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Summary record of the 2535th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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 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. 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.

tice of States; to lay a basis for future work by the Commission on the topic which States could view as sacrosanct; to provide a document that would stand the test of time and allow the Commission, *inter alia*, to assess whether the reaction of States indicated general acceptance; and, in the event of acceptance by States, to ensure wider acceptance of the Commission's future draft articles, which would be the subject matter of the second document. The latter, whether a treaty or non-treaty instrument, would be more elaborate, possibly containing elements of progressive development, and would seek to tackle all aspects of State responsibility. By adopting such an approach, the Commission, basing itself on the already "mature" portion of its work on the topic, would be in a position to offer States a serviceable instrument for their daily practice and to promote their gradual acceptance of the notion of State responsibility.

5. He personally considered that the elaboration of a treaty was not essential since what was involved was the essence of international law. The example of the 1969 Vienna Convention advanced by some was not really a conclusive argument, since the Convention's positive effect stemmed from its content rather than its form. A further disadvantage of the treaty form was that the application of the law would vary according to whether or not a particular State was a party to the treaty. Other arguments against it concerned the rigidity of treaty language and the possibility for States to enter reservations.

6. With regard to article 19 (International crimes and international delicts) and the problem of State crimes, he perceived certain common threads in the more or less divergent doctrinal views expressed by members of the Commission. It seemed to be generally agreed, for example, that certain wrongful acts were of such concern to mankind that they called for separate treatment, within or outside the system of State responsibility. The main underlying idea was that a common global public order existed and must be protected, but the question of who should be entitled to afford such protection remained unanswered. The community of States was still based largely on the so-called "Westphalian" system, a decentralized system characterized by reciprocity and founded on the sole competence of States to ensure respect for law in accordance with their individual interests. In modern times, however, international relations had evolved to the extent that a common interest had emerged and international society had reached a higher level of organization—international solidarity—whose progress entailed, however, a reduction in State sovereignty. Hence the existing uncertainty about the further development of the community of States and the difficulty of dealing with the question of crimes, although, leaving aside the terminology to be used and the possible borrowing of notions from municipal criminal law, it must be admitted that such violations required separate treatment.

7. It was likewise impossible to ignore the existence, acknowledged in many works of doctrine, of that particular category of contravention. As noted by certain authors, the lack of a judicial decision did not imply the non-existence of crimes, but rather the absence of bodies with jurisdiction to deal with them. Moreover, the assertion of the existence of crimes served a preventive function in its own right and it would be difficult in future to gain acceptance among States for a denial of their existence. Nevertheless, crimes in that sense contained a progressive element, particularly with regard to the implementation of the responsibility they involved. In that connection, the community of States was still in a transitional phase and based on somewhat shaky foundations. As an illustration of the existing uncertainty, it was a valid question whether, in view of the fact that such contraventions were a matter of concern to the international community and generated, for example, a sense of solidarity, there could exist not only a right of prosecution left to the discretion of one particular State or organ or of five particular States, but also a duty to prosecute. In an international community where the rule of law prevailed, there should be provision for a duty of States to take the necessary steps to bring the responsible State to justice. Thus, when a State committed an act of aggression against another State and occupied its territory, other States must have a duty to take action. When the German Reich had occupied Austria in 1938, only Mexico had immediately sent a written protest to the League of Nations,[4] a step motivated by the interests of the Mexican Government rather than any concern for the rule of law. A further example of the dilemma was the emergence in recent times of a duty under treaty law for coastal States to take measures against foreign vessels in order to protect the marine environment.

8. The duty not to recognize as lawful the situation created by a crime was manifestly insufficient. The confirmation of such a duty in a resolution adopted by the Assembly of the League of Nations[5] prior to the events of 1938 had failed to produce any preventive effect. And what could non-recognition be taken to mean in the case of genocide? While it might seem excessive in the circumstances to institute a duty to prosecute, a dilemma would nevertheless ensue as a matter of course from the Commission's assertion that certain acts were a matter of concern to the international community as a whole. By classifying certain acts as crimes, the Commission would assume a responsibility towards mankind to ensure that such crimes were prosecuted.

9. It was therefore plain that the task of formulating rules concerning crimes would be far from easy, especially when it came to defining crimes. It was impossible to transpose the procedure used to define a peremptory rule of international law in the 1969 Vienna Convention, namely, the inclusion of a reference to their process of creation, to the case of crimes, aside from the fact that one was entering the field of primary law. A more generic definition than that given in article 19 thus seemed virtually unattainable. Even if it was possible to focus on the consequences without having a clear idea of the nature of the crimes themselves, that is to say, to pursue a more phenomenological approach, it would still be difficult to reach a clear-cut conclusion on the responsibility resulting from such crimes because the community of States was currently in a transitional and hence unstable phase of development.

[4] Communication from the Mexican delegation of 19 March 1938 (League of Nations, document C.101.M.53.1938.VII).

[5] See resolution adopted by the Assembly on 11 March 1932 (League of Nations publication, *VII, Political, 1932.VII.5*, document A. (Extr.)48.1932.VII).

10. In that connection, he stressed the need to draw a clear distinction between crimes, breaches of obligations *erga omnes* and breaches of peremptory norms. The notion of obligations *erga omnes* itself should not be confused with the notion of obligations of a general nature and a breach of the former did not necessarily coincide with a breach of the norms of *jus cogens*. The foregoing triple distinction should be recognized in article 40, a requirement that warranted its recasting.

11. Lastly, if the concept of crime was maintained in the draft articles, the Commission must clearly differentiate such crimes from those entailing individual responsibility, bearing in mind the tendency, reflected in the establishment of ad hoc tribunals and the proposal to create an international criminal court, to lay emphasis on the latter type of responsibility. The Commission must therefore approach that concept of crime against the background of two ostensibly conflicting trends: on the one hand, the higher level of integration of the community of States, which lacked a supranational central organ so that the activation of the system was still left to the discretion of States; on the other hand, the obligation of States to surrender parts of their sovereignty when individuals were prosecuted directly by international bodies. On the one hand, a criminalization of the State was demanded and, on the other, individuals were being tried by international bodies. Furthermore, the trend towards a more centralized system of organization was not yet irreversible, so that it was not inconceivable that the old system of States would prevail.

12. The criminalization of States, with all its legal implications, undoubtedly constituted a progressive development of international law and, in that connection, the Commission must also respect such current developments as that relating to the international criminal court. It had been argued that it was unnecessary to extend the court's jurisdiction to acts of aggression since they belonged more appropriately to the category of crimes of State. That idea had therefore acquired the status of a general view.

13. In conclusion, he urged the Commission to hold a special discussion on the question of State crimes. The Special Rapporteur could prepare an outline of the consequences of such crimes (with the possible inclusion of breaches of obligations *erga omnes* and norms of *jus cogens*) which would serve as the basis for a discussion of the matter either in the existing working group or in a separate one. In that way, the discussion could be further structured without encroaching on the work relating to State responsibility.

14. Mr. LUKASHUK said that it would help the discussion if, rather than speaking of "criminalizing" the conduct of the State, the Commission reverted to the idea of international responsibility under the law. Secondly, while acknowledging the desirability of defining a category of exceptionally serious crimes, he believed that the Commission would face great difficulties if it undertook immediately to define all the consequences of such crimes, as well as the procedures relating to them. On the other hand, the Commission could well, as a first step, affirm the most general and fundamental principles of State responsibility with a view to having a resolution adopted by the General Assembly.

15. He did not think that the Commission necessarily had to embark on the consideration of breaches of *jus cogens* or obligations *erga omnes*, concepts whose relevance in the current context he doubted; the main criterion for defining State responsibility was the fact that the act in question had caused considerable damage and suffering to millions of people.

16. Mr. HAFNER explained that he had not intended to give any technical meaning to the expression "criminalization of the State" and had left the question of a possible analogy with internal law completely open. The only implication was that criminalization was the consequence of a State crime.

17. Mr. BENNOUNA said that he agreed with Mr. Lukashuk's comment about the use of the word "criminalization", which could be confusing. Whatever the supporters of the term might say to dismiss any analogy with internal law, a crime was still a crime.

18. While he agreed with Mr. Hafner that there were exceptionally serious acts which could have a traumatic effect on a people or a State and which could not be placed in the same category as ordinary breaches, he was convinced that dealing with such acts in the general framework of the draft articles on State responsibility would give rise to many difficulties. When all was said and done, a "crime" was a singular act in that it undermined the very essence of international law. And since, at the current stage of its work on the topic, it would be difficult for the Commission to retrace its steps and drop the concept of crime altogether, he too wondered whether it might not be best to avoid failure by isolating the concept from the framework of the general law of State responsibility and dealing with it separately. The previous Special Rapporteur had been well aware of the difficulties and had looked in vain for a competent independent authority—not the Security Council or any particular State taken individ-ually—to which the task of classifying the act as a crime might be entrusted. But in doing so he had found himself trying to change the whole world, including the United Nations and the Charter of the United Nations, and starting on a process that went beyond the limits of the Commission's competence.

19. Thus, the path of wisdom for the Commission would be to preserve the concept of State crimes as a subject for separate treatment and to make proposals along those lines to the General Assembly.

20. Mr. CRAWFORD (Special Rapporteur) said that Mr. Bennouna had given an accurate account of what had happened during the previous quinquennium. The draft articles provided, in substance, that, within the field of general State responsibility, the consequences of an act which was a crime were without prejudice to such further consequences as might follow from the classification, in accordance with international law, of that act as a crime. That amounted to a *renvoi* to some other special regime provided for in the Charter of the United Nations or elsewhere. For those who believed in the possibility of so-called international crimes, the article in question presented no problem. Beyond that, however, the Com-

mission was immediately plunged into a dilemma which had not escaped Mr. Bennouna and Mr. Hafner and which had to be resolved. In the international system, crimes *ut singulis* were simply inconceivable. In that connection, he wondered whether the procedural suggestion put forward by Mr. Hafner at the latter end of his statement had been made with a view to the reintegration of a more systematic treatment of crimes in the draft articles or, in a more nuanced fashion, with a view to giving separate treatment to the subject.

21. Mr. HAFNER explained that, in his view, the Commission should first see what the consequences of taking up the matter of State crimes really were and draw up an outline concerning all the implications of crimes. On the basis of such an outline, it would be able to decide how to proceed. That exercise would inevitably lead to the decision that the question of crimes could not be incorporated in the system of State responsibility as it stood. A further advantage would be that of enabling the Commission to make more rapid progress on the topic of State responsibility and to produce a result long awaited by the international community. As a working hypothesis, the Commission might perhaps speak of "simple State responsibility", a concept which could but need not include State crimes once they had been duly defined.

22. Mr. ECONOMIDES said that he associated himself with the comments made by Mr. Lukashuk and Mr. Bennouna. The fact was that the draft articles on State responsibility did not, strictly speaking, contain any criminal element. Articles 19 and 51 to 53 merely determined the consequences arising from exceptionally serious breaches of international law; they set forth international obligations, not criminal sanctions within the usual meaning of the term.

23. Turning to the question of the definition of the word "crime", he said that, all definitions being of necessity arduous and somewhat arbitrary as well as incomplete, the definition of the expression "international crime" given in article 19 of the draft articles was neither less precise nor less complete than that of a "peremptory norm of international law" (*jus cogens*) given in article 53 of the 1969 Vienna Convention. In fact, it might even be said to be more explicit and clearer, since article 19 gave examples of international crimes which helped to clarify the concept.

24. As for obligations *erga omnes*, he noted that, unlike *jus cogens* as defined in the 1969 Vienna Convention and unlike the concept of international crime as it resulted from the draft articles on State responsibility, those obligations did not as yet have a clear-cut legal status except insofar as it was established that they were obligations incumbent upon all States belonging to the international community. They derived their characteristics from the fact that they were compulsory for all. The question remained whether their breach gave all States the right to impose sanctions of their own. In his view, the answer to that question was no. In other words, the Commission could not use that concept as a basis for dealing with the most serious international breaches. It was not by chance that the former Special Rapporteur, Mr. Ago, had set aside the concepts of *jus cogens* and obligations *erga omnes* and had instead used the still narrower expression "international crime".

25. Mr. ADDO said that he found Mr. Lukashuk's comments perplexing. To his knowledge, there had been no formal decision to exclude all references to the concept of "international crime" or to that of the "criminal responsibility of States" from the discussion. The fact was that the Special Rapporteur had submitted a report in which he considered the question of State crimes and proposed five approaches between which the Commission was invited to choose. He would therefore refer in his own statement to "State crimes". The debate should be open and not unduly restricted.

26. Mr. FERRARI BRAVO said that, the further the discussion went, the greater the uncertainty became. It was clear that the topic related to "State crimes" and not to crimes committed by individuals representing States, which would come under the jurisdiction of the future international criminal court. It was also clear that the two concepts were linked to each other, for a State crime was an act committed by an individual. In the current case, it was a wrongful act of exceptional seriousness. The use of the word "crime" to designate such an act might be regrettable, but the word had existed for a long time and to replace it by another would be difficult.

27. The expression "State crime" still had to be defined. A State crime was an act by a State which, because of its seriousness, gave rise to more serious consequences than an internationally wrongful act. The latter was supposed to lead to a reaction by the victim State, which could, as it were, absolve the perpetrator by giving its consent, whereas, in the case of a State crime, all States had the right to react in the manner provided for by the law of international responsibility. Once a State took action, even if it was not directly a victim of an internationally wrongful act, international responsibility came into play.

28. It was therefore important to define the State crime, it being understood that its subsequent consequences, namely, the consequences of the act which had been committed by an individual and had given rise to a criminal activity of the State fell under the proposed establishment of an international criminal court. There was no other solution. Even changing the terminology, in other words, no longer speaking of "international crimes", would solve nothing and would, instead, disturb the balance of the draft articles under consideration. He was entirely opposed to such an approach.

29. Mr. AL-KHASAWNEH said no one would disagree that a crime was an abominable act by whatever name it was designated and whoever was the perpetrator: that was true, for example, of aggression, massive pollution or genocide. He failed to see why, if the Commission agreed that crimes—international crimes—existed, the analogy with internal law and with national criminal systems, all of which dealt with acts of that kind, should be ruled out. The Commission should be consistent: if it accepted the concept of crime, it could not deprive it of its penal connotations.

30. After a procedural discussion in which Mr. ROSENSTOCK, Mr. CRAWFORD (Special Rapporteur), Mr. HE and Mr. MIKULKA took part, the CHAIR-

MAN suggested that, in order to prevent matters from getting out of hand, the mini-debate within the debate should be confined exclusively to requests for clarification which the members of the Commission might wish to make.

It was so agreed.

31. Mr. DUGARD, referring to article 19 of part one of the draft, said that, in proposing that article, the former Special Rapporteur, Mr. Ago,[6] had launched an idea that had dramatically changed the nature of international law in the sense that it reflected a major stage in the evolution of international law from an early undeveloped legal system to an advanced legal system, from bilateralism which had sought to provide reparation only for the injured party to a system of multilateralism in which a community response to the violation of community values was possible and from individual criminal responsibility to State responsibility for crimes under international law. It was, of course, generally agreed that article 19 was poorly drafted. It was an idea rather than a code of criminal responsibility, but it was an idea that had been accepted by the international legal order, despite the fact that it remained incomplete and undeveloped. That was confirmed by the most conservative international text in the English language, which stated that

> [T]he comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term.[7]

32. Of course, there were problems with the concept of "State crime". First, some were troubled by the domestic law analogy, although he personally was not. If a corporation could be punished by way of a fine or other sanction for the wrongful acts of the management, so could a State be punished for the wrongful acts of its Government. Secondly, there was the question of how to punish a State. There, the Commission needed to give careful consideration to State practice and measures taken by the Security Council against States such as apartheid South Africa, Iraq and the Libyan Arab Jamahiriya before dismissing the possibility that a State could be regarded as criminal. For example, in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, the United Kingdom of Great Britain and Northern Ireland had argued that the Libyan Arab Jamahiriya's application to lift sanctions had been designed to preclude the Security Council from acting in relation to a wider dispute involving allegations that the Libyan State had been guilty of State terrorism.[8] The Commission should examine State practice, the main features of which had been referred to by the Special Rapporteur in paragraph 59 of his first report.

33. The notion of State crime was today part of the corpus of international law, however incomplete it might be. Moreover, there was an expectation on the part of States that it would be developed further into an instrument to deter States from violating the most basic norms of the international community.

34. Although article 19 was inspired by the notions of *jus cogens* and obligations *erga omnes*, the latter were not synonymous with State crime, as some speakers seemed to believe. In that respect, he could not agree with those who endorsed the Special Rapporteur's second option, namely, replacing "State crime" by some other expression and relegating the concept as such to a species of *jus cogens* or obligations *erga omnes*. To quote Oppenheim, the Commission was dealing with the notion of "criminal" acts in its generally accepted meaning, and it must therefore address it properly and seriously. It could not trivialize the concept by treating it simply as a serious form of delictual responsibility. It was argued that the commentary to article 19 did not contemplate "crime" as understood in domestic law. That might be true, but that was irrelevant, since article 19 had acquired a life of its own, distinct from its commentary. The question which the Commission had to address was not whether to accept or discard the notion of State crime, which had already been endorsed, but whether to deal with the concept and to define its consequences in the draft articles on State responsibility. His initial response had been that it should, but, after following the discussions in the working group, he currently believed that it should not, and for three reasons.

35. The first reason was that the draft articles were concerned with civil and delictual responsibility. For example, article 3 (Elements of an internationally wrongful act of a State) dealt with responsibility for omission on the part of a State, and he failed to see how an omission, that is to say, negligence, could constitute a crime. The same applied to *ultra vires* acts, as dealt with in article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act), which made no provision for criminal intent (*mens rea*) by the State that offered such aid or assistance, and article 29 (Consent), about which it might be asked whether it could justify a crime.

36. The second reason was that the draft articles did not contain the various components which any system of criminal justice worthy of that name, as referred to in paragraph 85 of the report, must have and which constituted the essential principles of criminal law that must be taken into consideration. The third reason was that the draft articles did not do justice to the concept of State crime.

37. The choice before the Commission was therefore the following: either to convert the draft articles into a comprehensive code of "criminal" and delictual State responsibility, which might take years and at the very least another quinquennium, or to separate criminal and delictual responsibility and deal with each separately. That would allow the Commission to complete a code of delictual responsibility in the current quinquennium. He preferred the latter choice because the Sixth Committee expected a result. But the Commission must conclude a

[6] See 2532nd meeting, footnote 17.

[7] L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I, *Peace*, p. 339.

[8] *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, in particular, p. 11, para. 27.

saving clause in the draft articles making it clear that it recognized the existence of State crimes and did not reject article 19, which was comparable to article 4 of the draft Code of Crimes against the Peace and Security of Mankind.[9] The Commission must also ask the Sixth Committee for permission to embark on a code of State criminal responsibility, because, unlike Mr. Kateka, he believed that the Commission required a special mandate.

38. Mr. CRAWFORD (Special Rapporteur) said he took it that, in his statement, Mr. Dugard had not used the word "delictual" in the way in which it was employed in article 19 of the draft because to do so would be to reintroduce the notion of crime.

39. Mr. DUGARD said that he had in fact used the term to mean State responsibility in the traditional sense. He agreed that the Commission should avoid using the term "delictual" for the purposes of the draft articles.

40. Mr. ECONOMIDES, noting that, in Mr. Dugard's opinion, a system of State responsibility should include all the elements listed by the Special Rapporteur in paragraph 85 of his first report, asked whether it would not be utopian to envisage such a system. He was afraid that there would be some confusion between State crimes and human rights violations. The approach of the draft articles was very timid from the point of view of the consequences of crime, but it constituted a modest step in the right direction. He was not certain that it would be wise to jettison that approach by discontinuing consideration of crimes in the draft.

41. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur seemed to be in favour of removing the notion of crime from the draft and keeping only that of delict. In his opinion, however, the construction by the former Special Rapporteur, Mr. Ago, was perhaps not perfect and was certainly incomplete, but it was based on a dual representation whose two elements went together: either the Commission approved or rejected it as a whole. The unifying principle of that construction was the internationally wrongful act, which replaced the notion of fault on the basis of which the former law of State responsibility had been drafted. He was afraid that, once crimes were sacrificed, delicts would be disregarded and he did not see how it would then be possible to organize responsibility as a function of damage or fault. Discarding the notion of crime would be tantamount to taking a step backwards and it was not for that reason that the Commission had requested the Special Rapporteur to submit his first report on the key questions of the draft articles which it had adopted on first reading, any more than the Special Rapporteur had drafted his report to set the Commission back a quarter of a century. Even States hostile to the notion of crime would consider that the Commission would be guilty of a "betrayal" of sorts in view of the trends that had been taking shape towards the consolidation of an international public order since the end of the Second World War.

42. The Commission should be grateful to the Special Rapporteur for summing up the draft articles adopted on first reading, but also for everything that had been written since then on the subject. A concern that was reflected throughout the first report was that the regime of State responsibility should be designed to give effect to the distinction drawn in article 19 between crimes and delicts. Noting, in paragraph 80 of his report, that the consequences attached to international crimes in the draft articles were limited and for the most part non-exclusive and that the draft articles failed to do what the Commission set out to do at the twenty-eighth session, in 1976, that is to say, to elaborate a distinct and specific regime for international crimes, the Special Rapporteur seemed to be showing an abiding interest in moving ahead with the construction begun in 1976. He spoke of shortcomings and inconsistencies and, although it was possible not to be in agreement with him, it must be admitted that article 19 was poorly designed, both in its various elements and in the order in which they followed one another. For example, the notion of the subject matter of the obligation breached, referred to in article 1 (Responsibility of a State for its internationally wrongful acts), had not been used to distinguish between crimes and delicts. But that was not only a question of drafting or legal technique; for some, it was a substantive problem, that is to say, the failure to determine the conceptual point of reference of the dual construction which article 19 outlined. Why, it might be asked, was unlawfulness arbitrarily broken down into only two categories, namely, delicts and crimes?

43. In paragraph 94 of his report, the Special Rapporteur said that the recognition of the concept of "international crimes" would represent a major stage in the development of international law; he endorsed that view, but disagreed when the Special Rapporteur stated, at the end of the same paragraph, that the subject might be treated separately by a body other than the Commission. As it was the Commission which had worked out the notion of crime, he did not see what other body might be able to define its content and produce the relevant regime, whereas the Commission might do so without requiring new terms of reference from the Sixth Committee.

44. In his view, the option proposed by the Special Rapporteur of handling the regime of crimes separately was the result of a misunderstanding, namely, that the unlawfulness which was the basis of the regime of crimes was different from the unlawfulness which served as the foundation for the regime of delicts. That was incorrect because, in the construction by the former Special Rapporteur, Mr. Ago, unlawfulness was the foundation of international responsibility. That was why draft articles 1 and 19 worked together to highlight the importance of modernizing the international law of State responsibility. At issue was the fate of the notion of fault, for the sake of legality, the source of obligations, notably the obligation to provide compensation. Since modern international legality borrowed from various sources and its authority derived from multilateralism, communitarianism and the peremptory nature of the law, the penalty for violating that legality must be rather flexible to match the flexibility of legality itself. The notion of international crime was thus inherent in that of international legality, which had to be taken as the basic point of reference. That unique point of reference applied not only to crimes and delicts, but also to everything that might be less than a delict or which might be imagined to go beyond crime. If that point of

[9] See 2534th meeting, footnote 10.

reference was disregarded, the discussion on the subject would no longer make any sense.

45. From that perspective, any reference to domestic crime was completely inoperative. The "criminalization" of the State did not have a greater criminal connotation than its "delictualization". Any debate on the notion of international "criminal" responsibility of States was thus out of place because it led to another misunderstanding. The Special Rapporteur noted in paragraph 75 of his report that great caution was always required in drawing analogies from national to international law. The Commission would go astray if it accepted that analogy and ventured out in the direction of who knew what international criminal code. Neither the general principles of international law as enshrined in case law, nor international customary law nor specific conventions establishing special regimes of responsibility contained any rule calling for a particular sanction applicable to States for a breach of its provisions.

46. Neither the logic of codification nor, a fortiori, that of the progressive development of law was a justification for the Commission's giving separate treatment to the regime of international crimes provided for in the general framework of the law of State responsibility on the grounds that that regime would be for "criminal" matters. The arguments put forward by the Special Rapporteur in support of the idea of a "criminalization" of the State were thus unconvincing. The same held for what he said about the position of the Security Council, that is to say, about Chapter VII of the Charter of the United Nations. It should also be noted that the crime of aggression, to which the Special Rapporteur called attention, was in fact a crime for which the relevant rules of international law were not equally peremptory because the Council did not always react to aggression in the same way.

47. The Commission was duty bound to help ensure that the law of State responsibility could take a decisive step forward towards codification. It must be imaginative and bold in rearranging the parts of the draft articles which it had adopted on first reading. It would then discover the key to the message which was at the basis of article 19 and which was addressed to all special rapporteurs who had succeeded the former Special Rapporteur, Mr. Ago, and to each member of the Commission, who had an obligation to remember and a duty to produce results.

48. Mr. BENNOUNA said that he was surprised to hear the words "betrayal" and "obligation to remember". He had thought that the members of the Commission were merely under an obligation to be conscientious in making logical and consistent proposals likely to ensure the progressive development of international law.

49. Mr. AL-KHASAWNEH said that the first report was very persuasive, to the point that he had been tempted to discard the notion of State crimes in favour of an approach which would be primarily civil and bilateral, but supplemented by notions of obligations *erga omnes* and rules of *jus cogens*. The temptation was that much greater because the Commission had to strike a balance between, on the one hand, its sense of justice and, on the other, the realities of political life in the post-cold war era, which were not conducive to optimism about the prospects of codification and progressive development of the law in general and, in particular, in areas that might have an impact on the concept of international peace and security. Notwithstanding the Special Rapporteur's eloquence and persuasiveness, he would retain the notion of State crime, for the following reasons.

50. The first was that the notion of State crime was far from a new one. The draft as adopted on first reading and the commentaries thereto did indeed represent a "conceptional revolution", as one of the members of the Commission had pointed out, but it should not be thought that the former Special Rapporteur, Mr. Ago, had created *ex nihilo* a concept called international crimes or that the notion had had its genesis in the writings of some Soviet lawyers in the years immediately following the Second World War, as had been suggested. In reality, the idea that certain breaches committed by States affected the community of nations as a whole and that the effects of the most serious of those breaches could not be erased by compensation went back to the nineteenth century. The commentary to article 19, particularly paragraphs (36) to (53), gave the names of numerous jurists who had noticed the passage from bilateralism to community interests, but those authors had never expressed the idea of responsibility for crimes in a systematic way and Ago's genius had been in having been able to read his times correctly and to capture the essence of that major trend to reflect it in the draft articles.

51. Article 19 as adopted on first reading had been born of that attempt to integrate major trends. The article's drafting was far from perfect and, as the previous Special Rapporteur, Mr. Arangio-Ruiz, had prophesied, its drawbacks, especially in connection with the consequences of breaches, had become even more perceptible now, as its consideration on second reading approached and as the Special Rapporteur's deconstruction of the article and of its consequences revealed. The article was a product of the single most important development in international law in the past century, namely, the emergence of the notion of community interest, but its drafting and the consequences flowing from the distinction between criminal and delictual responsibility were not entirely clear. That was not, however, a reason to abandon the notion of State crimes entirely. Such a decision would be a regressive and regrettable step.

52. The second reason why he supported the retention of the concept of State crimes was very simply that States committed crimes almost on a daily basis. Yet some States were currently being subjected to conditions that made them virtually indistinguishable from criminal States, under an ever-expanding concept of threat to or breach of international peace. The inconsistencies between article 19 and its consequences paled by comparison with the inconsistencies that arose from the absorption of the law of State responsibility by the law of international peace and security.

53. To take the case of Iraq, no action had been taken to follow up the aggression that had launched its war with Iran, but, after its war with Kuwait, sanctions had been imposed, causing massive and irreversible hardship for its population. All that had happened without Iraq having been called a criminal State and without any punitive

intent having been acknowledged. It would be better to call things by their proper names, to elaborate a fully-fledged regime of State criminality with all the attendant requirements of precision in penal matters, with a view to sparing the population of the criminal State, but not the State structure, the consequences of a crime. Such a regime should also contemplate the "purging of collective guilt", including the corrective value of punishment and the reintegration of the guilty into society. It was inconceivable that States should have lesser guarantees under international law than were given by domestic law to individuals. While the draft could not amend the Charter of the United Nations, as the Commission had acknowledged at its twenty-eighth session, in 1976, the law of State responsibility should not be completely absorbed by the law of international peace and security.

54. It was naturally necessary to be concerned with the success of the Commission's draft when the great majority of internationally wrongful acts were delicts and not crimes, statistically speaking. Completing a draft which regulated delicts would respond to the needs of the international community, but crimes posed a much greater danger to the rule of law than did ordinary wrongful acts. Ultimately, the Commission had to decide what sort of international law it wanted for the twenty-first century: if that law was to regulate commercial transactions and to provide for compensation for ordinary wrongs, but leave serious infractions without regulation, the Commission would have to admit that it was considering a successful, but modest draft.

55. The third reason why the concept of State crimes should not be deleted was that nothing in the replies by Governments or the reactions of the international community warranted it. When article 19 had been adopted in 1976, it had met with considerable support in the Sixth Committee. Moreover, the concept of objective responsibility on which the entire draft was based rested on solid grounds, as evidenced by more than three decades of debate in the Sixth Committee. Article 19 had been the subject of much controversy, including among academics, but the Commission should keep the options open for the international community. As the Special Rapporteur had observed, the general law of obligations in national systems was distinct from penal law. He had also observed that the original intention of the former Special Rapporteur, Mr. Ago, had been to devise separate consequences for crimes. The Commission should accordingly try to develop those consequences, taking into account the procedural aspects and guarantees of due process for criminal States. The idea that those consequences might be grouped together in a separate chapter that might be optional in nature was also worth looking at, insofar as the Commission must provide the international community with the widest range of choices. But the matter had to be settled as early as possible, otherwise the momentum acquired over three decades would be lost. The new approach also required the approval of the General Assembly.

56. With regard to the argument that international responsibility was neither criminal nor civil, but simply international or *sui generis*, he said he did not accept it, first, because it said nothing about international responsibility and, secondly, because it aimed to dismiss the considerable wealth of national experience from which many concepts of international law had been developed by analogy. In order for international responsibility to come into play, a right had to have been breached. But the concept of the rights of States had itself been developed from national law. Similarly, the civil nature of State responsibility had been developed from the general law of obligations in national legal systems.

57. International society was different from national societies in two main aspects: first, in the absence of institutions for investigation and enforcement and, secondly, in its greater heterogeneity. That did not, however, serve in any way as a bar to developing the notion of criminal responsibility by analogy with the domestic law of national societies. The debate as to whether punitive damages and interests were recognized by international law was largely academic. The central point was that for certain serious breaches civil responsibility was simply inadequate to make up for the injury suffered: what amount of compensation could make up for genocide, for example? He also believed that punitive damages were part of any system of reparative justice.

58. If the Commission wished to take up the idea of developing a distinct set of consequences for crimes, it would have to redraft article 19. That article laid down a general criterion for defining crimes and followed it with an enumeration of the most obvious crimes. That was not unknown in legal technique, but it was far from perfect. The Special Rapporteur believed that a different approach could be taken (para. 48), for example, by referring to the distinctive procedural incidents of crimes as opposed to delicts or by defining crimes by reference to their consequences. Delicts could be defined as breaches of obligation for which only compensation or restitution was available, as distinct from fines or other sanctions. That was a very promising approach. The previous Special Rapporteur, Mr. Arangio-Ruiz, had proposed simply to effect certain modifications of the consequences of crimes to make them stricter than those for delicts. The current Special Rapporteur had analysed those modifications and had rightly concluded that they did not amount to much and could in fact be wrong, for example, when the duty of non-recognition, which was the most passive duty of solidarity, was confined to the effects of crimes alone. Independently of any decision the Commission would take on the fate of article 19, those matters would have to be looked at and corrected.

59. The Special Rapporteur had also recalled that the Commission had elaborated part one of the draft on the assumption that it would result in a general regime of responsibility that would in turn give rise to various consequences. That had been done to avoid the fragmentation of the concept of responsibility by a number of different regimes. At the same time, the Commission had been trying to reflect the notion that certain internationally wrongful acts were so serious and so detrimental to fundamental interests of the international community that they could be qualified as crimes. That approach had been in consonance with the development of the idea of community interest and had reflected the revulsion inspired by such acts. Yet in part one, the Commission had not laid the groundwork carefully for two regimes. That was why he supported the idea of reopening the debate on the provi-

Rapporteur's statement in the footnote concerning articles 29 to 34 that it was possible to draft key provisions in such a way as to be responsive to very different wrongful acts.

60. Summarizing his views, he said the idea of corporate criminal responsibility, including State criminal responsibility, was gaining ground and should be reflected in the draft, all the more so as no case had been made for deleting it. The deficiencies in article 19 were correctable, although that would be a major exercise. The Commission's work must respond to the needs of the international community: its prestige depended on it. On balance, a draft that did not cover crimes would be a disservice to the topic of State responsibility and to the rule of law in international relations.

61. In conclusion, he noted that the Special Rapporteur had been attacked with unusual harshness by certain members of the Commission, but he congratulated him on having correctly fulfilled his mandate, which had been to study the topic, adduce precedents and marshal relevant arguments and information.

The meeting rose at 1 p.m.

2536th MEETING

Wednesday, 27 May 1998, at 10.05 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. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, 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. ROSENSTOCK said he believed it would be premature to take a decision at the current time on the final form to be given to the Commission's work. He doubted that a convention was a good idea, but was hesitant to adopt the two- or three-step approach that seemed to be envisaged in the Austrian proposal. It would be unfortunate to tell the General Assembly that, after over a quarter of a century, the Commission could submit only a list of principles, but would have more material later. The Austrian proposal, while more complicated than necessary, was an interesting one and should be kept in mind for when the time came to make a decision on form. In the meantime, the Commission should try to complete part one of the draft articles at the current session and see how far it could get with part two at the fifty-first session, in 1999: it would then be able to determine what the best course of action was.

2. As to the main issue, namely the concept of crimes of States, he wished first to associate himself with Mr. Al-Khasawneh and others who had deplored the *ad hominem* and demagogic remarks made by some members. The validity of the concept of international crime should be measured not by the identity of persons or States supporting the concept, but rather, by whether it was a useful idea that the community of States could embrace. A special rapporteur who failed to express a view and provide guidance would not be doing his job. No Special Rapporteur had been more outspoken—to the point of grinding an axe—than Roberto Ago. Though he himself wholeheartedly rejected some of his ideas, he did not think Mr. Ago had been wrong to have them and to press them.

3. He was among those who rejected the concept of crimes of States, and not simply because it was not essential to the Commission's task, was badly handled in article 19 (International crimes and international delicts) and could not work without a judicial or quasi-judicial institution that States were in no way prepared to create. He rejected the concept because it was flawed from the start. As Mr. Brownlie had said, it had "no legal value, cannot be justified in principle, and is contradicted by the majority of developments which have appeared in international law".[4]

4. The roots of the concept lay in the early writings of Mr. Ago and Mr. García Amador and of a few Soviet lawyers. While serving as Special Rapporteur on State responsibility in the 1950s, Mr. García Amador had suggested a category, beyond delicts, which would be punishable—similar in some ways to article 19.[5] The Commission had rejected that distinction in the mid-1950s. Yet had it not been for the special circumstances of the 1970s: the cold war, the emergence of newly independent States anxious to brand the colonial Powers as criminals, hatred of apartheid, frustration over the advisory opinion by ICJ in the *International Status of South West Africa*, lack of progress in building on the Nürnberg principles and, perhaps, electoral politics, the matter would have ended there.

5. The Special Rapporteur's deconstruction of article 19 was unquestionably right, as was his conclusion that arti-

[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] I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 152.

[5] See *Yearbook . . . 1956*, vol. II, p. 183, document A/CN.4/96, paras. 52-53.