the Security Council's recent practice and demonstrated its key role in the settlement of major international conflicts during the previous decade. With the ever-increasing number of serious violations of international law, the idea of responsibility for "crime" was coming more and more to the fore and, in his view, the introduction of a "special regime" of responsibility for crime was a task the Commission should knuckle down to as a matter of priority, in accordance with its mandate, as regularly renewed by the General Assembly since 1976.

52. The question whether the crimes could be defined was tendentious in that it could call into question the very basis of article 19. Nobody could seriously imagine that there could be just one single category of offences when there were several kinds of primary obligation, which were unequal in importance and whose violation constituted an internationally wrongful act. In particular, the obligations imposed on States under Article 2, paragraphs 3 and 4, of the Charter of the United Nations were so important that their violation justified the remedies and measures laid down in Chapter VII. Such violations could, of course, be characterized as particularly serious internationally wrongful acts or as very serious international delicts and the explanation could be given that the difference between them and violations of ordinary obligations was only one of degree, not one of kind. In his view, there was no particular reason not to characterize them as "international crimes", keeping the term "delicts" for all other internationally wrongful acts that did not have the same character of seriousness. There could therefore be no talk of the Commission exceeding its mandate when it considered that the time had come to determine the consequences of international crimes.

53. As to the criticisms of the definition contained in article 19, paragraph 2, the words [international] "community as a whole" were simply borrowed from the wording used in article 53 of the Vienna Convention on the Law of Treaties to define *jus cogens*. Furthermore, the subjective criterion, which derived from the fact that the violation of the obligation was "recognized" as a crime, was no more open to question than the criterion of recognition by "civilized nations" of the general principles, as referred to in article 38 of the Statute of ICJ.

54. Unlike the Special Rapporteur, he did not believe that article 19, paragraph 2, was worded in circular terms, as it was clear that the crimes recognized by the international community as a whole were, *inter alia*, the crimes set forth in paragraphs 3 (*a*) to 3 (*d*). In the circumstances, the violation by the State of an obligation of the kind covered by paragraph 2 in no way implied recognition of any criminal responsibility. That did not mean, however, as the Special Rapporteur had pointed out, that the State might not incur responsibility, *de lege ferenda*, if not *de lege lata*, which differed from civil liability under internal law. Even in the so-called liberal countries, the maxim *societas delinquere non potest* had fewer and fewer supporters, particularly in view of economic and financial crime such as money laundering. In such a case, the most serious criminal conduct of States called for an appropriate policy of sanctions, the nature of which, albeit punitive, could not be afflictive, as in the case of individuals guilty of crimes.

55. In view of those new areas of crime, the list in article 19, which in any case was only indicative, should be completed by a reference in particular to drug-traffic-related crimes.

56. As to which organ should determine whether a crime had been committed, in his view, the role of the Security Council should be decisive in the case not only of aggression, but of other crimes as well in so far as it could act within the framework of Chapter VII of the Charter. Otherwise, there would be an unacceptable gap in the law. In the case of remedies, the Council would also have a central role to play in connection with measures that could undermine the independence, sovereignty or territorial integrity of the State which committed the crime and, in particular, of armed action. It also seemed as though the prohibitions laid down in article 14 could not be lifted in the case of crime without the intervention of the Council.

[12] For the text of the draft articles provisionally adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 *et seq.*

57. So far as the possible exclusion of crimes from the scope of the provisions on the circumstances precluding wrongfulness was concerned, it would be difficult, having regard to the definition contained in article 19, paragraph 2, and to the *erga omnes* nature of the crime, to preclude wrongfulness on account of the consent of the injured State; and that was what article 29, paragraph 2, seemed to indicate. Similarly, a state of necessity was not grounds for precluding wrongfulness in the case of the violation of a *jus cogens* obligation. Apart from those two cases, however, it did not seem that the circumstances precluding wrongfulness could be removed a priori.

58. His position with regard to the general obligation not to recognize the consequences of a crime and not to render assistance to a "criminal" State was consistent with the reasoning which lay behind his proposition that the Security Council should have exclusive responsibility for the decisions incumbent on the international community and, more particularly, on injured States *uti singuli*. The obligation to render assistance to the victim was a matter solely for the sovereign will of each State.

The meeting rose at 1.10 p.m.

2344th MEETING

Friday, 27 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to embark on the second reading of the draft Code of Crimes against the Peace and Security of Mankind. The text of the draft articles, including the commentaries, was to be found in an informal paper which was available in all languages.

2. Mr. THIAM (Special Rapporteur), introducing his twelfth report (A/CN.4/460), said that corrections were required in the text. In the French version, the commas before and after the word *déjà*, in the last sentence of paragraph 4, were to be deleted. In paragraph 21, the words "the second sentence of" should be inserted before "draft article 2". In paragraph 64, the words "rule *non bis in idem*" were to be replaced by "rule set forth in article 6". In subheading 2, directly following paragraph 99, the word *assistance* should be replaced by *existence*, a correction that applied only to the French text. Lastly, in subparagraph (*c*) of paragraph 159 of the French version, the second sentence should form a separate new paragraph 160, the following three paragraphs being renumbered accordingly.

3. The twelfth report was the shortest thus far presented on the topic. The concepts it dealt with had already been discussed at considerable length both in the Commission and in the Sixth Committee, and he had therefore decided to take the course of simply reproducing the text of each draft article as adopted on first reading, without reverting to the discussion on it, except in those cases where no clear view had emerged in the Commission.

4. As indicated in paragraph 1, the report focused on the general part of the draft, namely, chapter I (Definition and Characterization), and chapter II (General Principles). Members who had participated in the elaboration of the draft from the outset would recall the debate on whether the consideration of general principles could logically precede that of the crimes actually to be referred to in the Code. Now that the Commission knew more or less clearly what crimes were involved, it was in a position to embark on the identification of the general principles applicable to those crimes. The chapter dealing with the crimes would form the subject of the next report, which would present a far shorter list of crimes than envisaged earlier. In the light of discussions in the Commission and of observations by Governments, he had decided to limit the number of crimes to those whose inclusion in the Code had not given rise to objections from any quarter. Thus, threat of aggression, intervention, and so on, although characterized as crimes by virtue of resolutions of the General Assembly and the Security Council, could not be so characterized from the point of view of criminal law and he had therefore concluded that it would be wisest to omit them.

5. The layout of the twelfth report was explained in the introduction to the report.

6. Mr. IDRIS, after commending the Special Rapporteur for his excellent report, said that a preliminary issue was article 2, which he continued to think not only confusing but also devoid of any legal value.

7. Mr. THIAM (Special Rapporteur) drew attention to those paragraphs of the report setting out his point of view on article 2, and also to his earlier corrections to

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* Resumed from the 2334th meeting.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

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

[3] Ibid.