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Summary record of the 2534th meeting

Topic:
State responsibility

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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. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

State responsibility¹ (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 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.*

rather, that the common goal could be realized in a less controversial and more sober way. That, incidentally, was precisely how he understood the intention of the Special Rapporteur.

4. He had spoken of a “fair chance” of developing an alternative approach to the issue behind article 19 of part one (International crimes and international delicts). In that regard, he was “not amused” at being labelled a “servile conservative”—a cold, uncommitted observer unable or unwilling to distinguish between a breach of a commercial agreement and a case of genocide—simply because he dared criticize article 19, while the supporters of article 19 reserved for themselves the labels “progressive” and “morally sensitive”. He fully agreed with Mr. Pellet that, if the Commission at the current session were to decide to rest content with a codification of the traditional strictly bilateralist rules on State responsibility, it would indeed deserve to be called “conservative”, in the pejorative sense. But he trusted, or rather he was convinced, that the Commission would not choose that course.

5. As Mr. Pellet had rightly pointed out (2533rd meeting), the Commission of the 1970s had taken the truly revolutionary step of detaching State responsibility from the old bilateralist ethos—described by Mr. Philip Allott as the “contract-delict ethos”—that had been conditioned upon material damage. It had instead chosen an objective approach that brought State responsibility closer to the public order system found in modern domestic law. The Commission must currently take the remaining, second step to implement the conceptual revolution initiated by the former Special Rapporteur, Mr. Ago, and to take that step precisely where it was most necessary, namely, in response to breaches of international law which constituted offences against the international community as a whole. There again, he was in full agreement with the Special Rapporteur. He had seen nothing in the Special Rapporteur’s first report (A/CN.4/490 and Add.1-7) and had heard nothing in its oral introduction to make him suspect that the Special Rapporteur was—in the words of Mr. Pellet—“preparing not to deal with the issue” of differentiated responsibility.

6. True, the first report did concentrate on the dismantling of the concept of “international crimes” and it allowed only a few isolated glimpses of the potential alternatives whereby the Special Rapporteur intended to accommodate community interest in the system of State responsibility. If the Special Rapporteur had been a little more forthcoming in that regard, he might have been spared at least some of the fury of Mr. Pellet’s attack. Yet again he thought Mr. Pellet had misunderstood the Special Rapporteur. It was not the Special Rapporteur’s intention to limit the Commission’s draft to a codification of strictly bilateralist responsibility: the repeated references to obligations *erga omnes* dispelled that suspicion. As he interpreted the meaning of paragraph 95 of the report, it called for separate treatment of the concept of “international crimes” only if that concept was to be understood as introducing a genuinely criminal responsibility of States. He did not read it as an announcement that the issue of policy which underlay the text of article 19 would not be taken care of in the Special Rapporteur’s future work. Should he be mistaken in that regard, he would be

grateful if the Special Rapporteur would correct him as quickly and unambiguously as possible.

7. It was not admissible to denounce the critics of the text of article 19 as thereby opposing the development of a system of differentiated responsibility. His own criticism could be extremely brief, first, because he had written about article 19 on a number of occasions over the years and did not wish to repeat himself; and secondly, because the Special Rapporteur’s “deconstruction” of that text had been complete and deservedly devastating.

8. Mr. Pellet had said (2533rd meeting) that terminology did not matter. Unfortunately, that was not true. Terminology mattered a lot, especially in the law, and if he had to select just one example of how a laudable idea could be spoiled by an unfortunate choice of terminology, article 19 would be his natural choice. The language used in the article had infected the debate with great confusion, which, incidentally, had already been present in the commentary to the article,⁴ and it had got worse ever since. References to the international criminal responsibility of individuals were used to lend a foundation to “crimes of States”, and so on. The truth was, of course, that State responsibility was *sui generis*, modelled to accommodate relations between sovereign equals. Owing to that structure, while State responsibility might bear some similarity to the domestic law of torts, it was unacceptable to draw analogies with, or even adopt concepts of, domestic criminal law in the field of State responsibility. To speak of a criminal responsibility of States *sui generis* would only make the confusion worse.

9. Reference had been made to war reparations. Yet aside from propagandistic and polemical contexts, such reparations had always been considered consequences *sui generis*. Secondly, reference had also been made to so-called “punitive damages”. But behind that term there also lay hidden confusion, because the fact that, for instance, triple damages could be claimed in tort suits in the United States of America did not turn such civil actions into criminal proceedings. Thirdly, reference had been made to sanctions under Chapter VII of the Charter of the United Nations, but there was nothing in Chapter VII that would force one to assume that one was in the presence of criminal law elements in that context. What one did find was the possibility of coercion in the service of collective security. That, again, was really *sui generis*, and had nothing to do with criminal responsibility. Such a variety of phenomena should not be pressed into the conceptual straitjacket of “crimes of States”.

10. As shown by no less an expert than Ms. Marina Spinedi, whose contribution to the genesis of article 19 was well known to insiders, the term “crimes of States” had originated above all with certain Soviet writers of the post-Second World War period whose obvious intention had been to provide legal justification for the measures taken against Nazi Germany at Yalta and Potsdam. A reading of the commentary to article 19 revealed that substantial gobbets of Potsdam and Nürnberg had been stirred into an indigestible, politically charged brew. Such a mixture had apparently still had its attractions in the 1970s. But the current Commission should not burden its

⁴ See 2532nd meeting, footnote 17.

future work with such a remnant of the political correctness of the cold war.

11. Some remarks could be made on what an adequate regime of State responsibility for breaches of fundamental obligations in the community interest might look like. The recognition of the existence of such international law in the community interest had found threefold expression in modern legal discourse: first, in the acceptance of *jus cogens*, as a barrier standing in the way of the freedom of States to contract out, *inter se*, of any rule, though as Mr. Economides and others had pointed out (*ibid.*), *jus cogens* had a much wider scope than that currently embodied in the law of treaties; secondly, in the emergence of the concept of obligations *erga omnes*, which, according to the *Barcelona Traction* jurisprudence, were the concern of all States, all States having a legal interest in their protection; and thirdly, in the theory of crimes of States, which ought to be discarded. The important thing was that all those doctrines had one and the same basis: that certain rules of international law consecrated values which were not—or were no longer—at the disposal of individual States *inter se*; and that some obligations under international law which protected fundamental interests of the international community must be “strengthened” more than others. The Commission’s approach to taking due consideration of such community interest in State responsibility ought to proceed from that core, and instrumentalize the two out of the three doctrinal developments which had commanded wide, if not universal, acceptance, namely, *jus cogens* and obligations *erga omnes*. Incidentally, a close look at the arguments in support of article 19 revealed constant references to *jus cogens* and obligations *erga omnes*, assembled in a way that tried to let the concept of international crimes appear as a sort of logical and necessary consequence of the recognition of *jus cogens* and obligations *erga omnes*, something which was definitely not the case.

12. With his emphasis on *jus cogens* and obligations *erga omnes* as the conceptual basis for a system of differentiated responsibility, he had come very close to the views of Mr. Pellet. He also agreed with Mr. Pellet that the concern underlying article 19 could not be taken care of by the Commission by basing itself on the concept of obligations *erga omnes* alone. Two elements must be taken into consideration: first, the element of an *erga omnes* “outreach” of an obligation; but secondly, the element of the essential importance of that obligation for the protection of community interests. The concept of obligations *erga omnes*, standing alone, as it very much did in the Special Rapporteur’s first report, did not adequately capture both elements. He had to concede that the relationship between the concepts he was using was not entirely clear, but most authors would agree that the scope of obligations *erga omnes* was wider than that of *jus cogens*. In other words, there could be an obligation *erga omnes* that did not derive from a peremptory norm of international law. For instance, the obligations on States under the general international law to respect and protect human rights constituted obligations *erga omnes*, but one could certainly not assume the totality of those rules to constitute *jus cogens*.

13. He would also make a distinction between general customary international law as such and obligations *erga*

omnes—differing in that regard from Mr. Economides, who had said (*ibid.*) that general customary international law was *erga omnes*. In his view, that was true at the textbook level, but in application, such law applied to specific States, and a State owed its obligation to, for instance, the State with which it shared a boundary or to the State that had sent a diplomat to its territory.

14. It must, of course, also be borne in mind that only grave, particularly serious breaches of obligations *juris cogentis* and *erga omnes* would deserve “VIP treatment” in the Commission’s work on State responsibility. Mr. Pellet was right in that regard, and there was a considerable body of literature on those concepts. Like Mr. Pellet, he regarded the formula used in article 19, paragraph 2, to denote international obligations owed to the international community as a good starting point for a new concept replacing that of crimes.

15. One of the most important testing grounds for the new concept would be what was currently draft article 40. As it currently stood, the article implemented the community interest in strong reactions to what were “crimes of State” by designating every State as “injured”. In other words, the draft tried to live up to its promise to provide an objective system of responsibility in the public interest by multilateralizing subjective injury. It was a highly problematic concept, but he doubted whether, at the current stage in the organization of the international community, it was possible to escape that dilemma. It would not necessarily go against the spirit of energetic responses to violations of community obligations to introduce a differentiated schema of responses available to different States, in accordance with what one might call their “proximity” to the breach. But such differences of proximity would exist only where States too were the victims of the breach. In a case of massive violations of the human rights of the perpetrating State’s own population, for instance, such a differentiated schema would not work. In its current formulation, article 40 granted all States the full range of responses, including the right to take countermeasures. Obviously, such an approach must render the danger of abuse particularly great. In the circumstances, the only really effective solution would lie in the elaboration of specific custom-tailored regimes taking into account, and overcoming, the deficiencies of a system trying to achieve something like an objective regime by simply bundling together subjective rights of all States. But that was certainly not the Commission’s mandate and would probably go beyond its means. However, the dilemma was not perhaps as great as it seemed.

16. His last comment was linked to what was currently article 37 (*Lex specialis*) of the draft. If one looked at the list of candidates for “crimes” status in article 19—he did not wish to subscribe to that list as such, but certainly the obligations mentioned therein had to be considered in any system of differentiated responsibility—one must realize that, under international law already in force, there were more, and more comprehensive, *leges speciales* already available in that regard than one might assume at first glance. One had only to think of Chapter VII of the Charter of the United Nations, on aggression, the very comprehensive and differentiated human rights regime built up in the United Nations over the years, or the network of environmental treaties. Those observations would remain

valid for any new approach to securing community obligations in State responsibility. He saw some tension in that field, which ought to caution the Commission to move with particular care: in the case of the most likely candidates for special treatment in State responsibility, one was in the presence of specific regimes custom-made by experts—even though Mr. Brownlie would regard most of those experts as soft lawyers. The Commission should avoid causing those specific systems to lock themselves into self-contained regimes for fear of political contamination. That was certainly the case with regard to the human rights community. Hence it could well be concluded that the more residual the future system of legal consequences to the breach of community obligations turned out to be, the better.

17. If the Commission's discussion did not remain fixated on unfortunate terminology, but instead turned to the real question of how a constructive, generally acceptable solution to the problem could be found, then it would be possible to achieve a real breakthrough. The Commission should cease to "look back in anger". It must at the current time look forward. If members agreed on their goal, the Commission would be able to devise the way to reach it. He was convinced that the decision on what to do with article 19 and the concerns underlying it would be one of the most important, if not the most important, in the history of the Commission.

18. Mr. CRAWFORD (Special Rapporteur) said that Mr. Simma's statement had certainly been no anticlimax. He felt like some long-distance swimmer who, having got into difficulties, had been plucked from the boiling surf by a bronzed life-saver in the form of Mr. Simma. In what was indeed a long-distance race, the Commission would get nowhere if it engaged in sterile controversies over the notions he and Mr. Simma had been talking about. He took issue with Mr. Simma on just one point: he would like to leave open for the future the possibility of there being real international crimes of States and other collective entities, for a regime of corporate criminal responsibility, properly worked out, had a future in legal systems. But, as to the draft articles on State responsibility, he could not add a word to what Mr. Simma had said.

19. Mr. HAFNER said that Mr. Simma had rightly called for a further distinction to be drawn between crimes *jus cogens* and obligations *erga omnes*. In that regard, he asked whether it was possible that there could be a rule of *jus cogens* or preemptory norm of international law giving rise to an obligation that was not an obligation *erga omnes* in the strict sense.

20. Mr. SIMMA said that Mr. Hafner had raised a very interesting question which called for further consideration.

21. Mr. CRAWFORD (Special Rapporteur) said that, at the forty-ninth session, many members had pressed the then Special Rapporteur, Mr. Arangio-Ruiz, to develop the notion of a differentiated regime. The problem was that article 40 acted as a kind of hinge for parts one and two, and then no distinction was made as between the different injured States in article 40 or for the purposes of part two. That created all the problems to which Mr. Simma had referred. The then Special Rapporteur had

seen that a difficulty existed and was not to be blamed for having been unable to do anything about it. That was the reason why his own first report did not enter into the further reflection that those questions quite clearly merited.

22. Mr. BENNOUNA said the thing that stood out from Mr. Simma's excellent statement was that it was impossible to deal with secondary rules without reference to primary rules. In his analysis of the sources of law and the hierarchy of rules, Mr. Simma had shown that questions the Commission had supposed were settled when it had tackled the distinction between crimes and delicts had not in fact been settled at all. Hence the confusion that had reigned so far in the debate on a regime of crimes that satisfied no one. The Commission had dealt only superficially with those problems. Either it should have treated primary rules as a whole, or else it should have made a far more thorough distinction between crimes and delicts. He feared it might currently be too late to do so, and that the issue of crimes might itself have criminal consequences for the future of the topic of State responsibility. His own concern was to save the draft articles, if need be by jettisoning the notion of crimes.

23. Mr. ADDO said that professorial pontifications had a tendency to confuse practical lawyers, himself among them. Mr. Simma had expressed strong disagreement with Mr. Pellet, but had not stated unequivocally whether article 19 should be deleted. Were the "community obligations" to which he had referred part of the general law of obligation or were they something that should be developed further in order to incorporate it into the draft articles?

24. Mr. SIMMA said he hoped that the "crimes" camp and the opposing camp agreed that State responsibility could not be codified in a unified way, limited to the very bilateralist rules found in the textbooks. The Commission had already overcome that theoretical standpoint by adopting, in article 1 (Responsibility of a State for its internationally wrongful acts), the concept known in French doctrine as objective responsibility, in the sense not of no-fault responsibility, but of responsibility that arose if a rule was transgressed, without regard to concrete damage. Once such a system was adopted it became impossible to treat all breaches of international law in the same way, as Mr. Pellet had pointed out (2533rd meeting) ad nauseam. A differentiation had to be made. All members shared that concern; they differed only in their views as to how to couch that concern in precise legal rules. Notwithstanding Mr. Pellet's brilliant advocacy of the "crimes of State" approach (*ibid.*), he himself remained convinced that that approach was thoroughly confused and should be dropped.

25. As for the question of differentiation of responsibility raised by Mr. Bennouna, the problem might not be as intractable as it appeared. Redrafting article 40 so as to bring it closer to article 60 of the 1969 Vienna Convention, in which three different categories of States injured by breaches were distinguished, would constitute an important step towards a solution.

26. Mr. LUKASHUK said that the Special Rapporteur had adduced some highly convincing arguments against making the conduct of States criminal, but the Commis-

sion had long since decided that it had no intention of doing so. It was concerned with something entirely different, namely, singling out especially serious breaches of international law and discussing two separate legal regimes for international, not criminal, responsibility—a position that had repeatedly been restated by the Commission.

27. The concept of State crime was no mere fabrication on the part either of Soviet jurists or of the Commission but had arisen in the minds of populations since the Second World War. That awareness was reflected in the idea that extremely serious breaches of international law, such as aggression and crimes against humanity, were perpetrated by States and their organized authorities. Such especially dangerous crimes required special treatment.

28. It would be difficult indeed to convince the man in the street that aggression of the kind that had led to the Second World War or genocide involving millions of victims could be called a delict. The Special Rapporteur's arguments in support of that thesis were not very convincing for, basically, he referred to the practice of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda which had, however, been set up to deal not with States but with natural persons. On the other hand, the International Tribunal for the Former Yugoslavia had rightly held that it had no power to take forcible measures against a State. Similarly ICJ did not have criminal jurisdiction. In that connection, the Special Rapporteur had quoted the opinion of Judge Lauterpacht in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* to the effect that the Court had essentially civil, and not criminal, jurisdiction.⁵ That was quite true. There were, however, many British jurists who held the view that international legal responsibility was civil responsibility. But his own view was that the views of Governments were more correct, for they held that States incurred neither criminal nor civil responsibility but a specific form of international legal responsibility. For that reason, he had doubts about the term "delict" which was a civil law term borrowed from Roman law. That point should be explained in the commentary to article 19 and the title of the article should make it clear that what was referred to was a delict under international law, in clear distinction to national law. That underscored the need for the entire draft to be renamed to refer to the international legal responsibility of States, or the responsibility of States under international law.

29. The Commission's work to establish a special regime of responsibility for the most serious offences was in total accord with contemporary international law. Aggression, the most grievous offence, was so dangerous to the international community as a whole that that community had given the Security Council unique powers to suppress the offence. Aggression was committed not by an individual but by a State, as was clear from the Definition of Aggression,⁶ laid down in 1974: individuals bore responsibility for crimes against peace only where there was an act of aggression by the State. The reference there

was not just to any individuals but only to those who had authority and exercised State power. Almost everything that had been said about aggression held true of genocide, which was, above all, a crime of State power rather than of individuals. Unless the Commission grasped that point, its work on responsibility would be flawed.

30. The Special Rapporteur had quoted the opinion of the International Tribunal for the Former Yugoslavia that under present international law it was clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems (para. 57 (d)). A decision along the same lines had been reached by the Inter-American Court of Human Rights.⁷ It was clear therefore that the issue was a matter of current international law, but nothing prevented its being developed in an appropriate direction. It was likewise clear from the opinion cited that, in future, State responsibility would entail something entirely different from criminal sanctions under national legal systems.

31. Some light was thrown on the question by international practice. Iraq's aggression against Kuwait had been described by statesmen and in the media as a crime and the measures taken by the Security Council were to a significant extent punitive in nature. One could only agree with the Special Rapporteur when he stated that "crime" had at times been used with respect to the conduct of States in such fields as aggression, genocide, apartheid and the maintenance of colonial domination (para. 58). Nevertheless, account had to be taken of the negative position of some Governments and of their reluctance to adopt the term "crime". It could perhaps be replaced by the proposed formula, to which even Mr. Pellet, who could hardly be called a conservative, had referred, but at all events a special kind of responsibility for such crimes had to be retained. The considerations raised were likewise intended to point to a certain trend towards progressive development of the law on State responsibility. The Special Rapporteur had not excluded such development and referred to measures that had to be implemented to ensure a regime of international crimes of States in the proper sense of the term (para. 84).

32. It had also been indicated that it was necessary to identify the content of State crime and to provide for the procedural aspects. Due process of law could hardly be guaranteed at the current time, although certain elements were emerging. The Security Council handed down decisions under Article 39 of the Charter of the United Nations in cases not only of aggression but also in other cases when it considered that there was a threat to the peace: for instance, in cases involving massive violations of human rights. And the resolutions relating to Iraqi aggression had to a considerable extent replaced not only ceasefire agreements, which had previously performed such functions, but even peace agreements. They resolved a variety of issues and even regulated the question of responsibility. That was a first step. The Council, under Article 36 of the Charter, could recommend that interested States should consider dealing with the question of responsibility through the appropriate procedures, which

⁵ See *Counter-claims* . . . (2532nd meeting, footnote 20), p. 286.

⁶ General Assembly resolution 3314 (XXIX), annex.

⁷ Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Compensatory Damages, Judgment of 21 July 1989 (Art. 63(1) American Convention on Human Rights), Series C, No. 7.

included referral to ICJ, and such referral could be a condition for the lifting of Council sanctions. That procedure might be satisfactory in the near future for dealing with questions of responsibility for especially serious crimes. It had the support of many Governments and scholars and represented a compromise between what was desirable and what was feasible.

33. The Special Rapporteur's recommendation to do away with article 19 would be a step backwards, for the reasons explained by Mr. Pellet. A set of draft articles prepared on that basis would mean non-recognition of particularly serious breaches of international law and of the special responsibility of those who committed them. Hence there was a fundamental problem to which he would propose two possible solutions. One would be to abandon the idea of a special category of especially serious breaches of international law; but such a decision would not be in keeping with modern positive international law or with its progressive development. The entire responsibility for the resulting blockage of an important movement in international law would lie not with Governments but with the Commission. An alternative would be to adopt the article on especially serious breaches: with all its procedural imperfections, it sufficiently clearly embodied the idea and paved the way for a subsequent solution to the problem.

34. Further development of the law of international responsibility would not lead to the establishment of an international criminal law for States akin to national law. The object was to establish a special form of international legal responsibility. If States still rejected the Commission's proposals then responsibility for their doing so would lie with them, not the Commission. The Commission would have done its duty as a body of independent experts charged with the progressive development of international law.

35. Mr. BENNOUNA said that it was precisely with a view to making certain conduct by a State criminal that the former Special Rapporteur, the late Roberto Ago, had introduced the notion of responsibility arising out of a wrongful act, which act could itself be of such gravity as to amount to a crime. Both States and individuals could, of course, commit a criminal act but only an individual could be imprisoned or beheaded on that account. What was so terrible about the matter was that any attempt to punish the State for its crimes, rather than the leaders responsible for those crimes, could in practice result in collective punishment—as when, in the fascist era, the population of a whole village had been executed for one offence committed in that village.

36. If it was at the current time to be concluded that there were degrees of responsibility depending on the primary rule breached, there would be various levels of responsibility rather than just crimes and delicts, and that might correspond more closely to reality. To that end, further analysis would be required to determine the different consequences in terms of codification of the norms involved, which, in turn, would call for a less conservative approach than simply thinking in terms of crimes and delicts. His question to Mr. Lukashuk, therefore, was whether a more satisfactory result would not be achieved if the Special Rapporteur was asked to determine the

degrees of responsibility by reference to the kind of rules breached rather than just to the question of crimes—which in the past had hindered rather than speeded up matters, as it had introduced an element of passion into an area where what was required was legal expertise.

37. Mr. LUKASHUK said that what he had in mind was something far simpler than States being beheaded or imprisoned. He could not however agree that a breach of an international trade agreement and the killing of millions of people were both delicts with the same level of responsibility. In other words, for especially serious crimes there should be a special regime.

38. Mr. THIAM said that his reservations about article 19 were a matter of record. A more immediate question, however, concerned the powers of the Commission. Specifically, did it have the right to revert on second reading to a matter that had been settled on first reading or should members' comments be confined to questions of form?

39. Mr. CRAWFORD (Special Rapporteur) said it was clear from the Commission's practice that the second reading of a draft was a substantive exercise.

40. With regard to Mr. Lukashuk's comments, no one was suggesting that genocide and a breach of a bilateral trade agreement should be treated in the same way. He did however wish that people would stop caricaturing those who wished to get rid of the simplistic distinction in article 19 and engage in the much more refined exercise to which Mr. Bennouna and Mr. Simma had referred.

41. Mr. ADDO asked whether the special regime which Mr. Lukashuk had mentioned would be elaborated within or outside the draft articles on State responsibility.

42. Mr. LUKASHUK said that he had been speaking not about crimes but about the most serious breaches of the law. If the title was changed, he would be quite satisfied with the draft.

43. Mr. PAMBOU-TCHIVOUNDA said that he endorsed Mr. Lukashuk's conclusions and wished to thank him for reminding the Commission of its responsibility in the light of what States expected of it.

44. Mr. PELLET said that he agreed, to a very large extent, with what Mr. Lukashuk had said, but subject to one small nuance concerning the need to envisage procedures. It would, of course, be necessary to reflect on a mechanism to determine what was a crime, just as the 1969 Vienna Convention contained a mechanism to determine whether or not a *jus cogens* rule was at issue. That, however, was a point to which the Commission had agreed to revert. But he was somewhat more doubtful about the need for a mechanism to assess the consequences of a crime, since that would go far beyond what the Commission could do in the context of a draft on State responsibility and might lead it into deep waters. A very careful distinction would have to be made.

45. On the other hand, he could not agree with Mr. Bennouna, who seemed to be barking up the wrong tree. The notion of crime was a normative notion, and the notion of responsibility under discussion was not to be

confused with the question of action by the Security Council. Though draft article 40 (former article 5)—to which the previous Special Rapporteur, Mr. Arangio Ruiz, had desperately, but rightly, reverted—was badly worked out, the idea it contained should be preserved. It was not because the Commission decided to discard the idea of crime that the Council's powers would be changed.

46. He was pleased to hear the Special Rapporteur say that no one suggested putting on an equal footing trifling violations and very serious violations which affected the fundamental interests of the international community as a whole. Yet the recommendation in paragraph 95 evoked the possibility of speaking of breaches of obligations *erga omnes*. Paragraph 95, which did not mention *jus cogens*, went on to say that it should be understood that the exclusion from the draft articles of the notion of "international crimes" of States was without prejudice to the scope of the draft articles or to the future development of the notion. In other words, the Special Rapporteur wanted to bury the idea without actually saying so, and that did not tally with what he had just told the Commission. For his own part, he was in disagreement with the recommendation.

47. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Pellet, noted that paragraph 95 said *inter alia*. He had referred to the notion of obligations *erga omnes* because, first of all, it had been at the origin of article 19, the *Barcelona Traction* dictum was the primary authority cited by the Commission. It was a very important dictum: the Court had been ahead of its time in issuing it, and the Commission should make it operational. In that respect, he was in complete agreement with Mr. Simma and Mr. Bennouna. On the other hand, the notion of "crime", properly so called, could have a role in future; he did not object to that idea, although most people did, and in that regard, he himself might be ahead of his time. He was therefore prepared to leave out the notion, but was totally opposed to reflecting a thing called "crime", which Mr. Pellet wanted to have without using its name, in article 19, disrupting the much more important exercise of elaborating and making operational the notion of obligations of interest to the international community as a whole, which did belong in the draft articles.

48. Mr. BENNOUNA said the debate had clarified a number of issues. To move ahead from a methodological point of view, it would be necessary to say whether or not the Commission retained the notion of "crime". The answer to that question would free the Commission to deal with more serious matters. In his view, there was no need to engage in a metaphysical debate on the existence of the notion of "crime", which was of no interest from the standpoint of international law today.

49. Mr. KATEKA said that he wanted first to comment on the Austrian proposal, which had attracted considerable attention in the Commission. The proposal had been taken by some members to be a two-track approach: a declaration of principles to be accompanied by a convention. Other members had interpreted it as a general declaration to be followed by a guide to practice or a non-binding code. Still others had understood it to mean that the Commission would produce two instruments and

the General Assembly would choose one. It was because of that confusion that he regarded the proposal as attractive, but it had potential snares. He was afraid that once the declaration had been adopted, that would be the end of the matter, and the idea of a binding instrument would be forgotten. One member had drawn attention to the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,⁸ which had later been followed by the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. But without a watertight linkage between the two possible instruments, he did not endorse the two-pronged approach to the question.

50. In his first report, the Special Rapporteur reminded the Commission that it was engaged in the second reading, 27 reports having been submitted in the nearly 50 years of the topic's history. But the existence of many volumes on State responsibility was no justification for the deletion proposed in paragraph 95. The Commission should not, through radical surgery, kill what could be cured by administering the right medicine. Earlier drafting efforts on article 19 should not be jettisoned. He was concerned that the members of the Commission were trying to undo in one session what their predecessors had taken years to achieve. In that regard, he had considerable sympathy with the comments made by Mr. Thiam.

51. He was relieved, however, to hear the Special Rapporteur say that if the Commission decided to retain crimes he would act accordingly. He personally did not foresee any problem in developing the topic further, because the first reading had been predicated on the existence of State crimes.

52. After considering five distinct approaches to the question of State criminal responsibility in his first report, the Special Rapporteur dismissed the first three and picked up the last two, arguing for rejection of the concept of State criminal responsibility. While he was prepared to give the Special Rapporteur the benefit of the doubt that the weight of evidence currently tended to favour the view that international law did not recognize State criminality, he did not agree that it was not necessary or appropriate to try to do anything about it. That was for the members of the Commission and, ultimately, for the General Assembly to decide. The comments calling for deletion of the concept of State crimes in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) were those of a vocal and insignificant minority of States and did not represent the views of the international community as a whole. The silent majority had yet to make its position known.

53. Mr. Lukashuk was right to say that the concept of State crimes had not been an invention of Soviet lawyers. Paragraph (36) of the commentary to article 19 cited a nineteenth century Swiss lawyer and other legal experts who had distinguished between serious breaches and other, lesser breaches of international obligations. Perhaps it was a matter of wording or terminology.

⁸ See 2532nd meeting, footnote 13.

54. He also disagreed with the Special Rapporteur's view, in paragraph 94, that the Commission needed a mandate from the Sixth Committee to deal with the question of State criminality. The Commission already had that mandate, which the General Assembly did not confine to certain aspects of State responsibility. The Sixth Committee collectively had not challenged article 19, which had been provisionally adopted at the twenty-eighth session, in 1976. As could be seen in paragraph 89, the Special Rapporteur had not completely ruled out the notion of State crimes, having allowed for it in the case of aggression; personally, he would add genocide as another example.

55. The Special Rapporteur's five elements for a regime of State responsibility were not all necessary; the fifth element, for instance, on avoiding stigmatizing a State with criminality, overlooked today's reality. It was similar to the argument about punishing a State's entire population. In practice, that had already happened. The Commission had no need to tell the people of Iraq that the adoption of the concept of State crimes could lead to the punishing of an entire people. The Iraqi people were suffering even before the Commission adopted the concept.

56. Certain international crimes could indeed be committed both by individuals and by States. The traditional view, based on the Nuremberg approach, which stated that crimes against international law were committed by men, was too narrow. The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda dealt with individual criminality, and even the proposed international criminal court limited itself to crimes by the individual. But as the written views of the Nordic countries pointed out in the comments and observations received from Governments on State responsibility, the conduct of an individual could give rise to the responsibility of the State he or she represented. In such cases, the State itself must be made to bear responsibility in one form or another, be it through punitive damages or measures affecting the dignity of the State. Naturally, the penal sanction could not be the same for an individual and for a State.

57. Fear of encroachment on the sovereignty of States had been invoked to oppose criminalizing them. But legal provisions on repression had been confined to compensation, restitution in kind and satisfaction. If a State committed an internationally wrongful act, it must, for example, pay compensation "only for the proximate and natural consequences of its acts", to quote Mr. Brownlie.⁹ Just as, in municipal law, a person was deemed to have intended the natural and probable consequences of his acts, so must a State bear international responsibility for serious violations and other breaches.

58. A distinction should be made between international crimes and international delicts and it was essential to use the criterion of the gravity of the breach. As rightly pointed out, the breach of an international tariff clause could not be placed on the same level as aggression or genocide. He did not object to employing the term "crime", although less controversial terms, such as "seri-

ous unlawful act" or "serious violation" were also acceptable. However, the basic concept, namely that a State could commit an internationally wrongful act of a serious nature, must be retained.

59. It had also been suggested that the notion of State crime could be abused by the powerful to oppress the weak. That would not be the case if the Commission provided for an appropriate institutional mechanism to establish objectively when a crime or delict had been committed, a question that should not be left to the subjective determination of the injured State. Even counter-measures had been restricted by imposing conditions and excluding the use or threat of force. Such a mechanism, coupled with compulsory dispute settlement machinery should be possible to allay the fears of some Commission members.

60. Flaws and lacunae remained in the draft articles, but they could be overcome through further debate in the Commission and work in the Drafting Committee. Shortcomings included article 40, where the injured State meant all other States if the internationally wrongful act constituted an international crime. The provision was too broad and it might be abused. Parameters had to be set: while all States might be injured by the breach of an *erga omnes* obligation, not every State would have the right of bringing a claim.

61. As for the consequences of an international crime, some members had raised articles 51 to 53 as an obstacle. He wondered whether anyone could be opposed to the obligation not to recognize as lawful the situation created by an international crime. Who would render assistance to a State that had committed an international crime in maintaining the situation so created? He could understand the reluctance of some States about an obligation to cooperate, but not with the obligations of non-recognition. It had been argued that the Security Council's role might be undermined by the criminalization of States, yet no one had proposed a change in the primary responsibility of the Council in the maintenance of international peace and security. In practice, it was the Council which had failed the international community by intervening too late, as had been the case in the former Yugoslavia, or by doing nothing at all, as had happened during the genocide in Rwanda in 1994. Had an independent system been in place, the tragedies in those countries might have been averted.

62. Article 19, paragraph 3, had been singled out for special criticism, the contention being that paragraph 3 was in contradiction with paragraph 2 and that it merely listed vague concepts of crimes. Yet that argument had not been used in respect of the draft Code of Crimes against the Peace and Security of Mankind,¹⁰ where there had likewise been no specific definition, but a simple enumeration of crimes. The list in paragraph 3 needed some drafting changes to make it acceptable. In that connection, he had been intrigued by a paper delivered by Mr. Pellet in which he argued that the industrial Powers were afraid

⁹ J. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), p. 224.

¹⁰ For the text of the articles, and the commentaries thereto, as adopted by the Commission at its forty-eighth session, see *Yearbook... 1996*, vol. II (Part Two), p. 17, document A/51/10, para. 50.

that the legal concept of crime could be used as a weapon against them: after all, it was the small Powers which should be afraid, the major Powers being in any case already covered by the provision of the right of veto in the Security Council.

63. The commentary to article 19 suggested that there was unfinished business that required attention. A clearer distinction based on degree of gravity was possible if the will existed in the Commission. That would contribute to the progressive development of international law in the true sense of the term. He endorsed Mr. Simma's view that the Commission should make it clear whether it was against the principle of dealing with international crimes or the method.

64. Mr. CRAWFORD (Special Rapporteur), asking for the floor on a point of clarification, said that he was not in favour of alternative 4, but alternative 5. His views were set out in paragraphs 83 and 89. Secondly, regarding the fifth of the five conditions he had said would be necessary to have a regime of crimes in the proper sense, the point about stigmatizing conduct as a crime was that, at some juncture, it would prove necessary to say that the book was closed, that the issue had been resolved and the entity in question could be reintegrated into the international community. That was clearly a very serious problem in respect of the treatment of States over long periods. He was not concerned whether they would be stigmatized at the time: it was obvious that they were. The question was at what point that stigma would be regarded as effaced. The issue was a real one, for countries such as South Africa and Cambodia were currently struggling with the problem of closing the books on certain terrible crimes.

65. Mr. OPERTTI BADAN said that he had serious doubts about the subject. He endorsed the comments made by a number of States in the comments and observations received from Governments on State responsibility, for example France under article 19, when it had stated that State responsibility was neither criminal nor civil, but *sui generis*. He agreed with the argument in the comment made by the Government of France under paragraph 3 of that article that at international level there was still no legislator, judge or police to impute criminal responsibility to States or ensure compliance with any criminal law legislation that might be applicable to them. However, the Commission was engaged in the progressive development of international law. It should not begin by adopting a position that might block such development by refusing to consider a matter which was *sui generis* but in any case also required it to give thought to a special procedure or set of rules that would satisfy the international community's legitimate desire to have some protection mechanism.

66. The international community was on the way to creating an international criminal court and the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court¹¹ was to be held at Rome from 15 June to 17 July 1998. The Commission was currently discussing related issues. The best signal the Commission could give was that, in beginning the debate, it was not starting from scratch; the past

must be taken into account. Hence, the Commission should try to agree on whether it would deal with State responsibility at the level of an internationally wrongful act, whether criminal or *sui generis*. But it was not appropriate to do away with the subject of responsibility by arguing that punishing the State meant punishing the population. Needless to say, the population felt the effect of the acts of its rulers. However, in the case of a population which suffered under the leaders of its own State and populations of another State which also suffered the consequences of the violation of international law by that State, he gave greater attention to the latter population, because it had no way of controlling or influencing the leaders of the State who committed an act of aggression. It was therefore important not to give in to the temptation to be very radical at the outset. That could be done at the end. In the beginning, it was necessary to be open-minded.

67. Mr. ROSENSTOCK said that the mess the Commission had made of article 19 and part two had led Mr. Kateka to suggest that those who opposed the whole idea of article 19 were in some sense not sympathetic to non-recognition of events brought about by the criminal acts of States. That was not the problem: no one was opposed to non-recognition of consequences arising from so-called crimes of States. The mess could be illustrated by the following example: if Canada were to attack the United States and the United States were to rebuff that attack and end up occupying Manitoba, in so doing the United States would have exercised force in self-defence. It would be a perfectly legal act, and no crime would have been committed by the United States, and probably not by Canada either. Should such an acquisition of territory by use of force be recognized? If not, then there must be some question about a regime which established a system in which the *a contrario* implications of part two as it currently stood would recognize that acquisition. Irrespective of whether it was possible to clean up the mess by retaining the notion of article 19 while giving it another name or by deleting article 19, it was essential to find a way out of the current situation. The whole of part two, insofar as it related to so-called crimes or acts of a particularly serious nature, or however the notion was formulated, created a chaotic situation not only for so-called crimes, but for international law in general. He was far from convinced that a solution could be found as long as the Commission retained the neologism of "crime" or whatever it eventually decided to call it.

68. Mr. PELLET, referring to Mr. Rosenstock's comments, said it was difficult to grasp, in the example cited of Canada attacking the United States, how Canada would not inevitably be responsible for committing a crime, namely, aggression against the United States. He shared Mr. Rosenstock's view that the confusion surrounding the question of crime needed to be cleared up, but that did not mean article 19 should be deleted. He saw Mr. Operti Badan's point about the risk of a deadlock and did not think that the Commission needed to enter into the details of the matter. For the time being, it should simply take note of what existed, and he continued to think that such crimes did in fact exist, even if Mr. Bennouna thought that that was merely a metaphysical conviction.

¹¹ See 2533rd meeting, footnote 8.

69. Mr. Kateka had queried his comment in a lecture at the Graduate Institute of International Studies that one of the reasons for the questions currently being raised about the concept of crime was that the great Powers were fearful of that concept. He had two arguments to justify that view. First, concepts were generally the weapon of the weak: sovereignty, for example, far from being an instrument used against small States, was in fact wielded by them as a formidable legal instrument against larger States. Crime was a concept that could work in a similar way. Secondly, the great Powers already possessed a weapon for imposing punishment, namely the Security Council. The concept of crime was a way of taking a different tack, without giving the Council the power to throw up obstacles in a situation in which the permanent members might block matters when a crime had been committed.

70. Mr. GALICKI said that the impression he gained from the discussion was that the Commission was engaging in the work not of lawyers but of geologists. While digging up the remnants of the past, it had unearthed a variety of mineralogical substances, some solid, some in liquid form. Crimes committed by States were of the latter variety but no legal edifice could be constructed on such unsound foundations. In any case, the Commission's primary task was to prepare a draft on State responsibility. That did not mean the Commission could set aside definitively the task of defining State crimes. The Special Rapporteur was right to say it should concentrate on more solid concepts and to advocate a very flexible course of action, one which he personally fully endorsed. Lastly, it was unwise, and it created misunderstandings, to draw an analogy between responsibility for State crimes and responsibility for crimes committed by individuals.

71. Mr. Sreenivasa RAO said that in general he agreed with Mr. Kateka's comments. The Special Rapporteur had essentially obliged the Commission to answer yes or no to the question of whether article 19 should remain in the draft. As the debate progressed, a number of valid considerations for the overall structure of the draft were being distilled and, irrespective of the fate to be reserved for article 19, those considerations would require much more extensive discussion.

72. Among the points that had emerged—a philosophical question which had practical ramifications—was whether it was feasible to punish a State, in the person of the individuals responsible for its decisions at a particular moment, without punishing all the citizens of that State. To what extent could a leader function entirely autonomously of the society he or she governed? Even in the worst dictatorship, there was often an emotional concordance between society and its leaders, while in a democracy, where leaders were supposed to reflect the will of the people, a certain distancing from the will of the people often occurred in politics.

73. A number of legal questions had arisen as well, and were being elucidated through many comments by members of the Commission: what was the distinction between crime and *erga omnes/jus cogens* obligations? How would States injured, though to differing degrees, be covered, and the common interest ensured?

74. Mr. AL-KHASAWNEH said Mr. Rosenstock was correct in saying that the draft was flawed for having confined non-recognition to crimes: it should apply to many illegal situations, regardless of whether or not they were characterized as crimes. The prime example was the advisory opinion of ICJ in the *Namibia* case in which the Court had called on States not to recognize the continued presence of South Africa in Namibia. There was a real danger that confining non-recognition to crimes would give rise to a *contrario* interpretations. In the example given by Mr. Rosenstock, it mattered very little whether Canada's action was a crime, for Canada was clearly the aggressor and any territory acquired by the United States was gained while acting in self-defence.

75. Mr. DUGARD noted that those who favoured the concept of State crime—as he did—had indicated they would not object to the use of some terminology other than "State crime". Yet it would be more consistent for proponents of that viewpoint to seek to equate the concept of State crime to the concept of crime in domestic law, so as to attach the serious consequences normally attached to crime in domestic law to State crime. Changing the terminology for the concept might trivialize it, reducing State crime to something in between an international delict and an international crime. Did Mr. Kateka and other proponents of "State crime" feel that that compromise could legitimately be made? If Mr. Kateka favoured covering international crime in all its ramifications, did he feel the Commission could do justice to that endeavour within the current draft articles? Or should it embark upon a separate study under the existing mandate? He was greatly attracted by Mr. Kateka's idea that the Commission could undertake a new study without requesting anew the approval of the Sixth Committee, for it had already received such approval by implication. That might offer a way out of the current dilemma.

76. Mr. KATEKA said that, though the use of the word "crime" created philosophical problems for some members of the Commission, replacing it with another term might create problems for the Special Rapporteur. An analogy between domestic crimes and international crimes was likewise problematic: how could one establish the *mens rea* of a State? And the phrase "international crime" was already used in the context of crimes committed by individuals: war crimes, crimes against humanity and genocide, for example.

77. As to whether the Commission could do justice, in the current draft articles, to the concept underlying article 19, that was up to the Special Rapporteur to decide. He had already indicated that a new study should be undertaken to serve that purpose; he himself, on the other hand, thought the problem could be solved within the current draft. The strongly differing views that currently prevailed over a number of issues—crimes, the injured State, compulsory dispute settlement and the mechanisms involved—would have to be worked out. If that was done—and he believed it was possible—there would be no need to begin the work afresh: the current draft could be used as the starting point.

78. Mr. PELLET said he agreed with those remarks. On the other hand, he entirely disagreed with those who considered that there was one immutable, particular meaning

to the word “crime”, that is to say, the meaning that existed in domestic law. He was absolutely convinced of the opposite, and on that point concurred with the view advanced by France in its comments: international responsibility was neither criminal nor civil in nature, it was a different legal system. He did not understand why the “crime partisans” were accused of inconsistency: in fact, they were ready to live without the word “crime”, whereas many opponents of the concept of crime were fixated on the term. He had no objection to speaking of an international crime of the State, as Mr. Kateka had suggested. Alternatively, article 19, paragraph 2, could be reworded to read: “An internationally wrongful act which results from the breach by a State of an obligation that is essential for the protection of fundamental interests of the international community as a whole has specific legal effects.” What he absolutely refused to accept was the idea that a State could be a criminal in the same way as an individual could be a criminal under domestic law.

79. Mr. Galicki had commented that members of the Commission tended to mention individual criminal responsibility rather often. That was true. The first report of the Special Rapporteur, and still more his oral presentation, mixed both things and tried to encourage the Commission to shift from the realm of State crime towards that of the crimes of individuals, though the two realms were completely different. It was inconceivable that the leaders of a State could be brought before an international criminal court, thereby losing their immunity from jurisdiction, without some event having occurred: and that event, in his opinion, was definitely a crime.

80. Mr. CRAWFORD (Special Rapporteur) said the partisans of article 19 could be heard at times to demand a separate regime, and at others, to call for an undifferentiated one. They might be enlightened by referring back to the thinking of the former Special Rapporteur, Mr. Ago, on the subject. Mr. Ago had clearly stated that a separate regime was needed to cover crimes—a statement with which he himself fully agreed. Incorporating crimes would necessitate modification of article 1, which worked perfectly well for internationally wrongful acts in general but would need the addition of a reference to fault to cover crimes as well. Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), would also have to be modified, because a State could not be found to have committed a crime in respect of an *ultra vires* act of an official, whereas it could be found to have committed a wrongful act.

81. It was true that there was an emotional force inherent in the concept of crime, and part of the force that Mr. Pellet wanted was precisely the concept of crime. He himself wished to retain that for the future. He was talking not of individuals but of corporate entities, which were already being held criminally accountable. Although that stage had not yet been reached in the case of crimes of State, it was not impossible that it would be in future. Iraq was currently being treated as a virtual criminal. The original aggression, as pointed out by Mr. Simma, was subject to a special regime under the Charter of the United Nations, but as a jurist, he would be happier if the treatment of Iraq and all the ensuing consequences were a more orderly process than it had been. The requisite insti-

tutions were not yet available to do it any other way, but the possibility of their emergence must be preserved for the future.

82. In the meantime, if all that Mr. Pellet was saying was that a breach of an obligation to the international community as a whole carried special consequences, he could not fail to agree. Indeed, he was trying to spell out in a systematic way what those consequences might be and how they would operate. And he agreed with Mr. Pellet on another point as well: that the current draft articles completely failed to do that. The way he himself proposed to remedy the problem was to acknowledge the existence of obligations to the international community as a whole such that their serious breach affected the interests of that community. Not all obligations of interest to the international community as a whole would give rise to “crimes” in the proper sense in the event of a breach, even a serious breach. However, he wanted to reserve the possibility that some might be crimes in the real sense. Morally, a State which committed genocide committed a crime. What had happened in Cambodia was a crime.

83. Mr. HAFNER said it must be borne clearly in mind that individual responsibility was something entirely separate from the responsibility that could be assumed by a State. The responsibility of the individual was dealt with by the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and would be the work of the future international criminal court. Even in the case of genocide, he had doubts about whether the commission of the crime was identical, irrespective of whether it was committed by an individual or by a State.

84. Mr. PAMBOU-TCHIVOUNDA noted that the positions adopted by members of the Commission were gradually converging. There seemed to be a strong movement towards the idea of reading article 19 in conjunction with article 1 and a growing awareness that any changes to article 19 would automatically entail consequences for the preceding articles. Article 19 was built on the same foundations as article 1, the latter article being the spark that was kindling the revolution in the law of the international responsibility of States. If all analogies with domestic law were to be expunged and, in particular, the word “crime” was to be sacrificed, then the word “delict” might have to suffer the same fate.

85. Mr. CRAWFORD (Special Rapporteur) said he fully supported that idea, since both terms created an analogy with domestic law and, while the French word *délict* had a very specific meaning in criminal law, in English “delict” did not. In view of the many defects in article 19, he was entirely in favour of abandoning it provisionally—without, of course, abandoning the distinction between obligations to the international community as a whole and obligations to particular States. The debate could be clarified and a proper regime developed without article 19, which had immeasurably confused the debate.

86. Mr. GALICKI explained that, in his earlier statement, he had not been saying the Special Rapporteur had wrongly juxtaposed in his report the concepts of the responsibility of individuals and the responsibility of States, but rather that the Commission seemed to be doing so in its discussion. He was in favour, not of abandoning

the concept of State crime definitively, but of leaving it aside temporarily.

87. Mr. BENNOUNA said the problem with article 19 was that it required an offence to be placed in one of two categories, crimes and delicts, but there was actually a continuum in wrongful acts and they must be judged as such, individually. That did not, however, mean the problem of crimes could not be taken up later, in another context.

88. Mr. PAMBOU-TCHIVOUNDA said he could agree to taking up the problem of crime at a later date, but why not do so under the same topic the Commission was currently considering—especially if there was a continuum in internationally wrongful acts? He was not in favour of artificially separating concepts that were in fact related, although they were at different points in the continuum.

89. Mr. AL-KHASAWNEH said the Special Rapporteur appeared to have said that even a serious breach of the fundamental interests of the international community did not constitute a crime. What, then, did? He was not disturbed by the analogy with national legal systems, because what constituted a crime in such systems was ultimately decided on a subjective basis: the degree of reprobation elicited in the public consciousness by the commission of a reprehensible act. There was no uniformity in public consciousness nationally, and there would be still less uniformity in an international society.

Organization of work of the session (*continued*)*

[Agenda item 1]

90. The CHAIRMAN announced that the Commission had established an open-ended working group on diplomatic protection to be chaired by Mr. Bennouna, Special Rapporteur on the topic.

The meeting rose at 1.15 p.m.

* Resumed from the 2530th meeting.

2535th MEETING

Tuesday, 26 May 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam, Mr. Yamada.

State responsibility¹ (*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. HAFNER, commenting on the introduction to the first report (A/CN.4/490 and Add.1-7) and particularly on the relevance of the distinction between primary and secondary rules, said that, in his view, the real distinction lay in the function of a particular norm rather than in its content. However that might be, the existence of agreement within the Commission and among States made further discussion of the matter superfluous.

2. With regard to the reorganization of the draft articles, he was in favour of deleting the articles that ruled out the attribution of acts to a State in part one and simplifying other articles such as those relating to complex crimes. Part two, especially draft article 40 (Meaning of injured State), needed to be reformulated. As to part three, the Commission would doubtless, in due course, address the question whether there was really any justification for its existence. It was clear, however, that the system envisaged by the former Special Rapporteur, Mr. Ago, must be retained in view of the as yet embryonic degree of organization of the international community. Neither the insertion of damage as one of the constituent elements of a wrongful act nor the reference to some form of *culpa* or *dolus*, in other words a *mens rea*, could be expected to introduce greater clarity and stability into international relations, given the subjective nature of such notions.

3. The idea of extending to part one of the draft articles the provision in article 37 of part two (*Lex specialis*) was not as simple as it looked because the special regime would prevail only if it provided for a different rule; otherwise the general rule must apply. With regard to the possible addition of a provision on loss of the right to invoke responsibility, analogous, for example, to that in article 45 of the 1969 Vienna Convention, he took the view that the rule of consent would in no way suffice to settle the issue.

4. With regard to the eventual form that the Commission's work should take, he said that the so-called "Austrian" proposal would amount to establishing uncontroversial principles as soon as possible so that States could use them as the basis for their activities, while leaving open the option of elaborating a treaty on State responsibility. According to his interpretation, the first document would set forth guiding principles in the area of State responsibility embracing the content of part one of the draft articles and incorporating some ideas from part two, provided that they did not involve the progressive development of international law and were already accepted in State practice. The purpose of such a formula would be fourfold: to reflect and honour the existing prac-

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.*