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Summary record of the 2533rd meeting

Topic:
State responsibility

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more constructive, means to restore the situation in that country after a period of time.

78. Thus, although there had been a substantial development of international criminal law in respect of individuals, there had been no development whatever of the notion of State crimes.

79. He had already referred to developments since 1976 in relation to peremptory norms of international law and obligations *erga omnes*. Whatever the position might have been before, the fact was that there currently was a hierarchy of substantive norms in international law; it was generally recognized that those concepts existed. The old bilateral forms of responsibility, while still present and important, were not the only ones. Indeed, one of the main criticisms to be levelled against the provisions on State crimes was that they distracted attention from the more important task of making sense of different categories of obligation within the framework of responsibility. For example, article 19 treated a State crime as more or less the only case of a breach of an obligation *erga omnes*. Yet the literature was unanimous in treating obligations *erga omnes* as a much broader category than State crimes, even assuming that the latter category existed.

80. Hence, significant development had taken place. To be sure, one or two Governments continued to oppose the notion of obligations *erga omnes*, but they were currently rather isolated and the Commission, having repeatedly endorsed that concept, could not change course at the current time. There were certain norms, perhaps few in number, that were non-derogable. There were other norms, a broader category, which gave rise to legitimate international concern. The Commission should seek to ensure that the consequences of those categories of norms were carefully spelled out in the draft articles. But that was not the same thing and, indeed, was almost the opposite, of adopting a distinction between crimes and delicts. It was possible and desirable to define more systematically the consequences of obligations *erga omnes* and of norms of *jus cogens* without adopting any distinction between crimes and delicts.

81. The Commission, in adopting article 19 at the twenty-eighth session, in 1976, had taken what might be described as a monastic vow—it had said that it would resist all temptations to say what the distinction meant; it had kept that vow very successfully, and as he would show, the Commission more recently had had little success in spelling out those consequences.

The meeting rose at 1 p.m.

2533rd MEETING

Wednesday, 20 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), introducing chapter I.E of his first report (A/CN.4/490 and Add.1-7), said he had sought (2532nd meeting), to demonstrate that, although there was a limited degree of practice supporting the notion of State crime in the particular context of aggression, there was nothing very decisive about it. In particular, article 19 of part one of the draft (International crimes and international delicts)[4] had not been followed in practice, nor indeed by the Commission in elaborating anything that could be described as a proper regime of crimes. And the fact that it had taken a decision at its twenty-eighth session, in 1976, which it had regarded at the time as potentially progressive, did not mean that that decision was irrevocable or really progressive. The Commission was therefore confronted with a choice.

2. Five possible approaches were identified in paragraph 70 of his first report, bearing in mind certain constraints that were structural both to the international community and to the Commission. In particular, it was not possible to force on the Security Council a system of crimes which would, in important respects, qualify the existing provisions of the Charter of the United Nations; and the Commission had to complete its consideration of the topic during the current quinquennium, for, otherwise, it would do serious damage to its standing in the Sixth Committee. But there was another important issue, namely, the issue of the so-called domestic analogy or, rather, the question whether, in using the word "crime", the Commission meant what it said. That word had a general connotation both in English and in other languages. It meant a distinctive wrongful act which attracted the condemnation of the international community as a whole and which was different in quality and in consequences from other forms of wrongdoing. In all the legal systems of which he knew, crimes attracted special consequences and were subject to special procedures. They were not treated as part of a continuum of the law of obligations,

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.

[4] See 2532nd meeting, footnote 17.

which operated in parallel with the law of crimes. There might be links between them, but they were distinct.

3. It had been said, and was sometimes said, in the Commission that the word "crime" was not used in the normal sense. In his view, it was inadmissible not to follow usage and, consequently, the analogy with internal law should not be entirely rejected even if there were differences between the international and national systems. But the notion of "international crime" was used before the international courts. It had been used more than 200 times in General Assembly documents over the past four years, but not once in the sense of article 19.

4. In the circumstances, what were the alternatives? The first would be to maintain the status quo, in other words, the provisions of the draft articles relating to crimes. But those provisions were not, strictly speaking, provisions. As he had explained in paragraphs 77 and the following of his report, the Commission had not established any distinctive and appropriate system for crimes. Part one of the draft articles, for example, made no distinction between "crimes" and "delicts". It followed that the rules for imputation were exactly the same as for those two categories. Furthermore, the notion of fault, or *dolus* or *culpa*, did not play a major role in the general law of obligations and rightly so. In the case of State crimes, however, that requirement was more exacting, something that was not covered by draft articles 1 (Responsibility of a State for its internationally wrongful acts) and 3 (Elements of an internationally wrongful act of a State). There was no reason why the rules of complicity should be the same for crimes and for delicts, as provided in draft article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act).

5. It was true that articles 52 (Specific consequences) and 53 (Obligations for all States) of part two laid down certain distinctions between crimes and delicts, but they were minor and made no difference in reality. He would not revert to the curious article 52, to which he had referred in paragraph 78 of his report, but would comment on what should be the key provision in part two, namely, article 53, which laid down the obligations for all States arising from an international crime. Those obligations had to be distinctive and significant, unless crimes and delicts were to be assimilated. The most important consequence was not to recognize as lawful the situation created by the crime. But it was perfectly clear that, in international law, that obligation was not limited to crimes: it also applied, *inter alia*, to the acquisition of territory by force and to the detention or killing of a diplomat. Another obligation was not to assist the criminal State in maintaining the situation thus created. But there again there would be an obligation, for example, in cases of detention of a diplomat. Indeed, there was some contradiction with article 27, which imposed a stringent obligation not to be complicit in unlawful acts in general. Every obligation listed in article 53 applied, or at any rate, might well apply, to serious delicts.

6. Part three of the draft did not provide for any specific procedure for crimes. Yet not only did the legal systems he knew of make such provision: the international instruments that dealt with due process of law and, in particular, the International Covenant on Civil and Political Rights also expressly made a distinction between criminal liability and the other forms of obligations. It could not be the case that there was an international State crime to which no procedural consequences attached. But the Commission had failed to agree on any. The conclusion must be that the status quo, by minimizing the consequences of crimes, tended to trivialize delicts.

7. The second alternative adumbrated in the footnote to draft article 40 (Meaning of injured State) as adopted on first reading was to replace the concept of international crime by the concept of exceptionally serious wrongful acts. Either that merely involved a change in name, a new label for a special legal category, or it did not. In the latter case, it was obvious that the term would cover a broad spectrum of more or less serious wrongful acts ranging from acts that had the most dreadful consequences for populations to mere failure to notify a nuclear catastrophe—which could also have catastrophic consequences for populations—or from an extremely serious breach of the rules relating to diplomatic immunity to trivial breaches of the rules relating to the use of force. And yet to say that only certain norms gave rise to serious breaches was to trivialize the rest of international law. That, the Commission should not do. As to the first possibility, it was tantamount to reintroducing the notion of crime under another name. If the Commission meant crimes, it should call them by their name. At all events, that was the solution to which he was most vigorously opposed.

8. The three remaining solutions were the most serious ones. The third was to criminalize State responsibility, namely, to admit that State crimes did exist, bearing in mind that they should be treated like genuine crimes, like the most dreadful acts which called for condemnation, special treatment, special procedures and special consequences. That was not an intellectual viewpoint, for two reasons: in the first place, since 1930, most of the disasters that had happened to humanity had been caused by States and, secondly, the rule of law meant that, in international law, all legal persons should be subject to the full range of its prohibitions and penalties. It was true that many legal systems recognized only the criminal responsibility of individuals, but the maxim *societas delinquere non potest* had been proved wrong and it was being recognized, little by little, that States could commit a crime. But that meant that crimes would have to be properly defined and not only by reference to the seriousness of the act committed, that a proper collective system for investigation and not an ad hoc mechanism would have to be developed, and that a proper procedure for determining the guilt of the State, a proper system of sanctions and a system whereby the criminal State could do penance would have to be introduced. With a little imagination and a proper mandate from Governments, that was not an impossible task.

9. The fourth solution was to exclude the possibility of State crimes because the existing international system was not ready for it and because it was difficult to contradict the Security Council other than by an amendment of the Charter of the United Nations, which was an impossibility. It would be tempting in that case to give up criminalizing State responsibility and simply to pursue crimes committed by individuals. In that connection, the

creation of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and the possible creation of an international criminal court represented real progress.

10. There was a fifth position, which was that, in a system in which international law itself recognized the procedural and substantive distinctions between a "crime" and a simple breach of an obligation, State crimes, if it was established that they existed, should be treated separately. It was true that some legal systems started out with a decentralized method of pursuing criminals, but the international community had prohibited it in the name of due process. Consequently, that method could not be applied in international law. It followed that it was not only convenient not to deal with the critical question of crimes in the context of the draft articles on State responsibility, but that that approach was entirely consistent with civilized standards of due process. The Commission should not put crimes in cold storage, but should consider the ways in which, with proper authorization from the Sixth Committee, it could look at crimes. There was nothing automatic about the inclusion of crimes in the general law of obligations; in all legal systems, that law encompassed all categories of act and the systems for compensation and for consequences applied to their full extent. But, at the same time, there were special procedures for crimes which applied where appropriate. That system was entirely consistent with the legal experience of mankind and it was the only sensible way for the Commission to proceed. The Commission should admit that crimes might exist and that the international community might perhaps need to accept the notion that States could commit them and it should therefore elaborate the procedures that the international community should then follow. But it should not create a situation in which the draft articles on State responsibility were broken apart in the name of a practical illusion.

11. Mr. PELLET, speaking on a point of clarification, said that he might have been wrong (ibid.) to take up the Special Rapporteur's point about the Austrian proposal because the discussion had focused on "authentic" interpretations of that proposal. As he saw it, what really mattered, leaving aside the proposals of individual countries, however respectable they might be, was what the Commission itself wanted to do. He urged the Commission to consider the possibility of drafting two instruments: a statement of principles, at once formal and succinct, setting forth the fundamental principles of the law of State responsibility, and a guide to practice or, as Mr. Lukashuk had proposed (ibid.), a code drafted along far more comprehensive lines and containing details relating to rules—something that States certainly needed. Whether or not the two instruments, which would, in any case, be draft articles with commentaries, should take the form of a treaty did not have to be decided at the current session. The Commission did, however, have to decide as a matter of urgency whether there should be separate categories of principles and rules because that would have crucial implications for its method of work.

12. The first report struck him as being more "the pleading of a case" than a report and the Special Rapporteur's introduction had simply added to his misgivings. The Special Rapporteur had a certain result in mind and, to that end, showed a definite tendency to present all the arguments on one side, while skimming rapidly over the others. That was a skilful technique, but the ultimate aim was crystal clear: "to kill" the concept of "crime"—not to "root it out", an entirely noble task—and let it sink into oblivion, naturally with a big send-off. That was a crime against the very spirit of the awesome draft articles designed and, unfortunately, not completed by a former Special Rapporteur, Mr. Roberto Ago.

13. There were many things in the report that were not wrong, and that was what made it so dangerous. In paragraph 77, the Special Rapporteur said that the notion of "objective" responsibility was a keynote of the draft articles. Quite so, and that was one of Mr. Ago's strokes of genius, as the Special Rapporteur had acknowledged in another discussion—a stroke of genius that had consisted in separating responsibility from harm: "Every internationally wrongful act of a State entails the international responsibility of that State" (art. 1).[5] That was an acknowledgement in resounding terms that there was such a thing as international lawfulness, that it was universal and that States must respect international law even if they did not, in failing to respect it, harm the specific interests of another State and even if a breach did not perforce inflict a direct injury on another subject of international law. That was so because there existed an international society based on law: a society, not an anarchy.

14. Unfortunately, the Special Rapporteur continued with what was, in his own view, the completely erroneous statement that the notion of "objective" responsibility was more questionable in relation to international crimes than in relation to international delicts. It was, however, precisely in relation to crimes that the "objective" nature of responsibility was most apparent because it was in that context that the general and "objective" interests of the international community as a whole must be protected. Of course, international society was infinitely less integrated and mutually supportive than domestic societies, but there was a society of States nonetheless, as reflected in a minimum number of inviolable rules whose existence was recognized, as yet hesitantly, by the 1969 Vienna Convention and respect for which was a matter of concern to everyone because a violation was a threat not only to the victim State, but also to the international community as a whole. It was not even necessary, where the rules were breached, for a State to be the victim. They could protect the population of the violating State against that State, the prohibition of genocide and apartheid being one example. Such basic obligations for the international community as a whole were incumbent on each of its members and were so essential for the protection of fundamental interests of that community that their breach was intolerable and not to be equated with, for example, the breach of an agreement on citrus fruit trade or on air traffic. In seeking to eliminate that distinction from the draft articles, however, the Special Rapporteur was measuring everything by one standard.

15. If the word "crime" was the source of the problem, he had no objection to trying to find an alternative, but the Special Rapporteur knew full well that he might then be

[5] For the commentaries to articles 1 to 6, see *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, pp. 173 et seq.

prevented from achieving his goal. That was the reason for his criticism of the proposed alternatives in one of the least convincing passages of his "pleading", in paragraphs 76 to 82, which were extremely weak in terms of intellectual reasoning. In his own view, it was quite feasible either not to name what was currently known as "crime" or to find another name. Ago's shrewd mind and clear-sightedness had admittedly failed him in that regard because both "crime" and "delict" had connotations in criminal law which were frankly out of place in the international sphere. The law governing relations between States was plainly not the domain of criminal law and he was not in favour of saying that it should be. It was, moreover, on the criminal law connotation that the Special Rapporteur had focused all his efforts, although he referred half-heartedly, without endorsing it, to an idea that he himself regarded as entirely correct, namely, that international responsibility was neither civil nor criminal, but *sui generis*.

16. In fact, the Special Rapporteur based his argument on a ready-made idea of the notion of "crime" and of the definition of that notion. It was as though he wished to condemn the Commission to transposing the definition of crime in internal law to the international sphere. The proof lay in the five unbelievable elements that he held to be necessary for a regime of State criminal responsibility. He asserted that, for the notion of crime to be applicable in international law, the crime must be identical in every respect to what was known by that name in internal law. But international society was different from national societies. There were, of course, parallels, and the notion of crime was admittedly one source of proof, but that did not warrant an a priori acceptance of a definition of crime identical to that in internal law. In law, words had the meaning given them by the legal system to which they belonged and definitions were normative. If it was the word that troubled a majority of members of the Commission, there was nothing to prevent them from replacing it by another expression, such as "breach of a rule of fundamental importance for the international community as a whole". As far as he was concerned, however, the terminology issue was of no importance. The Commission could delete the word "crime", if necessary, but it could not get rid of the concept without taking a big step backwards. By getting rid of the word, the Special Rapporteur wanted to get rid of what it designated, although he knew very well, and occasionally admitted, that genocide could not be compared, in terms either of its consequences or of its definition, with a breach of a trade agreement.

17. He urged the Commission not to be intimidated or overawed by the loud and vociferous but sparse opposition to the concept of crime. According to the list drawn up quite candidly in paragraph 52 of the report, there were only a few, admittedly powerful, States opposed to the notion. However, the list did not include most of the ones which were the most likely to be the victims of crimes, the ones which had not long previously welcomed the major step forward represented by the consolidation of *jus cogens*, that is to say, basically the States of the third world and those known at the time as the Eastern European countries. They were not on the list either because they could not afford to be or because they were intimidated by the offensive launched by the most powerful among the wealthiest countries against the notion of crime and hence the notion of *jus cogens*. The Commission's function was, however, not to defer to a handful of States, however powerful, but to distil the essence of legal rules and to draw conclusions therefrom by progressively developing international law. That was what the draft articles by the former Special Rapporteur, Mr. Ago, had done and it would be disastrous to go back on what had not so long previously, as noted by the Special Rapporteur, been regarded almost unanimously, at least in the East and the South, as an achievement and a major breakthrough in international law. In the interests of a consistent approach to international law, the members of the Commission should not undo the work of their predecessors and they must accept the concepts of *jus cogens* and of crime, which attested to the existence of genuine solidarity among the members of the international community.

18. A number of more specific points raised by the Special Rapporteur included the fact that, in the Special Rapporteur's view, the notion of crime lacked any operational status; the weakness of the legal consequences of crimes; the risks involved in criminalizing international society; and the relationship between the notion of crime and those of obligations *erga omnes* and *jus cogens*.

19. On the first point, the Special Rapporteur stressed that the notion of crime had never been used since it had been embodied in article 19. That was not, in his own view, entirely true: in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ had conceded (see page 616, paragraph 32) that any breach of the Convention on the Prevention and Punishment of the Crime of Genocide, including, therefore, the commission by the State of the crime of genocide, could entail the responsibility of the State itself. The main point was, however, that the same was true of crime and of *jus cogens*, namely, that they were notions designed to exist and not to be used. Since the adoption of the 1969 Vienna Convention and even since the early 1960s, when the notion of peremptory norms had been included in the draft articles on the law of treaties, that notion had in practice virtually never been used, primarily because both the rules of *jus cogens* and crimes were inevitably extremely rare in the highly disintegrated setting of international society. They were a reflection of a sense of community that was still very much in its early stages. Nevertheless, certain peremptory rules did exist, just as there were some breaches of international law that were particularly intolerable because they harmed the interests of the international community as a whole. But rarity did not warrant neglect of such cases of crime or *jus cogens*, since those concepts were the future of international law, the promise of a society in which solidarity would be stronger, and it would be disastrous for the Commission to deal a fatal blow to that slow advance.

20. Secondly, those concepts were "deterrent" in nature and, like nuclear weapons, were not meant to be used, although that was obviously no reason to put them aside. States must know that if they breached an international obligation essential for protecting fundamental interests of the international community as a whole, they did something which was more serious than when they breached a mere trade or financial assistance agreement and that the

consequences would also be more serious. The Special Rapporteur proposed that the Commission should not deal with the issue: that was certainly not the way to underpin that important deterrent function.

21. On the second point, the Special Rapporteur referred to draft articles 51 to 53 and derided the distinction between crimes and delicts. Admittedly, he was to a large extent in agreement with the Special Rapporteur in that connection and thought that the text of the three articles verged on the ridiculous, although he did not agree with the Special Rapporteur's interpretation of article 53, subparagraph (*a*): in the event of a crime, all States, including the immediate victim, were under an obligation not to recognize as lawful the situation created by a wrongful act; thus, the victim of an aggression could not recognize it as lawful, unlike the victim of the breach of a trade agreement. That was a fundamental difference because it reflected the existence of breaches, which the draft called "crimes", to which the victim could not acquiesce. By contrast, for delicts, only third States were prohibited from recognizing as lawful the situation created by the wrongful act, and that showed to what extent part two of the draft articles, and in particular articles 51 to 53, was disastrously drafted, since the distinctions which should have been included had not been included. There were two reasons for that enormous shortcoming, the first having to do with the method which the Commission had followed at the urging of its previous Special Rapporteur, who had prompted it to codify first, in an undifferentiated manner, the consequences of delicts and of crimes and then, once the damage had been done, had invited it to deal with the specific consequences of the crime. It had already been too late because some of the consequences which should have been set aside for crimes had been provided for in the case of mere delicts. Thus, the provisions on countermeasures, for example, were acceptable when the point was to react to crimes, but they defined a system which was much too lenient and very much in the interest of the most powerful States when the point was to respond to mere delicts. The lesson to be learned was not, as the Special Rapporteur thought, that the Commission should discontinue consideration of the consequences of crimes, but that it must by all means have the difference between crimes and delicts in mind when starting the second reading so that it could systematically draw a distinction between the consequences of crimes and those of delicts and avoid ultimately papering over the distinction between the two, as it had done on first reading.

22. The second reason why articles 51 to 53 were so disappointing was that the Commission had disregarded the fundamental consequences of the notion of crime. For example, the Special Rapporteur asserted that the concept of punitive damages did not exist in international law, yet draft article 45, paragraph 2, tended to prove the contrary. Another example was provided by what might be called the "transparency" of the State in the event of a crime, that is to say, the phenomenon whereby government officials could be brought before international criminal courts. The persons convicted at Nürnberg had probably never killed anyone themselves; what they had been accused of had been acts which they had committed on behalf of the State. In such cases, the individual was usually protected by State immunity. However, as in the case of Nürnberg, that immunity no longer applied when the breaches committed by the State and in its name were so serious that they had the effect of rendering responsible both the State and the individual through which it acted. An official or head of State who breached a trade agreement was not accountable for consequences of that kind.

23. Concerning the third point, namely the "criminalization" of State responsibility, dealt with in paragraphs 83 and the following of the report, it seemed that the Special Rapporteur was mixing up two things: when a crime was committed by a State, the rulers were held criminally responsible, but that did not mean that the responsibility of the State itself was criminal in the sense that the Special Rapporteur gave to that term. Rather, it meant, once again, that the State became "transparent" and that its leaders could be prosecuted directly. That case was illustrated by the *Prosecutor* v. *Tihomir Blaskic* case,[6] before the International Tribunal for the Former Yugoslavia: the Appeals Chamber had very clearly concluded that the latter could not subpoena States because their international responsibility was not a criminal responsibility.

24. Hence the need to be wary of putting the various forms of responsibility under internal law into the same category as responsibility in the international sphere and, in particular, of transposing to that sphere the distinction between civil and criminal responsibility which characterized internal law. The international responsibility of the State was neither civil nor criminal, it was quite simply international. For his part, the Special Rapporteur seemed to have a ready-made idea of crime fundamentally based on internal law. But to speak of the international "crime" of a State did not mean that that State would be put in prison. Once again, if it was a mere question of words, it would be enough to change the term. The Special Rapporteur did not seem to want to do so because that would weaken his argument and because the conclusion he reached was the result of a line of reasoning based on the word "crime", with the strong criminal connotation which that had in internal law. Either the term could be replaced by the expression already proposed or it might even be possible to speak of a breach of a rule of *jus cogens*, for that was really what it was.

25. Concerning the last point, that of the relationship between the concept of crime and those of obligations *erga omnes* and rules of *jus cogens*, he noted that the Special Rapporteur proposed in effect to forget about the concept of crime and to focus on something more innocuous which did not trouble anyone, the notion of obligations *erga omnes*. A crime was necessarily a breach of an *erga omnes* obligation, but it must be an obligation of essential importance for the international community as a whole, and that was not the case with all such obligations. However, what he had in mind much more closely resembled a notion akin to *jus cogens*, which article 53 of the 1969 Vienna Convention defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". That definition was very similar to the definition of crime in draft article 19, paragraph 2.

[6] See 2532nd meeting, footnote 21.

26. That had not escaped the Special Rapporteur, who sought to dispose of the problem in various ways: first, by stressing the question of obligations *erga omnes*; then, by occasionally raising, in passing, the question of the violation of peremptory norms, which he more or less categorized as *erga omnes* rules, for example, in paragraph 81 of the report; and, lastly, by forgetting about *jus cogens* in his conclusion in paragraph 95 and remembering only obligations *erga omnes*. Taking too great an interest in the violation of *jus cogens* meant simply reverting to crime, that is to say, according to the definition given in article 19, paragraph 2, the breach of obligations "so essential for the protection of fundamental interests of the international community . . . as a whole". Reference might just as well be made to breaches of peremptory norms of general international law.

27. For want of being able to reverse the breakthrough in internationalist thought constituted by *jus cogens*, the Special Rapporteur had made crime the target of attack. He hoped that, when analysing State responsibility, the Commission would, on the contrary, examine in greater depth another aspect of the patient construction by international law of a fragile international community to which the notion of crime, like that of *jus cogens*, could add the requisite ethical element.

28. In closing, he justified his long statement by the need to counterbalance a report which had been drafted with talent, but which was unbalanced in that it presented only one side of the important problem with which it dealt and which therefore needed a counterweight. He hoped that the Special Rapporteur would take account of his observations, which were inspired by the importance of the topic, and that the Commission would not withdraw into an overcautious and servile conservatism.

29. Mr. CRAWFORD (Special Rapporteur) said that Mr. Pellet held a view which apparently differed from his own. The Commission would therefore have to choose and that raised the question of the Special Rapporteur's role: the Commission was on the second reading and, if, endorsing Mr. Pellet's views, it wanted to have a complete regime applicable to crimes in the framework of the draft articles on State responsibility, he as Special Rapporteur would not object, but it would then have to bear in mind the consequences of that decision from the point of view of the timetable.

30. In fact and despite appearances, he and Mr. Pellet were in agreement on a number of points: first, in the draft articles on State responsibility, much of what concerned State crimes was drafted disastrously, as Mr. Pellet had said, notwithstanding 49 meetings of the Drafting Committee; secondly, international law was not limited to bilateral relations of responsibility; and, thirdly, the draft articles must spell out in a more systematic manner the consequences of both breaches of norms of *jus cogens* and breaches of obligations *erga omnes*.

31. The main disagreement had to do with the fact that Mr. Pellet was in favour of introducing a new distinction between "serious" and other acts in the draft articles on the general law of obligations. In fact, he was attempting to single out four or perhaps five norms of international law which he qualified as "serious" and to trivialize all the others. Thus, he spoke of "mere" bilateral obligations. But it was possible to imagine a situation of a State for which those "mere" bilateral obligations were vital, for example, because its survival depended on a river which it shared with a neighbour.

32. It was not possible to have such a strict classification and, even if it were, it would be necessary to make it the subject of a separate analysis, that is to say, to find a separate definition of crime—something which had never been done—without destroying the general law of responsibility. It was important not to minimize national experience: after all, in the area of crime, that was all the Commission had. Moreover, whenever an attempt was made to introduce the notion of crime at the international level—and that was happening in the European Union, where fines were being imposed on States—the implications appeared to go beyond the ordinary law of obligations. The notion of international crime had special connotations, a fact which no amount of relabelling would change.

33. He therefore proposed that the Commission should hold a general debate and take a clear decision. For his part, he was not denying the notion of multilateral obligations; on the contrary, he was trying to make it operative. Nor did he rule out the possibility of State crimes: he was seeking to leave it open for the future. It was his judgement that that was best done in the way he suggested.

34. Mr. FERRARI BRAVO said he was firmly convinced that the concept of State crime was really beginning to take shape. The main defect of the approach followed so far by the Commission was that aggression was used as the prime example of that type of crime. In so doing, the Commission had taken the wrong tack: aggression could not be defined in the draft articles for the simple reason that a non-State entity, the Security Council, was involved. Yet there were other State crimes to which the idea of a fundamental obligation applied and which could be linked to the idea of *jus cogens*. In general terms, it could be said that an international crime existed when the option of *actio popularis* was available. When a country could act although it had not directly suffered harm—a case of *actio popularis*—the concept of State crime began to take shape in a very tentative and embryonic way.

35. ICJ was aware of that, as shown by two judgments and the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which had been issued in 1996 and to which he referred to illustrate his comments. The judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* contained reasoning that related to the concept of State crime, particularly in the separate declaration of Judge Oda (see pages 625 et seq.). Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provided for an international criminal court and, since none existed, that provision had been considerably broadened. ICJ had found itself in a very delicate position, since it had had to do something, and had ended up by declaring itself competent. In the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*,[7] the Court had also upheld its own jurisdiction to interpret an article on commercial

relations in a case involving the use of force. It could thus be seen that even ICJ expanded on certain treaty provisions. Some treaties contained provisions that were predicated on a given structure of the international community. In the absence of such a structure or in the event of its modification, the provisions still produced effects that had not been foreseen at the time when they had been adopted. Consideration should therefore be given to those recent developments in the decisions of ICJ in order to gain a better understanding of what was happening with the law of international crime.

36. He believed that a distinction must be drawn between State crime and criminal acts committed by Governments which were in some way related to State responsibility.

37. He recalled that the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was to be held at Rome from 15 June to 17 July 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court.[8] Despite the delay in the codification of the international law of responsibility, he would advise the Commission to wait to hear what positions would be taken by States at the Conference. He himself hoped that the existence of international crimes would be proclaimed. To engage in codification of the subject matter without even mentioning that legal device would be a step backwards and leave the Commission open to an accusation of blindness to changes in modern-day international life.

38. Mr. PAMBOU-TCHIVOUNDA said that the Commission, which was "hostage" to the pleadings of two lawyers, had to turn the situation to good account by making the codification of the law of responsibility its "concern", even though it was doing that work at the request of and for the benefit of States.

39. With regard to the form of the instruments to be drafted, he was prepared to support Mr. Pellet's proposal for a statement of principles followed by a code. As to what authority those two instruments would have, he said the question should be left open, it being understood, however, that it must be the authority of law, and not of non-law.

40. In the case of the problem of crimes, a balance must be struck between the concepts of sovereignty and solidarity, although the State must not be lost sight of in the edifice being built. While in the main endorsing the ideas expressed by Mr. Pellet, he emphasized that, over and above conceptual assumptions, the Commission should perhaps examine the structural, normative and institutional implications, while seeking to preserve what had been achieved.

41. Mr. ECONOMIDES said that he was generally surprised and dismayed about the Special Rapporteur's final recommendation, which he saw as a step backwards and as contrary, moreover, to the spirit of synthesis and compromise that characterized the Commission. He basically endorsed the tenor of Mr. Pellet's statement and had only one objection: it would be wrong to abandon the distinction between crimes and delicts, first, because the very word "crime" had a deterrent force that was far from insignificant and, secondly, because the two terms had entered into public consciousness and were part of the heritage of international law and international responsibility.

42. Two trends had been taking shape in that field in the past 30 years. First of all, for the most serious breaches that affected the international community as a whole, there was a tendency to go beyond the strictly bilateral relations which usually prevailed between author State and victim State and which were giving way to a new bilateral arrangement in which the victim State was no longer alone, but benefited from the solidarity of all States of the international community. Secondly, for the same very serious breaches, there was a tendency no longer to regard compensation as the exclusive consequence of responsibility and to add other measures, even sanctions, to force the wrongdoing State to put an end to its wrongful conduct.

43. That twofold trend, which ICJ had acknowledged in the *Barcelona Traction* case, had been designed to develop and consolidate, on the basis of the institution of international responsibility, the notion of international public order in the interests of the entire community of States. At the twenty-eighth session, in 1976, the Special Rapporteur, Mr. Ago, had had the brilliant idea of proposing article 19 of part one, which made a distinction between crimes and delicts, and, as indicated in paragraph (56) of the commentary to that article, the Commission had adopted the article unanimously on first reading. That provision, which had then been part of the progressive development of the law, had nevertheless been based on solid foundations, mainly of two kinds.

44. First, the Charter of the United Nations itself, and Chapter VII thereof in particular, had shattered the classical bilateral relationship of the law of responsibility and its tradition of unity by authorizing the Security Council, on behalf of the international community as a whole, to apply preventive measures and enforcement action of a collective nature, including the use of armed force, against a State that had threatened the peace, breached the peace or committed an act of aggression. Collective security, one of the cornerstones of the contemporary international order, indisputably met all the requirements of a specific regime of responsibility applicable to States that committed serious breaches of international peace and security. It would be inconceivable for the Commission's draft not to take that into account, especially as Chapter VII of the Charter was being applied more and more frequently to acts other than aggression which, in the opinion of the Council, threatened international peace and security. Secondly, it was on peremptory norms or *jus cogens* that article 19 of part one was based. As stated in paragraph (62) of the commentary to that article, the concepts of peremptory rules and international crimes were closely interrelated. Some writers even established a parallel between the fact that provisions contrary to the rules of *jus cogens* were null and void in the field of the law of treaties and the fact that, in the field of State responsibility, the waiver by a State that had been the victim of an international crime of its right to impose sanctions did not apply to other States. In paragraph 65 of his first report, the Special Rapporteur indicated that there was a hierarchy of norms, some of which involved a difference of

[7] *Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803.
[8] General Assembly resolution 52/160.

kind, a difference which would be expected to have its consequences in the field of State responsibility. Nevertheless, for reasons that were by no means convincing, he had chosen not to follow up on that conclusion.

45. In his own view, it was clear that, at the current time, for reasons relating to justice and the defence of international public order, the distinction between crimes and delicts was a requirement of the most basic justice, as it was inconceivable, as Aristotle had said, to treat two essentially unequal things as equal, that is to say, minor violations and the most serious crimes.

46. Turning to more specific comments, he said it was unfortunate that, after having pointed out that the consequences of international crime as provided for in the draft were fairly limited, the Special Rapporteur had not proposed to enhance those consequences in order to make them more valid. It went without saying that the Commission had to be realistic and refrain from criminalizing the State. The fact remained, however, that draft article 19 would authorize it to increase slightly the admittedly modest, but not negligible, consequences provided for in draft article 53.

47. Secondly, he generally endorsed the comments made by the Special Rapporteur in paragraphs 49 and 50 of his report on article 19, paragraphs 2 and 3. Aggression, colonial domination by force, genocide, slavery and apartheid were serious crimes in themselves and there was no justification for requiring an additional element of seriousness.

48. Thirdly, he agreed with the Special Rapporteur that the number of States that had made comments and observations on the draft was not representative and that it would probably be necessary to wait a long time before drawing any conclusions from them.

49. Lastly, he said the Special Rapporteur's decision to give primacy to *erga omnes* obligations was questionable, especially as there were three types of rules which formed more or less concentric circles: first, the enormous circle of *erga omnes* obligations which corresponded to a very general idea and produced differing effects depending on the issue in international law involved; secondly, the smaller circle of rules of *jus cogens*; and, thirdly, the very tight circle of rules whose breach constituted an international crime. It would be counter-productive to shift the discussion away from international crime or even breaches of *jus cogens* to the softer and smoother ground of breaches of *erga omnes* obligations.

The meeting rose at 1 p.m.

2534th MEETING

Friday, 22 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Galicki, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SIMMA said that, after the exchanges at the previous meeting on the question of crimes of States, anything that followed could only be described as an anticlimax. What he was about to say was particularly addressed to Mr. Pellet, whom he regarded as the party most seriously injured—in the sense of draft article 40 (Meaning of injured State)—by what he had to say. The previous meeting's fireworks had not brought the Commission any closer to a solution that would be acceptable to all and the purpose of his statement was to help pave the way towards such a solution.

2. The debate on crimes, both at the current and at earlier sessions, had been quite confused. The Commission needed to be clear about what its intention was. Was it, on the one hand, in favour of or against the embodiment in the draft of a regime according to which particularly grave violations of international law were to be followed by more severe legal consequences? Or, on the other hand, was it simply defending or criticizing the specific method whereby the former Special Rapporteur, Mr. Ago, and the Commission in earlier incarnations had attempted to introduce such a differentiation of responsibility? Was the current Commission opposed to the principle, or was it opposed to the method by which its predecessors had pursued that principle?

3. For his own part, he was firmly convinced that the draft must take particularly serious breaches into full and specific account. But he was equally convinced that the "crimes of States" approach was flawed and ought to be discarded: not because he failed to recognize the concern behind it, but because he believed the Commission could do better. He simply could not conceive of the Commission ignoring the need for rules of international law that consecrated fundamental interests of the international community to be equipped with a system of legal consequences of a breach that was up to the task. Members would surely agree on that: where they differed was on how to achieve that goal. Hence, the adherents of the "international crimes" concept should give those members who were opposed to it a fair chance to demonstrate that they did not advocate a roll-back to bilateralism, but

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.