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Summary record of the 2348th meeting

Topic:
State responsibility

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International Tribunal[9] did not solve the problem in itself because the reference to ordinary crimes and fake trials raised some real questions. In his view, the reference to ordinary crimes was connected with the characterization of conduct as a crime under internal law, as opposed to the international characterization of conduct as a crime. It was a fact, for example, that genocide could not be treated on the same basis as homicide as perceived in internal law. The characterization of conduct under internal law could not be an obstacle to prosecution at the international level. Consequently, the *non bis in idem* principle could not be invoked. Contrary to what the Special Rapporteur thought, the problem was not so much one of incorrect characterization of the crime, but, rather, one of the difference of category between crimes tried at the national level and those to be tried at the international level.

51. The problem of fake trials was a real one and it could not be solved by encouraging a multiplicity of trials. In any event, a second trial was only a theoretical possibility unless it took the form of a trial *in absentia* which was contrary to the concept of respect for the rights of the accused. The principle of retrials should in any case be closely analysed with proper respect for all legal systems, laws and regulations, as well as ideas of justice irrespective of the cultural, religious and social backgrounds they represented.

52. Article 9, paragraph 2, adopted on first reading, which placed emphasis on the enforcement of the penalty, suggested that imprisonment was the only valid punishment. In many countries, alternative punishments could take the form of community work. While he did not know whether such a penalty could be imposed in the context of serious crimes, he thought that the question of the enforcement of penalties required careful consideration.

53. Article 10 (Non-retroactivity) was directly related to the question of which court, national or international, would try the accused. If the Code was deemed to cover crimes recognized as such by a treaty to be brought into force, article 10, paragraph 1, was relevant and paragraph 2 would no longer have a place. The principle would be justified and treated as final if the jurisdiction for such crimes was limited to the international criminal court to be established. However, if States preferred the Code to be applied by their own courts, it might be difficult to prevent them from prosecuting if they could declare themselves to be competent under the circumstances listed in article 10, paragraph 2. His own preference would be for dropping paragraph 1 and maintaining paragraph 2, but article 10 could also be dropped altogether.

54. Mr. VILLAGRÁN KRAMER said that he wished to revert to the question of the *non bis in idem* principle or the *res judicata* rule because the Special Rapporteur had put forward two broad working hypotheses: the establishment of an international criminal court or the exclusive jurisdiction of national courts.

55. The *res judicata* rule could be absolute or relative. It was absolute in systems where the possibility of a retrial was limited to a few clearly defined cases. In Anglo-Saxon law, for example, the principle of double jeopardy was strictly applied and sacred.

56. The rule was relative when it authorized a retrial in cases where the higher interests of justice so required, where new facts favourable to the convicted person came to light and where the court which had tried the case had failed to show impartiality or independence. In the event of a retrial, the period already served was taken into account. The new proceedings could be transferred to another national court or to an international court and it was on that last hypothesis that the Commission was working.

57. Noting that the Working Group on a draft statute for an international criminal court was considering an article concerning the revision of a judgement in the event of new facts coming to the court's notice, he said that a distinction should be drawn between such an eventuality and the above-mentioned working hypothesis of the Commission. The statute of the International Tribunal clearly illustrated the *non bis in idem* principle taken in a relative perspective by envisaging the hypothesis of a national court not characterizing the offence as an international crime in accordance with international criteria, but applying criteria of a strictly internal character.

58. With regard to article 10, he said that he viewed the concept of non-retroactivity differently from the Special Rapporteur, namely, from the normative point of view: the absence of legal effect of a rule or of its consequences or its exceptions, except that of benefiting the accused person. In other words, the law could have no retroactive effect except when it benefited the accused person.

59. Lastly, he said that a balance should be maintained between the judicial guarantees offered to the accused and the security of the international community.

The meeting rose at 1 p.m.

2348th MEETING

Thursday, 2 June 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada.

[9] See footnote 5 above.

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. ARANGIO-RUIZ (Special Rapporteur), summing up the discussion, thanked members for their guidance and said that he would do his best to cover all the opinions and, where possible, the various shades of opinion, expressed during the discussion.

2. In making his comments, he felt obliged to start with the general question—discussed by most speakers—whether the distinction between international "delinquencies" made in article 19 of part one of the draft and the term "crime" used therein should be maintained. With regard to terminology, he deemed it necessary to explain, above all, that in speaking of delinquency he had not intended to stress any criminal law connotation of the wrongful acts singled out as crimes in article 19 of part one of the draft,[3] although he believed that such a connotation was intended in article 19. He had used the term "delinquency"—a term used, *inter alia*, by Oppenheim—as shorthand for the expression "internationally wrongful act". As far as the substance of the matter was concerned, the debate had shown that most members seemed to have taken the view that the most serious breaches of international law should not be treated in the same way as "ordinary" breaches. Although some members had apparently based their view on a difference of degree alone, the prevailing opinion was that the distinction was based upon a difference in nature as well as in gravity. A few had expressed the view that the draft on State responsibility should not deal with a distinct category of wrongful acts specifically defined as "crimes", whereas Mr. Rosenstock, Mr. Idris and Mr. He had favoured the elimination from the draft of any distinction whatsoever, regardless of the terms used.

3. Despite the differences and nuances, the majority view was that article 19, notwithstanding its defects, should stand, subject to improvement on second reading in the light of the developments that had taken place in the practice of States and in the literature over the past 20 years and, of course, in the light of the Commission's choices with regard to the consequences. Despite some reservations, a fair number of members were apparently in favour of maintaining the term "crimes", but they did not exclude the possibility that something better could be found. Others, however, considered that the term "crimes" should be dropped. Some members had suggested that there should in particular be a reference to extremely serious violations of *jus cogens* rules, while others had been opposed to any term implying a national criminal law analogy.

4. The basic elements of the definition were generally accepted and particularly the reference to the violation by a State of an international obligation of essential importance in safeguarding fundamental interests of the international community. The list in paragraph 3 of article 19 was generally believed to be less satisfactory, most speakers suggesting that it should in due course be reconsidered. Some speakers, however, seemed to be decidedly opposed to the inclusion of a list of examples in the body of the text rather than in the commentary.

5. A few members had suggested that for the time being the Commission should postpone making any choice with respect to the definition, that it should submit to the General Assembly the text adopted on first reading that did not deal with the consequences of crimes, and that it should call the attention of the Assembly to the doubts expressed by numerous members about the possibility of codifying the matter until a better definition of crimes had been worked out. Mr. Calero Rodrigues and Mr. Vereshchetin thought that the fate of article 19 and the consequences of crimes would be determined only in the course of the second reading of the articles. However, the majority of members—save for those totally opposed to the article 19 distinction—thought that the Commission should not lose momentum, that it should explore all possibilities at the present stage and, only after making a tentative choice, should it verify the solution on second reading. According to those members, solutions in the form of articles should be proposed by the Special Rapporteur for debate in due course and for possible consideration by the Drafting Committee at the next session.

6. Assuming that a definition was accepted—more or less in conformity with the formulation of article 19 in 1976[4]—the next issue was: who would be competent to determine that a crime had been committed in a given case and to implement the applicable regime? As was apparent from the debate, two sets of problems had to be distinguished in that regard. One problem was which organ would be competent to settle the possible disputes over the existence and attribution of a crime, the legitimacy of the reaction, and the measures still to be applied to the situation—namely, which organ would have the last word. Some members—Mr. Mikulka and Mr. Pellet—seemed to suggest that that problem should be dealt with in part three of the draft. The other problem—surely a part two problem—was who could legitimately react, either by means of demands to comply with substantive obligations such as cessation, reparation, satisfaction and guarantees of non-repetition or by means of countermeasures or sanctions.

7. With regard to the first problem, the solution envisaged by some members was the establishment of the compulsory jurisdiction of ICJ, perhaps in an additional protocol. Other members questioned that solution in view of the reluctance of States to submit important issues to the Court, and also the voluntary nature of the Court's jurisdiction. At all events, many speakers

* Resumed from the 2343rd meeting.

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

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

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

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

advocated the need for a verification mechanism of a judicial nature, which could take a decision on the basis of the law.

8. As to the second problem—namely, who could legitimately react—a distinction could be made between opinions relating to the ideal solution and opinions relating to possible realistic solutions. As far as the ideal solution was concerned, it had generally been advocated in the debate, except by the few speakers who were radically opposed to the idea of a special regime for crimes, that the reaction to a crime, including the characterization and attribution of a crime, should emanate from an international organ capable of interpreting and implementing the "will" of the "international community as a whole". Such an organ would apply, directly or through binding decisions addressed to States, the consequences of crimes as provided for in more or less mandatory terms. There was also general agreement, however, that the international community was not at present endowed, and was not likely to be endowed in the near future, with a sufficiently representative organ entrusted with the function of implementing the regime for crimes and organizing the reaction, subject to an appropriate judicial verification of the legitimacy of characterization and reaction. Almost all speakers agreed that, at least for crimes which consisted of aggression or breach of the peace, a system of collective reaction was provided for under Chapter VII of the Charter of the United Nations, though it was not conceived for, nor easily adaptable *per se* to, the implementation of a regime of responsibility.

9. Regarding, in particular, the *de lege lata* or *de lege ferenda* competence of organs of the United Nations in the implementation of the reaction to crimes, the majority of members had stressed the inadequacy of the Security Council's powers with regard to the specific subject-matter of international responsibility, even for such a crime as aggression. They seemed to share his view, as expressed in his fifth report (A/CN.4/453 and Add.1-3), that the Council would not qualify as the organ which had specific competence for a collective reaction to crimes, either *ratione materiae* (for example, with regard to reparation) or from the standpoint of legal versus political evaluation criteria or, for that matter, from the standpoint of an elementary requirement of impartiality, which was hardly reconcilable, *inter alia*, with the fact that the so-called power of veto would ensure virtual immunity for some States. Although on the one hand, the regime to be envisaged for the implementation of the consequences of crimes should in no way call into question the Council's powers relating to the maintenance and restoration of peace, it would, on the other hand, be inappropriate to assume that the Council could be unconditionally recognized as a competent body for the implementation of the legal regime of international crimes of States, especially, but not exclusively, with regard to the three categories of crimes other than aggression. In view of those difficulties, some members had suggested either that the definition of crimes could be confined to the hypotheses covered by Chapter VII of the Charter or that the crimes relating to those hypotheses could be dealt with separately in order to take better account of the Council's possibilities for action with respect to such crimes. While it seemed doubtful that such solutions would resolve difficulties that were due to the obviously political—and not judicial—composition and function of the Council, they could be usefully explored.

10. A number of speakers thought that the Security Council's function was political and above the law, its aim being the maintenance of international peace and security. The Council was concerned neither with the prerequisite that a crime should have been committed nor with stating the law and sanctioning the perpetrator of the crime. The same speakers stressed that there must be no interference with the Security Council in the performance of its specific function. In particular, (*a*) no amendment to the Charter designed to establish new functions should be envisaged; and (*b*) the draft should not include any provisions likely to affect the Security Council's specific function; on the contrary, it should contain a saving clause to the effect that the provisions of the draft relating to crimes were without prejudice to the Charter procedures for the maintenance of international peace and security.

11. Other speakers had been inclined to rely on the Security Council only for the implementation of the consequences of the crime which corresponded to the hypotheses covered by Chapter VII of the Charter. Yet others had suggested a more liberal or generous interpretation of the Council's powers, with a view to encompassing crimes other than those corresponding to Chapter VII hypotheses. One member had made some interesting remarks on the desirability of re-evaluating, with regard to international crimes of States, the role of the General Assembly as an expression of the conscience of that international community as a whole, which was evoked in article 19 of part one.

12. A majority of members had given cautious consideration to the possibility of leaving the reaction to a crime in the hands of individual, or small groups of, injured States, except, presumably, in the case of those consequences of crimes that would coincide with the consequences of a delict. However, some collective response by the "international community" was generally deemed to be desirable either through United Nations organs, such as the Security Council or the General Assembly—the latter being competent to deal with all of the kinds of situation that might involve a crime—or, according to a few speakers, through other collective bodies yet to be established. Some among that numerous group of speakers had also suggested consultation procedures. A number of speakers had been firmly opposed to leaving any room for unilateral initiatives by States or groups of States, particularly in the case of the most severe measures or sanctions, in the absence of any manifestation of a "collective will". Another group of speakers had considered that some room for unilateral measures should be left for all States, either in the event of failure of a timely and effective reaction of the so-called organized international community or to supplement such a collective reaction, provided, however, that no armed reaction was acceptable. Unilateral reaction should, in any case, be confined within the limits applicable to organized reactions.

13. As to the objective aspects of the consequences of international crimes of States—in other words, the

nature and degree of the aggravated consequences of crimes as distinguished from delicts—useful suggestions had been made with regard to both the substantive and the instrumental consequences.

14. So far as substantive consequences were concerned, many comments by members indicated widespread acceptance of the idea that not all the exceptions envisaged for ordinary delinquencies should apply to the "criminal" State's obligation to provide reparation and/or satisfaction. A number of members were of the view that, in the case of restitution in kind and of satisfaction in particular, provision should be made for differences. More particularly, (*a*) in the case of restitution in kind, no extenuating circumstances would be admissible in favour of the lawbreaking State except for *jus cogens* limitations and physical impossibility; and (*b*) satisfaction could include not only severe punitive damages but also measures affecting internal sovereignty or domestic jurisdiction, such as disarmament, or curtailment or dismantling of certain kinds of industries. In addition, the State which committed a crime would not benefit from the exclusion of forms of satisfaction that would offend its dignity. Almost all speakers, however, had stressed the need to safeguard the population of the lawbreaking State.

15. In regard to the instrumental consequences, namely, countermeasures, there had been broad agreement on the prohibition of armed measures, even in the case of crimes, except, of course, for measures taken in individual or collective self-defence and for measures taken by the Security Council under Chapter VII of the Charter for situations involving the crime of aggression. Those generally-accepted exceptions seemed to confirm the preference of most members for differential treatment of the crime of aggression, as opposed to the other kinds of crimes listed in article 19.

16. In the matter of collective self-defence, one speaker had emphasized that the draft should stress the limits of self-defence and, in particular, the point that a State was entitled to act in collective self-defence only at the request of the State which had been attacked or on the basis of a treaty of alliance or of a regional security treaty.

17. There had otherwise been general consensus that, except for self-defence, the use of force must remain the exclusive prerogative of the "organized international community" and of the Security Council in particular. Force for crimes other than aggression, such as genocide, and humanitarian intervention could be used only on the basis of prior authorization by that community.

18. The stronger—though certainly not armed—measures envisaged should not, in the view of most speakers, reach the degree of intensity of measures applied by the victorious party against a vanquished State. Any measure attaining a high degree of intensity should, according to one view, be conditional upon a collective decision genuinely representative of the common interest of the acting States; unilateral initiatives or the initiatives of small groups were to be condemned. A number of speakers had included among the measures in question the pursuit of the criminal liability of the responsible individuals who occupied key positions in the structure of the lawbreaking State. The individuals responsible would be deprived of any immunity.

19. Two members had held that another limitation applicable to the reactions to crimes, in addition to the prohibition of force, would be the non-violation of *jus cogens* rules.

20. A number of speakers, notably Mr. Pellet, Mr. Bowett, Mr. Eiriksson, Mr. Crawford and Mr. Mahiou, had suggested that, subject to the rule of proportionality, to be applied *mutatis mutandis* in the case of crimes as well, the measures directed against the State that was the author of a crime could go beyond the mere pursuit of reparation. Some speakers had stressed the need to condemn any measures affecting the territorial integrity of the State or the identity of the people, even in the case of crimes.

21. One important caveat often mentioned concerned the population of the lawbreaking State. Although it would be impossible to avoid all prejudice to the, presumably innocent, people, care should be taken to avoid any particularly severe effects for the population. A few speakers had, nevertheless, noted that the population should itself be made aware of the possible dangers to them that could arise from attitudes which amounted to more or less overt complicity in the criminal actions of a democratic or non-democratic Government or a despot.

22. Given the wide variety of views he had summarized, it was perfectly possible that he had made errors in identifying them and in interpreting them correctly. It seemed to him, however, that, apart from the few speakers who, as a matter of principle, contested the legal or political propriety of the distinction between delicts and crimes, only one member specifically contested the existence of any differentiation in consequences as between crimes and delicts.

23. With reference to the obligations that might be incumbent upon the injured States—*de lege lata* or *de lege ferenda*—in relation to the taking of measures on behalf of the "international community", a certain degree of consensus had emerged during the debate. Thus, a general obligation would exist for all States not to recognize as valid in law any situation from which the lawbreaking State had derived an advantage as a result of the crime. It had been stressed, however, that that obligation would not be automatic and would exist only after some form of intervention by the so-called organized international community. A related general obligation would be the obligation not to help in any way the lawbreaking State to maintain a situation created to its advantage by the crime. A few speakers had, in addition, referred to a general duty of active solidarity with the victim State or States that would also be incumbent upon all States. The kinds of behaviour which such a general obligation would encompass had not, however, been specified. The only additional requirement mentioned was that all States should comply in good faith with the measures decided by the international community, or by States themselves acting in concert, in response to an international crime of a State. Doubts had been expressed, however, about the *de lege lata* foundation of the duty in question.

24. As to the conclusions to be drawn from the debate, while no firm and specific solutions had emerged, there had been sufficient indications of the lines to be followed in dealing with the consequences of international crimes of States. On the basis of those indications, he should be able to work out his proposals in the form of articles or paragraphs for parts two and three relating to the consequences of crimes. The Commission could then discuss them at the next session and, if it so decided, could refer them to the Drafting Committee. Together with the completion of the work already in progress on parts two and three, that should enable the Commission to conclude the first reading of the draft on State responsibility on time.

25. Mr. ROSENSTOCK said the Special Rapporteur's summing-up failed to take into account the fact that some members of the Commission were strongly opposed to constructing the entire edifice of State responsibility with article 19 of part one as part of its foundation. Others had indicated they would accept the ideas underlying article 19 but not the form of language used, which was heavily weighted towards penal implications and connotations of criminality. Still others had suggested that the idea of State crimes did not imply criminal responsibility. Taken altogether, therefore, a substantial number of members of the Commission were not in favour of predicating elements in part two of the draft on the language or concepts contained in article 19. If a constructive effort was to be made towards completion of the first reading of parts one and two, much less part three, during the current quinquennium, it would be advisable to suggest, for inclusion in part two or part three, alternatives or variations based on the assumption of a distinction, not between crimes and delicts, but between less serious and more serious acts.

26. Mr. CALERO RODRIGUES said that, following the Special Rapporteur's summing-up, he wished to make his position on the draft articles quite clear. He did not oppose the Commission's attempting to elaborate new articles at the current session. His main concern, however, was that there should be no delay in concluding the work on State responsibility during the current quinquennium.

27. The CHAIRMAN, speaking as a member of the Commission, emphasized that, in his statements on the topic, he had never intended to express anything other than strong support for article 19 of part one. True, he thought it should be brought up to date, but he was doubtful about the possibility or desirability of dealing with the consequences of crimes, especially in view of the complexity of the subject. Such an effort might prevent the Commission from completing its work on State responsibility during the time-limit established for that work.

28. Mr. ARANGIO-RUIZ (Special Rapporteur) said he thought his summing-up had reflected the views just outlined by Mr. Calero Rodrigues and the Chairman. He had indicated that some members of the Commission were concerned about whether incorporation of the idea of the consequences of State crimes would prevent the Commission from completing its work on State responsibility within the time-frame allotted to it. He had responded to that concern by saying that, unless a majority of members opposed such an approach, he was prepared to submit appropriate draft articles at the next session. That would be perfectly feasible if the Drafting Committee was able to keep working at its present pace through to the end of the present session. Conclusion of the work on first reading could then be projected for 1996.

29. Mr. Rosenstock's viewpoint, too, had been reflected, though perhaps not with all the detail he would have liked. It had been indicated that a majority of members of the Commission had been in favour of dealing with the idea of crime, though some would have preferred to use a term other than "crime", and some thought no analogies should be made with national criminal law. The problem of territorial amputations and the need to avoid any measures that would seriously affect the population of the lawbreaking State had also been mentioned. His summing-up may not have reflected all the nuances of the various positions expressed, but such a task was outside the scope of the exercise.

30. It was imperative for the Commission to give him a clear indication as to how to proceed with his work. If it so desired, he would endeavour to produce articles that would reflect the largest possible number of viewpoints expressed during the debate. He would not be able to accommodate all positions. Those who were unhappy with his product would, of course, be able to express fully their dissenting views and act upon them.

31. Mr. Sreenivasa RAO thanked the Special Rapporteur for his enormous efforts in identifying and synthesizing the broad outlines of the concept of crime that had emerged from the Commission's rich and enlightening debate. During that debate, members had been speculating on the nuances and implications of the concepts of crimes and their consequences. The main lines of thought could now be distilled, and a decision had to be taken as to the direction of future work. Should the Special Rapporteur produce new articles? Or would that delay the Commission's completion of the draft, which had already been pending for a very long time since the adoption of part one on first reading? A prudent approach might be to acknowledge that, despite the indisputable value of further exploring various aspects of State responsibility, the time factor must win out, and the work done so far must be consolidated.

32. Mr. VILLAGRÁN KRAMER said the Special Rapporteur's summing-up had shed light on the general trends in the Commission's current thinking. If that thinking was scrutinized in the light of the commentary to article 19, drafted in 1976,[5] a substantial evolution could be discerned on a number of specific points. The Special Rapporteur had fulfilled the first aspect of his responsibility—to outline the views of members of the Commission—but that did not release him from the task of submitting a detailed report drawing conclusions on the basis of the guidelines given during the debate.

[5] Ibid.

33. A number of questions still had to be resolved, including whether there was a difference between crimes, or serious offences, and mere delicts, and whether such a distinction resulted in aggravated responsibility commensurate with the gravity of an offence. The Commission must determine whether there were any international crimes other than aggression and genocide. Personally, he would argue that there were. As for the term "crime", it was difficult to see how its use could be denied, since it was incorporated in the Definition of Aggression[6] and in the Convention on the Prevention and Punishment of the Crime of Genocide.

34. Another question was what additional measures would have to be applied in respect of serious offences that entailed aggravated responsibility. The Special Rapporteur posited a reaction either from the "organized international community" or from individual States in the form of countermeasures. But the Commission's thinking on exactly what penalties were permissible in such cases had yet to be clearly delineated.

35. Lastly, the Special Rapporteur appeared to be trying to legislate for the future alone, leaving aside the whole area of *lex lata*, which would permit the Commission to find common ground on State responsibility.

36. Mr. TOMUSCHAT thanked the Special Rapporteur for a very good, succinct summary. A consensus was, he believed, within the Commission's reach, but it would be difficult to achieve if the Special Rapporteur worked on the assumption that international crime had some penal implications; on that basis, there was a risk of ending up in total disagreement. Like Mr. Villagrán Kramer, he thought that all members could probably agree on aggravated consequences in the case of the commission of an international crime. He further agreed that it would be most regrettable if the Commission were to balk, at the present late stage, at continuing to deal with the question of international crime. Were it to do so, the work on the topic of State responsibility as a whole, begun more than 30 years ago, would probably drag on until the year 2000 and beyond. It was incumbent on the Commission to finalize its work on the topic, if possible by the end of its mandate in 1996. The Commission should not be unduly daunted by the difficulties of the task and should make every effort to reach some agreed solution—which might, of course, fall short of the ideal—casting it in the form of draft articles, as the world community expected.

37. Mr. PAMBOU-TCHIVOUNDA said that he wished to associate himself with the chorus of congratulations addressed to the Special Rapporteur on his remarkable exercise in producing such a clear summing-up of what had been a most complex debate. If some members considered that their views had not been correctly reflected, it was certainly their right to say so, but challenging the exercise as a whole was another matter. The Special Rapporteur had identified certain trends of opinion within the Commission as he understood them, taking as the basis article 19—which, incidentally, had been drafted and approved on first reading by the Commission well before his time. Whether members liked it or not, article 19 did exist, and to pursue the argument about its choice of terms was futile. The Special Rapporteur should be encouraged to proceed to the next stage of his task along the lines he had suggested. The Commission would then have every opportunity to criticize the results.

38. Mr. MAHIOU said that, both in his fifth and sixth reports, the Special Rapporteur had raised more questions than he had answered. It was important that he should now move on to a more positive stage and present the Commission at its next session with new draft articles reflecting, as far as possible, the responses of members to the questions formulated earlier. The positions of some members had already evolved in the course of the debate and might well develop further. The Special Rapporteur was to be congratulated on his gallant attempt to reflect all the emerging trends in his summing-up. He wished to join with Mr. Pambou-Tchivounda and Mr. Mahiou in inviting the Special Rapporteur to present the Commission with new draft articles at the next session.

39. Mr. BOWETT said that the problem of international crimes fell into three parts: defining the concept, whether in the terms of article 19 or otherwise; the application of the concept, once defined; and, if it were found that the concept could be applied, the question of consequences. He was apprehensive that the Special Rapporteur might be proposing to go straight to the third of those points without dealing with the first or second. He had little enthusiasm for dealing with the consequences of a concept that could be neither defined nor applied.

40. Mr. ARANGIO-RUIZ (Special Rapporteur), having thanked members for their congratulations, said that he had difficulty in understanding Mr. Bowett's remark. He had been taught in law school that a legal fact was defined on the basis of its legal consequences. His task, as he saw it, was to find out what were the substantive and instrumental consequences, *de lege lata* or *de lege ferenda*, of certain acts, and then to inquire as to who should implement those consequences. Only when those two questions had been answered would it become evident whether a difference between the two categories of internationally wrongful acts really existed. With all due respect, he was surprised at Mr. Bowett's suggestion that a definition should be provided *in abstracto*. The course he was proposing to take was surely the more pragmatic and therefore, so to speak, the one an Englishman like Mr. Bowett should prefer.

41. Mr. BOWETT said that he was happy to hear the Special Rapporteur express an intention to deal with problems of application. He continued to doubt whether the problem could be resolved by working backwards, but was prepared to be favourably surprised when new draft articles came up for consideration at the next session.

42. Mr. KUSUMA-ATMADJA remarked that, for various reasons, none of the members of the Commission were entirely happy with article 19 as drafted. Some, including himself, were unhappy with the use of the term "crime", which had connotations of the concept of crime in municipal law, but accepted it for want of anything better. A further major difficulty was that

[6] General Assembly resolution 3314 (XXIX), annex.

both the Special Rapporteur and the Commission as a whole had tried to grapple with too many issues at once. He would suggest that the Commission should agree to carry on using article 19 as a preliminary basis, on the understanding that the article might be redrafted at some time in the future. In the meantime, it should invite the Special Rapporteur to produce a set of draft articles and, in doing so, to refrain from attempting to cover too much ground and thus to keep the discussion at a more practical level. For the time being, the Special Rapporteur might avoid using the word "crime" or, if he did use it, to place it in inverted commas. Notwithstanding his own objections to article 19 and in particular, as stated earlier, to paragraph 3 (*d*) in connection with transboundary pollution, he was prepared to proceed on that basis. The Commission should give the Special Rapporteur clear guidelines on what it expected him to do. The Special Rapporteur should not be prevented from drawing up the new articles that needed to be drafted on the question of internationally wrongful acts, although it would be unwise to embark on part three of the draft, which was likely to prove extremely controversial.

43. Mr. GÜNEY thanked the Special Rapporteur for his detailed summary of a number of important and complex questions, on which a difference of opinion clearly remained. It would be regrettable at the present stage not to complete the work already done, despite the difficulties that the question raised. The Special Rapporteur had encountered problems in defining the concept and preferred to start with the practical aspect by treating the consequences, which must of necessity follow or be a function of either the conceptual or the instrumental definition. The Commission had no choice but to allow the Special Rapporteur to proceed. Once texts were presented on those issues that had currently given rise to considerable reservations, the Commission must seek to reconcile those differences of opinion.

44. The CHAIRMAN proposed the following conclusion to the debate:

> "The International Law Commission thanked the Special Rapporteur for his conclusions. It takes note of the Special Rapporteur's intention to present at the next session articles or paragraphs on the matter under discussion to be included in parts two and three. It also notes that the Special Rapporteur intends to proceed in such a way as to enable the Commission to conclude the first reading of the draft by the end of the current quinquennium of the International Law Commission."

45. Mr. Sreenivasa RAO said that, in the absence of organized and accepted institutions, any effort to deal with consequences would inevitably lead to an arbitrary exercise of power and might well degenerate into more lawlessness. Yet apart from the case of aggression, which was covered by Chapter VII of the Charter of the United Nations, no such institutions existed. He therefore hoped that the Special Rapporteur could present proposals on consequences from the practical point of view, identifying the institutions that would apply the principles in question.

46. Mr. ROSENSTOCK said it was not his intention to stand in the way of agreement on the Chairman's proposal if that was the general view, but he had reservations about the wisdom of that approach. If part two, much less part three, was to be concluded before the end of the current quinquennium, the Special Rapporteur must proceed on the assumption that the Commission was examining potential consequences of extremely serious wrongful acts by States and should not include other, more polemical, concepts that failed to enjoy sufficiently broad support in the Commission.

47. Mr. de SARAM said that it could not be inferred that there was a consensus in the Commission on the concept in article 19 of part one as it stood. In fact, there was a substantial body of opinion that had reservations in that regard. Similarly, considerable concern persisted within the Commission as to how the concept would be applied. It therefore did not seem to be a good idea to move on to the subject of consequences. He agreed with Mr. Rosenstock that the best course was to proceed on the assumption that there were internationally wrongful acts of an extremely serious nature for which special provision needed to be made, but that was as far as the Commission could go.

48. He agreed with the Chairman's summing-up, namely, that the Commission should thank the Special Rapporteur and indeed believed that his abilities and experience were such that no one should be requested to provide the articles in his place. The Special Rapporteur must none the less bear in mind the reservations that had emerged in the debate with regard to the concept as it currently stood in article 19 and its application.

49. Mr. HE thanked the Special Rapporteur for his succinct and useful summing-up. In his view, the concept of State crime was unacceptable and was used incorrectly in the realm of State responsibility. The Commission must reconsider the concept on second reading of the draft. For the time being, it should proceed with its work on the understanding that two categories were involved: on the one hand, ordinary delicts and on the other, serious delicts. That way, it would be possible to arrive at the same conclusions as with "crimes". The Commission should ask the Special Rapporteur to continue with his work on the understanding that different delicts incurred different forms of a responsibility, depending on their seriousness.

50. Mr. AL-BAHARNA said he endorsed the Special Rapporteur's approach and agreed with members who maintained that the Commission should not redraft article 19 at the present late stage. The provision should remain and a distinction should be made between crimes and delicts. In accordance with its mandate, the Commission should finish the first reading of the draft without further delay. Mr. Bowett (2341st meeting) had said that he did not think that the elements provided by article 19 were sufficient because he had not seen the logic of the Special Rapporteur's drafting articles on consequences before agreement was reached on definition and application. That was not very helpful to the Special Rapporteur, who should be allowed to proceed on the course he had proposed.

51. Some members of the Commission had taken exception to the concept of "crimes" being attributed to a State, something that showed how difficult the prob-

lem would be if the Commission reopened discussion on the definition of the concept in article 19: if it did so, it would never complete the first reading on time.

52. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to place on record that he had been appointed Special Rapporteur in 1987 and had produced articles in reports almost every year since 1988, but the only time the Drafting Committee had elaborated articles had been in 1992. This had been because the Commission and the General Assembly had had what they had regarded as more urgent business, above all the draft Code of Crimes against the Peace and Security of Mankind. The drafting work on State responsibility had thus been delayed. He would do his best to meet the deadline by 1996, which was possible if the Commission was firm, in 1995 and 1996, in setting aside all the time necessary for the Drafting Committee to do its work. Indeed, the Commission should be able to complete not only "crimes" but also articles 11 and 12, whatever remained on part two and also part three, which should present fewer difficulties.

53. He wished to reassure members of the Commission who were concerned about the use of the term "crime". For the time being, he was ready, if it were really necessary, to refer to "crimes" as *la chose* (the thing). He was unable to refrain from noting, however, that the term "crime" was, none the less, important: it could not be ignored that the term "crime" was in common use among the public and in the media. Even if, as Mr. He had said, one could substitute for the term "crimes" the expression "most severe delicts", the impression would still remain that, in such cases, something was involved that went beyond mere reparation.

54. Be that as it may, one should keep in mind that the term "crime" was embodied in an article adopted on first reading in 1976. For his part, he would try, the following year, to prepare articles dealing with the consequences. It would be for the Drafting Committee to work out the name.

55. The CHAIRMAN said that if he heard no objection, he would take it that the Commission agreed to approve his proposed conclusions.

It was so agreed.

The meeting rose at 5.30 p.m.

2349th MEETING

Friday, 3 June 1994, at 10.40 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, 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. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada.

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 (*continued*)*

1. The CHAIRMAN invited the members of the Commission to resume their consideration of the articles of the draft Code of Crimes against the Peace and Security of Mankind.

2. Mr. MAHIOU said that article 1 raised the question whether the Code should include a conceptual, generic definition or simply a reference to the crimes which would be listed in it. A good conceptual definition would be acceptable, but was not absolutely necessary. Article 1 as drafted was not a definition and its title (Definition) was therefore deceptive. It would be better to entitle it "Scope of the Code" and to simplify the text in the following way: "The crimes defined in this Code are crimes against the peace and security of mankind." In any case, the Drafting Committee might base its work on the proposal put forward by the Government of Bulgaria (A/CN.4/460, para. 8).

3. Article 2 should be reduced to its first sentence only, the second being controversial and not really necessary. Article 3, paragraph 3, raised the problem of attempt, a concept not applicable to all crimes. The solution would therefore be to delete the square brackets and specify the relevant articles. The suggestion made by the Government of Belarus (ibid., para. 27) that the competent courts should be given the right to decide for themselves whether the concept of attempt was applicable to specific cases before them was attractive, but, unlike criminal courts, which, in most legal systems, had unlimited competence and were empowered to interpret certain concepts, the international criminal court would have well-defined powers and it was not certain that States would want to leave it a great deal of room for manoeuvre. Circumspection was therefore called for. Article 4 could be deleted provided that article 14, with which it was connected, was amended accordingly; otherwise, the wording of article 4 would have to be changed.

4. Article 5 was entirely justified: it was true that the Code was meant to apply only to individuals, but the

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* Resumed from the 2347th 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.