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Summary record of the 2536th meeting

Topic:
State responsibility

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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-

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[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.

cle 19 and references to two regimes of State responsibility should be deleted from the draft as unsound and unworkable.

6. Those who supported the creation of the notion of crimes of States or claimed that it already existed based their views on a number of false premises. They relied on the casual use, lacking any element of *opinio juris*, of florid language by politicians. They relied on dicta in the *Barcelona Traction* case, which spoke of rules that could be violated *erga omnes*, not crimes. The Court had been addressing the scope of the obligation (*erga omnes*), not the type of obligation. In any event, the responsibility involved had undoubtedly been civil responsibility. Finally, supporters of the notion of crimes of States relied on the widespread acceptance—despite the absence of widespread practice—of the notion of *jus cogens*. But to argue that an agreement was void *ab initio* for being against *jus cogens* was hardly the same as saying that the agreement was a crime in any sense of the term. In other words, the recognition implicit in the acceptance of *jus cogens* and *erga omnes* obligations was a recognition that international obligations were not in all cases confined to strictly bilateral contexts. Those who tried to defend the concept of crimes of States by accusing those who opposed them as reactionaries who sought to revert to a purely bilateral world were missing the point or were deliberately seeking to mislead. While recognition of community interest could be regarded as a necessary precondition for any notion of crimes or *jus cogens* or *erga omnes* violations, it could not be said to imply or require concocting the invention of the notion of "State crimes".

7. The previous Special Rapporteur, Mr. Arangio-Ruiz, had submitted a sophisticated scheme for dispute settlement in his fifth report,[6] but no one had supported it. Who believed that States would accept the binding jurisdiction of ICJ for crimes? Mr. Riphagen had been more realistic when, as Special Rapporteur, he had said in his fourth report that there was little chance States would accept article 19 without a court.[7] The current Special Rapporteur, in paragraphs 75 and 84 of his first report (A/CN.4/490 and Add.1-7), spoke of the need for due process. But that required a judicial or a quasi-judicial institution that the international community did not seem willing to contemplate.

8. The supporters of the concept of State crime relied on the decision of ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. But the most that could be squeezed out of the decision was that there was a notion of an *erga omnes* violation. Again, they cited the Convention on the Prevention and Punishment of the Crime of Genocide, happily ignoring the fact that criminal responsibility was dealt with in article IV, which related to persons, while article IX, relating to the responsibility of States, mentioned adjudication of disputes by ICJ—not a likely forum for handling criminal responsibility. The *travaux préparatoires* for the Convention indicated that the drafters had had civil responsibility in mind: Mr. Gerald Fitzmaurice, speaking for the United Kingdom of Great Britain and Northern Ireland, had stated that position unequivocally.[8]

9. The decision of ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* contained nothing, either in the statements of the Court or the pleadings of the plaintiff, to so much as suggest that the Convention on the Prevention and Punishment of the Crime of Genocide referred to anything other than the civil responsibility of States. It was neither helpful nor accurate to assert that comments made by the Court on the rules of attribution had been directed at some other subject. The Convention spoke of a court, but that was never intended to be an instrument for trying States as criminals.

10. It had thus to be acknowledged that there was no State practice to support the notion of crimes by States. Any talk of crimes of States would only distract the Commission from the positive developments relating to individual responsibility. It would be more useful to perceive a continuum in the seriousness of a breach, running from minor to material, from being of little consequence to the two States involved to being breaches of obligations to all States of a much more serious nature, such as Iraq's invasion of Kuwait. If one wished to improve the responsibility regime to deal with *erga omnes* obligations, the notion of State crime as embodied in article 19 was most assuredly not the best way. The sensible way, as mapped out by the Special Rapporteur, was a suitably graduated regime of responsibility and countermeasures.

11. Was there, then, any rationale for creating the notion of crimes of States? The consequences of article 19 revealed a mixture of the trivial, the wrong and the confusing. It was of little importance to fiddle with the applicability of restitution, and possibly jeopardize the political independence of the wrongdoing State, but the rejection of punitive damages was a more serious matter. In the Commission's discussion of punitive damages over the years, strong opposition to the concept had emerged. It was incorrect to suggest that non-recognition and the duty not to aid and abet were specific to a special category of acts designated as crimes: those obligations applied much more broadly, as the Special Rapporteur and he had already pointed out. Was there any logical or rational defence for embracing crime but not accepting punitive or exemplary damages? The frequent answer was that "crime", as used in article 19, did not really mean crime in the usual sense. That brought to mind a refrain from Humpty Dumpty, a nursery rhyme, to the effect that words meant not what they seemed to mean but what the speaker wanted them to mean. It was also asserted that crimes, used in that special sense, would act as a deterrent. Why should they, in the absence of punitive damages?

12. Even if the notion of crimes, or whatever euphemism Mr. Pellet chose to concoct, was plausible, was it a necessary or even useful idea? Acts involving a threat to the peace, breach of the peace or acts of aggression were covered by the regime under the Charter of the United Nations. He asked how one would trigger an obli-

[6] *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3.

[7] See *Yearbook . . . 1983*, vol. II (Part One), p. 12, document A/CN.4/366 and Add.1, para. 65.

[8] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 103rd meeting, p. 440.

gation to cooperate: by a finding of crime; and by whom. If the notion of crime was taken beyond what was already covered in the Charter regime, it would appear to require an authority to determine the criminal character of the act. He was not suggesting that the Charter regime spoke to questions of State responsibility. The measures envisaged under Chapter VII were not forms of punishment: they were means to bring about the restoration of peace. He was suggesting, however, that the existence of the Charter regime removed what some had cited as the rationale for crimes of States.

13. Without wishing to launch a polemic, he wished to state that he regarded the description of the measures on Iraq under Security Council resolution 687 (1991) of 3 April 1991 as "quasi-criminal" as sloppy and misleading. He did not believe those measures were punitive in the normal sense. Iraq held the key to free itself from the painful economic measures implemented pursuant to Article 41 of the Charter of the United Nations. No one had expected Iraq's failure to cooperate with the United Nations Special Commission and IAEA to drag on for so many years. The measures required to restore and maintain peace when dealing with a State that had used poison gas against its own people, had attacked Iran and had tried to swallow Kuwait could not be simple. But it was not a question of crime and punishment in any sense that careful lawyers should perceive. The argument was that the notion of crimes was progressive and that those who wished to remove it from the draft were trying to take a step back. But a step back from what? Article 19 had been a step in the wrong direction. The proponents of the article had given no reason why it would be a better world if the notion of crimes of States was invented. However, such an invention would provide the basis for exacerbating disputes among States, which would be able to call each other criminals more readily and then cite the Commission as authority. The notion of *erga omnes* violations would be further confused. The pressure for progress in improving the institutions governing the criminal responsibility of individuals would be eased. But he failed to see any real benefits from what the Republic of Ireland had called a quantum leap, in its comments under article 19, in the comments and observations received from Governments (A/CN.4/488 and Add.1-3).

14. In short, the term "crime" was at best misleading. He found no basis in law for a qualitative distinction between breaches of international obligations, and thought the existence of Chapter VII of the Charter of the United Nations diminished the need for such a distinction. It would be more useful to focus on the questions of scope, the directly and indirectly injured parties and the nature of their rights. Article 19 had no good consequences and had the potential to cause harm. The sooner it was extirpated, the better. He personally did not believe that there were distinct regimes of State responsibility, but if, as seemed unlikely, a majority in the Commission decided in favour of two regimes, at least the terms "delicts" and "crimes" should be deleted. If, as he hoped, the Commission opted for a single regime of responsibility, there would be no need to apologize for doing so and to urge that the question of crimes be reopened in future.

15. Some day the members of the Commission—or more likely, the participants in the International Law Seminar—might live in a world that would tolerate the existence of an institution to adjudicate on whether a State had committed a crime. The world of today, however, regarded the idea as something that States would never accept. It was a world in which less than half of all States accepted the jurisdiction of ICJ under article 36 of its Statute, and many that accepted it did so with reservations. The world of today could not handle the notion of crimes of States, even if it made sense. To ask States to give more than they could or would deliver was not progressive: it was subversive of the existing legal order.

16. Aside from the conceptual defects, there were political obstacles. Deleting article 19 would not prevent future consideration of the concept of crimes of States. Yet he could see no reason to encourage the consideration of the concept, whether as an element of State responsibility or otherwise. If the rationale was to avoid an *a contrario* conclusion that deletion of article 19 was without prejudice to the possible utility of the concept of crimes in some other context, such a decision could be rested on the grounds that the Commission was dealing only with the general law of obligations, which, as the Special Rapporteur noted in paragraph 71 of his first report, most legal systems treated separately from crimes.

17. Mr. GOCO, saying that he did not wish to enter into a mini-debate but was simply requesting clarification, recalled that the Nürnberg Tribunal had indicated that crimes "against international law are committed by men, not by abstract entities and that only by punishing individuals who committed such crimes could the provisions of international law be enforced."[9] Was a State to be considered an abstract entity in that sense—namely, as not subject to criminal liability?

18. Mr. ROSENSTOCK said he answered in the affirmative. It seemed a valid conclusion, although it remained to be seen whether historical analysis would reveal that the judges at Nürnberg had intended the phrase to refer to a State, and not to any other institution or organization.

19. Mr. ECONOMIDES said Mr. Rosenstock was passing severe judgement on article 19. True, the crimes envisaged therein were not accompanied by the usual penal consequences. The Commission was, however, timidly trying to break new ground. The term "crime" was not perhaps the most appropriate, but efforts were being made to establish certain obligations of an international character and they were not devoid of merit. Not recognizing an illegal situation, ending aggression and promoting co- operation among States to expunge the consequences of a crime were all fruitful ideas. They spoke of a growing spirit of solidarity among members of the international community and an attempt to act as a community in accordance with a notion of international public order. It was a positive and promising development and the start of a movement towards an obligation of solidarity among States.

20. Mr. ROSENSTOCK said he had no difficulty with the notion of *erga omnes* obligations—owed to States as a whole—but merely thought it was not productive to

[9] See 2532nd meeting, footnote 18.

plunge into the well of State crimes, which would be unaccompanied by punishment, since such a move would not be supported. His concern was that it might be inferred that non-recognition of an obligation to cooperate was something specific to crimes. That was not true, as it was important in many other circumstances, not least of them being situations involving the obligation not to recognize the acquisition of territory by the use of force. Conversely, there were many acts—which could not be designated as crimes—that States should not aid and abet and which required cooperation among States in order to confront them. Crime was dangerous if applied to non-recognition and the obligation to cooperate because of the unavoidable *a contrario* implications. He feared that the notion of crimes actually weakened the scope of *erga omnes* obligations in general and did nothing to advance the difficult concept of *jus cogens*. There were ways other than inventing the notion of State crime in order to underscore the need for the international community to act in concert.

21. Mr. CRAWFORD (Special Rapporteur) said he endorsed the comments just made by Mr. Rosenstock. As to Mr. Economides' remarks, the debate was not at all about solidarity versus sovereignty: everyone accepted the concept of solidarity among States. It was his hope that the debate would culminate in the establishment by the Commission of a working group that would, for the remainder of the session, try to elaborate the implications of solidarity for parts one and two of the draft articles. A very constructive effort could be made to spell out what solidarity entailed for the international community as a whole. Conversely, it would not be helpful if the work on the topic was forced into the straitjacket of a dichotomy between crimes and delicts. Mr. Pambou-Tchivounda had quite rightly pointed out (2535th meeting) the drawbacks of the notion of delicts, and he would add that one and the same act could constitute either a delict or a crime, in relation to different individuals. The implications of that rigid dichotomy must be carefully explored, including through the working group that he would like to see established, but in any event, the Commission's work must not be further delayed. That would most certainly be the result if the dichotomy was maintained, as articles 1 (Responsibility of a State for its internationally wrongful acts), 3 (Elements of an internationally wrongful act of a State) and 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), *inter alia*, would necessarily have to be supplemented.

22. Mr. LUKASHUK said he had gained the impression that the Commission had reached an impasse and that continuing the discussion was of no avail. Two opposing viewpoints could be discerned, but neither commanded sufficient support for adoption. The task therefore should be to seek a compromise that would be acceptable to the Commission as a whole. He believed that that was possible by establishing a special category of the most serious offences, one which would include genocide and aggression, and by agreeing that procedural matters would be resolved in keeping with the principles of the Charter of the United Nations. Other questions could be left for future discussion. However, the achievements of the past must not be jettisoned.

23. Mr. DUGARD said he endorsed that appeal for compromise. The Commission appeared to be evenly divided on the issue. He would like to know if Mr. Rosenstock could accept the proposal by the Special Rapporteur to insert a saving clause, making it clear that the question of State crimes was being deferred for further consideration. The clause could be drafted in such a way as to indicate that the Commission was not rejecting the notion completely but was putting it aside so that it could get on with its second reading of the draft articles.

24. Mr. ROSENSTOCK said that if such a compromise was prejudicial to neither side in the debate, he could accept it.

25. Mr. PAMBOU-TCHIVOUNDA said he fully endorsed the recommendation made by the Special Rapporteur, which took account of the fact that the Commission had not delved deeply enough into certain matters, specifically, the requisite amendments to articles 1, 3 and 10 if article 19 was to be retained. The discussion had truly brought out a number of interesting and positive ideas.

26. Mr. CRAWFORD (Special Rapporteur) said it was sometimes asserted that the group of members in the Commission opposed to the notion of crimes was very small. That remained to be seen, but he could say that Mr. Brownlie was opposed to it, for reasons along the lines of those argued by Mr. Rosenstock. There was a real impasse and, as Special Rapporteur, he felt that he had to raise the issue. He wanted the second reading to move forward and that meant confronting the reality of the division in the Commission.

27. Mr. Sreenivasa RAO said that Mr. Rosenstock had raised fundamental issues. Procedural questions could be worked out, but as Mr. Kateka had stated recently (2534th meeting), even procedure had substantive implications. There could be no compromise on differing views of the world.

28. Crimes had always been committed and would continue to be committed in the future. The word "crime" had connotations of violence and condemnation by world opinion. Such acts could not be placed on the same footing as normal delicts, which were wrongs and were dealt with separately. Hence it was neither realistic, proper or accurate to regard crimes as grave delicts. He did not understand why in 1998 the Commission no longer recognized an approach which it had approved in 1976. Surely the conduct of States had not improved so much as to make the concept of crimes irrelevant. On the contrary, the world had become even more dangerous. Crimes were committed at the international level, just as they were at national level. However, the concepts of *jus cogens* and *erga omnes* were not designed to deal with crimes, though they could have certain implications. But the members had a goal to pursue, within certain time limits. The Special Rapporteur had made a compromise in his presentation, and he could go along with it.

29. Mr. SIMMA, referring to Mr. Dugard's proposal, said that a saving clause in favour of something which did not exist made no sense. A true concept of crimes as the former Special Rapporteur, Mr. Ago, had had in mind did not exist, and a saving clause was therefore unacceptable.

He suggested that a phrase should be inserted in the commentary saying that, by confining itself to the law of obligations, the Commission did not intend to preclude further developments with regard to what he personally would call true crimes.

30. Mr. AL-KHASAWNEH said that Mr. Rosenstock had made a number of important points. He agreed that the duties of solidarity should be corrected in the draft, because it was plainly wrong at the moment to confine the duty of non-recognition to crimes. He shared Mr. Rosenstock's view that crimes without punishment made no sense. But if the Commission was to have a working group on solidarity, would it be limited to correcting matters which should in any case be corrected, or should it reflect the fact that, as Mr. Rosenstock had said, there was no recognition whatsoever in international law of the idea of State crimes? Others thought that some recognition did exist. He did not believe anyone would affirm that the concept was as firmly established as that relating to delicts. He referred in that connection to the memorial submitted by the Government of the United Kingdom in 1947, in the *Corfu Channel* case.[10] The action of Albania had been defined as an international delinquency. He did not know whether it would help if the term "delinquency" was used instead of "crimes".

31. Hence, there was disagreement on the degree of recognition which international law currently gave to the idea of crimes and to the extent to which that signified progressive development or codification. It was never easy to distinguish progressive development from codification. Any compromise should concern the elaboration of a fully-fledged concept of crimes with punishment—which should be set out in an optional form—and the development of the rest of the topic concurrently, leaving it to States to take the final decision. One reason for that assertion was that the unity of purpose of the law of State responsibility, at least under the objective theory of State responsibility, would simply collapse. The other reason was that the momentum of three decades of work would be lost. In his view, that was the real compromise.

32. Mr. THIAM said that he had always been opposed to the concept of State responsibility. What compromise could be found to reconcile the position of those who maintained that State crimes existed and those who said that they did not?

33. Mr. GOCO said it was premature to say how many members of the Commission were in favour of the notion of State crimes and how many were opposed to it. That would become clearer once all members had expressed their views.

34. Mr. ADDO, commending the Special Rapporteur for a balanced and incisive first report, said that he was in entire agreement with much of what the Special Rapporteur said about deleting article 19 from the draft, and unhesitatingly endorsed his recommendation, which represented the most pragmatic way of looking at the issue at hand.

[10] *I.C.J. Pleadings, Corfu Channel case, Judgment of 9 April 1949*, vol. I, p. 40.

35. If some members supported the idea of deleting article 19 it was because they had weighed up the pros and cons before reaching that conclusion, and not because they had been intimidated, as Mr. Pellet seemed to suggest. They had minds of their own and had the capacity to make reasonable choices without prompting from anyone.

36. The commentary to article 19 made it clear that an international crime was not the same as a crime in international law, pointing out that States were responsible for international crimes, whilst individuals bore responsibility for crimes in international law. He found that rather puzzling. The former Special Rapporteur, Mr. Ago, himself had warned that the international crimes of the State to which he had been referring must not be confused with crime under international law: "war crimes", crimes against the peace, crimes against humanity, and so on, which were used in a number of conventions and international instruments to designate certain heinous individual crimes for which those instruments required States to punish the guilty persons adequately.

37. In the first place, the distinction drawn between crime and delict was not necessary. Secondly, the contours of the said crimes of State had not been well laid out. The crime lacked specificity. The definition given was confusing in the extreme and most unhelpful for the indictment of any individual or State. A crime was a serious matter and must therefore be defined with precision, something which article 19 failed to do. Instead, it made the crime dependent on what the international community said or recognized. How certain was it that the international community would recognize the said State crimes? The article stipulated that a wrongful act would be an international crime only if so recognized by the international community as a whole, something that required unanimity of decision on the part of States, which might be difficult if not impossible to achieve. But at the twenty-eighth session, in 1976, the members of the Commission had stated, in paragraph (61) of the commentary to article 19, that that did not call for unanimity but rather for the agreement of all the "essential components" of the international community.[11] Could those who advocated retaining article 19 please indicate who constituted the essential components of the international community today and what the criteria were for selecting them? The disturbing thing about "crime" as spelled out in article 19 was that, apart from a circular and illusory definition, the draft did not deal with the legal consequences of such crime. Properly speaking, a crime must have penal sanctions. That was not the case with article 19. He did not know of a single example of criminal punishment imposed on any State for an alleged crime. If no criminal penalties were called for under the said international crime of the State, then it did not qualify as a crime.

38. Admittedly, some internationally wrongful acts were more serious than others, but that did not necessarily make them crimes. They could be internationally wrongful acts of a serious nature which could be compensated for by damages reflecting the serious nature of the acts.

[11] See 2532nd meeting, footnote 17.

39. If punitive damages were all Mr. Pellet required for his defence of article 19, then he could safely abandon the distinction between delict and crime and just stick to an internationally wrongful act of a serious nature, and the exemplary or punitive damages that he considered appropriate for a State crime could be subsumed under a delict and the general law of obligations. Personally, he thought punitive damages flowed from delicts, not crimes, which must of necessity have penal sanctions; otherwise, there was no point in calling such acts crimes. In speaking of a delict, he meant both contractual and tortious situations and, indeed, the general law of obligations.

40. Mr. Pellet, supported by Mr. Kateka, had proposed changing the word "crime", but neither of them had indicated what word should replace it. More was involved than merely changing names. Would a change of name make such acts something other than crimes; would they become delicts, or something else? What would the resulting legal consequences be? Mr. Pellet had said that State responsibility was neither civil nor criminal, but international. What did that mean? Compensatory damages flowed from delicts and the general law of obligations and criminal penalties flowed from crimes, but what was it that would flow from Mr. Pellet's "international" stance?

41. The focus in articles 51 to 53 was mainly on collective sanctions. Article 53 (Obligations for all States) only called for solidarity of States and imposed obligations on all other States in their dealings with the so-called criminally responsible State. They were not to render it assistance or recognize the situation created by the violation as legal. Actually that added very little to what was expected of States under the draft rules on liability for delicts. They were not criminal penalties. He had tried hard to be persuaded by Mr. Pellet's observations but parted company with him and those who endorsed his line of reasoning. Instead, he lent support to the Special Rapporteur and urged his colleagues to do the same, because the best way forward was the path taken by the Special Rapporteur in his first report and recommendations.

42. The Commission should not repeat the mistake it had made some years ago in connection with reservations to treaties. The General Assembly, seeking an advisory opinion from ICJ on the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had also invited the Commission to study the question of reservations to multilateral conventions from the standpoint of both the codification and the progressive development of international law.[12] Even though the Court had rendered an opinion in 1951,[13] in the same year the Commission had considered that the criterion of the compatibility of a reservation with object and purpose, applied by the Court, was not suitable for multilateral conventions in general.[14] In other words, it had recommended reverting to the traditional unanimity rule. The report of the Commission to the General Assembly on the work of its third session, in 1951, had met with a mixed reception in the Assembly and the outcome had been a neutral resolution requesting the Secretary-General to conform his practice to the advisory opinion given by the Court.[15] It had taken the Commission 11 years to see the obvious, for by 1962 it had proposed the flexible system[16] which, with minor modifications, was currently embodied in the 1969 Vienna Convention.

43. The Commission should not repeat the process its predecessors had gone through. It should delete article 19. It should not mar the draft, which had taken 40 years to produce, by retaining an article that had no place in a draft dealing with the general law of obligations. The idea of the former Special Rapporteur, Mr. Ago, should be developed in a proper manner outside the draft, as argued by the Special Rapporteur.

44. He failed to understand Mr. Pellet's remark that the Special Rapporteur was supposedly attempting to kill Mr. Ago's concept of State crimes. The Special Rapporteur was simply saying that leaving the concept of State crimes among draft articles on the general law of obligations was an oddity and possibly even an aberration. Mr. Ferrari Bravo had admitted that, although the concept of State crimes was in the making, it was still vague.

45. The Special Rapporteur had made it perfectly clear in his recommendation that deletion of article 19 was without prejudice to possible future development of the notion of international crime, either as a separate topic for the Commission, through State practice or through the practice of international organizations. Nothing was to be lost by doing away with article 19, as almost all the crimes referred to in article 19, paragraph 3, were covered by the draft Code of Crimes against the Peace and Security of Mankind,[17] and they had found jurisdiction in the draft statute for an international criminal court.[18]

46. The concept of the former Special Rapporteur, Mr. Ago, should be subjected to a rigorous reappraisal to determine its feasibility for current purposes. In doing so, the Special Rapporteur was not attacking "crime" or doing away with Mr. Ago's idea. Whatever merits the idea might have had in the past, developments in the meanwhile were such that it might no longer have any practical utility if left unchanged. It would be more worth while to move ahead with the concept of the international criminal responsibility of individuals, an area in which significant progress had been made. The Commission had adopted 20 articles of the draft Code of Crimes against the Peace and Security of Mankind, which incorporated many crimes that featured in the Ago concept underlying article 19, for example, aggression, genocide and crimes against humanity, including slavery. Hence, what might be lost in article 19 was already covered in both the draft Code and the draft statute. Accordingly, the Commission could safely sound the death knell of article 19.

47. He understood Mr. Pellet to say that the Ago concept would make it possible to deal with the people at the very highest level who planned and executed acts of

[12] General Assembly resolution 478 (V), paras. 1 and 2 (*a*), respectively.

[13] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

[14] *Yearbook . . . 1951*, vol. II, p. 128, document A/1858, para. 24.

[15] General Assembly resolution 598 (VI), para. 3 (*a*).

[16] See *Yearbook . . . 1962*, vol. II, pp. 159 et seq., document A/5209.

[17] See 2534th meeting, footnote 10.

[18] See 2532nd meeting, footnote 7.

aggression and genocide. He was not too sure about that. He was sure, however, that article 7 of the draft Code (Official position and responsibility), which extended the principle of criminal responsibility to heads of State or Government, took a clearer stand in the matter. As noted in paragraph (1) of the commentary to article 7, it would be paradoxical if those individuals who were in some respects the most responsible for the crimes covered by the Code could invoke, and hide behind, State sovereignty. The draft statute—to be the subject of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held at Rome from 15 June to 17 July 1998[19]—contained similar provisions. Further, although article 19 had not been adopted, a former head of Government had recently been convicted by the International Tribunal for Rwanda[20]—a conviction secured on the basis of rules similar to those formulated in the draft Code and in the draft statute.

48. The notion of State crimes was unnecessary. States, after all, were made up of people and people who planned and executed heinous acts of States should not be spared, whatever their rank. They were the people who must be targeted, as was admirably demonstrated in the draft Code and the draft statute. Their diabolical crimes would not escape punishment. The Special Rapporteur's recommendation, far from being a backward step, as suggested by Mr. Economides, was a move in the right direction.

49. Those who advocated that article 19 should be retained must realize that they were sowing the seeds for the destruction of the entire draft, which had taken more than 40 years to produce. If the article were to be retained, a whole host of procedural provisions would have to be incorporated in the draft to deal, for instance, with a possible prosecuting agency, complaints system, rules of defence and evidence, arrest, bail and release. An international judicial authority would also be required with compulsory powers to determine guilt and matters pertaining to sentence. The result would be complete chaos. He therefore agreed that Mr. Pellet's arguments in defence of the notion of State crime were totally flawed. As the Special Rapporteur had made quite clear, any future development of that notion could be achieved outside the existing draft articles, which should be acceptable to those who favoured the Ago concept.

50. When the occasion so required, bold action was necessary. The Special Rapporteur's task was a daunting, but not impossible—not impossible, because he had the capabilities to deal with it, but daunting, because those who advocated that article 19 should be maintained had not provided him with any guidance on how the concept of State crimes should be developed and applied. They had merely outlined the principle. It was embarrassing that it had taken 40 years to develop the draft articles, but it would be little short of scandalous if still more years were needed in order to develop the concept of State crimes.

51. He could not agree with Mr. Simma about the need to develop the *erga omnes* principle as laid down in article 19, since that would give rise to certain problems. In the first place, the dictum on the principle handed down by ICJ in one case was not, in his view, meant to cover absolutely everything. For a proper understanding of it, the context in which it had been pronounced must be examined closely. It was clear that the *erga omnes* principle had more to do with *locus standi* than anything else, in other words, with the interest and standing of States in a particular case.

52. Another case in which the *erga omnes* concept had been invoked, in 1966, had been brought before ICJ by Ethiopia and Liberia against South Africa in the *South West Africa* cases for violation of the League of Nations mandate in connection with the treatment of the inhabitants of Namibia. Ghana had been very much involved in bringing that case before the Court. The Court had denied that Ethiopia and Liberia had a legal interest or the standing to act in that case and had described their claim as analogous to the *actio popularis* in Roman law. Both cases were equally valid. They were not binding, but they did have persuasive authority. He did not, however, think it was implicit in the Court's dictum that any State had a right to bring an action to protect a "public" or "collective" interest of the community.

53. He had a number of nagging doubts in that connection. For instance, such a right could surely not be exercised unless the respondent State agreed specifically to jurisdiction or had consented to compulsory jurisdiction under article 35, paragraph 2, of the Statute of the Court. A number of questions then arose. If the category of potential plaintiffs was increased, would there not be a proliferation of legal actions? Would States be more reluctant to submit in advance to the jurisdiction of the Court? Would States which deemed that they had a legal interest in vindicating the community or collective interest assert that interest outside the judicial arena, for instance, in international forums? Would they take countermeasures, unilaterally or jointly, against what they perceived to be the offending State or States? Was there any danger that, in the absence of judicial control, every State could become a self-appointed policeman of the international community in the name of an *erga omnes* obligation?

54. All those problems made him even more hesitant about embracing the *erga omnes* principle as set out in article 19. In particular, the principle should not be stretched as it had been in the article. A claim for compensation by a State that had not suffered material damage did not seem to him to be right and proper. In passing, he would note it was somewhat ironic that those who, at the forty-ninth session, had argued so strenuously against international liability for massive environmental pollution were currently prepared to make that same massive pollution a crime under article 19, paragraph 3 (*d*).

55. It was important not to overload the draft articles, which, with the commentaries, already made for somewhat cumbersome reading. He was, however, persuaded by the Special Rapporteur's arguments as set forth in his first report and oral introduction and favoured deletion of article 19 and, as a consequence, of articles 51 to 53.

[19] See 2533rd meeting, footnote 8.

[20] *The Prosecutor* v. *Jean Kambanda*, case No. ICTR-97-23-DP, indictment of 16 October 1997.

56. Mr. PAMBOU-TCHIVOUNDA said Mr. Addo had stated that it was people who were the leaders of States and that States themselves were an abstraction. Did that mean he was prepared to replace the word "State", throughout the draft articles, by, for example, the words "minister", "President of the Republic" or "head of Government"? In other words, should the draft be modified to attribute responsibility for any acts deemed to be wrongful or involving fault, as understood in the traditional sense, to the leaders of States?

57. Mr. ADDO said that he had been referring to crimes, not delicts or the general law of obligations. The idea of State crime did exist, but it had yet to be generally accepted. His point was that the Commission could not wait interminably for that idea to be developed. If leaders of States could be punished under the Code, why not do so, leaving the principle of State crimes to be developed outside the draft articles?

58. Mr. SIMMA said that the best way of dealing with the matter would be to adopt the Special Rapporteur's proposal for the establishment of a working group to explore the implications of *jus cogens* and *erga omnes* obligations, which would do much to dispel the concerns of those who defended the notion of State crime.

59. Mr. GOCO said he would like to know whether Mr. Addo objected basically to the concept of State crime or whether he merely thought that article 19, though imperfect, could be improved if the crimes attributable to a State were defined. Mr. Addo had also mentioned corporate liability but, whereas a corporation could be wound up if its officers were charged with a crime, no matter how heinous the crimes a State had committed, it continued to exist with all its essential components: territory, population, sovereign authority. Did Mr. Addo believe that, if the draft articles were suitably amended, a State could be charged with a crime or a wrongful act committed in violation of international law?

60. Mr. ADDO said that the concept of State crime, though in the making, was not yet fully developed. Consequently, while he was not totally opposed to it, in his opinion, it had no place in the general law of obligations and should be discarded from the draft. So far as corporate liability was concerned, even if a company was wound up, the individuals responsible for, say, fraud could still be charged on that account. An analogous situation had arisen in the case of the former Rwandan head of Government who, though he had gone into hiding, had been caught and brought to trial on the basis of rules similar to those laid down in the draft Code. It would be a waste of time to incorporate something so indeterminate as the concept of State crime in the draft on State responsibility, even with the proviso that the concept would be developed further. Of course the Commission could develop it, but not in the current draft.

61. Mr. KUSUMA-ATMADJA said he had been pleased to hear that the Special Rapporteur was open to any suggested adjustments. The world community was passing through a transitional phase, moving away from purely State relationships towards a more open system involving the responsibility of the individual. Mr. Al-Khasawneh's statement had made a very useful contribution in that connection and had been followed by others in the same vein. It was not necessarily true, however, that the distinction between crimes and delicts had to be maintained. The main problem was that it would take a lot of time to adjust to changing conditions, for which reason he favoured a "soft" law approach rather than a hard-line approach for which the international community was not ready. He might be rebuked for being on the side of the major industrial Powers but that was not so, for he was present in the Commission in his private capacity. The irony was that, if the events in Indonesia over the past 32 years were to be characterized as a crime of the State, then its successor might inherit the problems, which would be unfair. For that practical reason, the concept of State crime could not be incorporated in the draft on State responsibility. It would also be necessary to specify which crimes came within the purview of the concept of State crimes; at the same time it had to be recognized that the power of lawyers to do something in such circumstances was limited.

62. Mr. YAMADA, commenting on the distinction between criminal and delictual responsibility, said that he endorsed the Special Rapporteur's conclusions, as set forth in paragraph 95, advocating that article 19 should be deleted from the draft on State responsibility. As to the inclusion of the concept of a crime of the State, he wished to be associated with many of the points made by Messrs. Addo, Dugard, Kusuma-Atmadja and Rosenstock. While he appreciated that there were different categories of internationally wrongful acts, involving breaches of *erga omnes* obligations and breaches of obligations under bilateral contracts, and did not deny that some internationally wrongful acts could be categorized as a crime of a State, the categorization of wrongful acts as such was not at issue. What was at issue was whether the category of a crime of a State should be introduced into the regime of State responsibility, and the State pursued for its responsibility for such crimes. His answer was in the negative.

63. The Commission had embarked at the twenty-eighth session, in 1976, on an ambitious project which included the concept of a crime of State set out in article 19 of part one. When it had come to deal with the legal consequences for wrongful acts in part two, however, it had been unable to provide for punitive damages for such crimes, let alone for fines or other sanctions. In his view, the Commission's decision at that time merely reflected the realities of the current state of affairs. As yet, there was no adequate State practice in the matter and no procedure for determining with authority whether a crime of State had been committed. Nor was there any institution fit to enforce criminal justice for State crime in the international community.

64. Although he was perfectly aware of the need to exercise caution in drawing analogies between national and international law, he firmly believed that legal terms must be used to express a concept that was broadly similar in the two cases. The term "crime"—entailing criminal responsibility—was a well-defined concept in national systems of criminal justice, but it should not be used in the context of international law unless provision was made for criminal responsibility in the regime of State responsibility. Naturally, the international community must take action to suppress such abhorrent State crimes as aggres-

sion, genocide and war crimes, but the regime of State responsibility should not be expected to figure prominently in that endeavour.

65. In countering organized crime, national Governments mobilized the political and administrative regime to take deterrent action and dismantle the organizations involved, the criminal justice regime to punish individual offenders and impose penalties, and the civil responsibility regime to redress the damage incurred by victims. Each regime had a limited role and operated in conjunction with the others.

66. In the international sphere, where a State engaged in ethnic cleansing of a minority population, thereby committing the crime of genocide, the Security Council was the political institution authorized to take action either under article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide or under Chapter VII of the Charter of the United Nations. Although it had failed to do so in Cambodia and Rwanda, and its freedom of action was impeded by the veto system, those were defects to be remedied by the United Nations itself and not by a regime of State responsibility.

67. A criminal justice regime for the crime of genocide was being developed. The Convention on the Prevention and Punishment of the Crime of Genocide required the contracting parties to punish perpetrators and the proposed international criminal court was expected to establish criminal responsibility in the case of individuals. Although article IX of the Convention spoke of the responsibility of a State for genocide, it did not, in his view, refer to criminal responsibility. He would nevertheless submit that the concept of criminal responsibility of States already existed in embryonic form and he would have no objection to initiating work on the subject, provided it was kept separate from work on State responsibility.

68. The role of the State responsibility regime vis-à-vis the crime of genocide was more or less analogous to that of the national civil responsibility regime, namely to establish the civil responsibility of States to redress the injuries suffered by the victims. He was not, of course, equating the international regime of State responsibility with that of domestic civil responsibility. The Commission must deal with the particular legal consequences of a breach of an obligation *erga omnes*. On that issue, he fully shared the Special Rapporteur's conclusion in paragraph 95 of the first report.

69. He agreed with the comments by the Governments of France and the Czech Republic under article 19, in the comments and observations received from Governments, to the effect that the law of State responsibility was neither civil nor criminal. However, that circumstance could be attributed to the fact that the international community and international law were as yet immature and he believed that international law also would and should develop in the direction of a separation of civil and criminal responsibility. For example, article 11 of the International Covenant on Civil and Political Rights already prohibited imprisonment for inability to fulfil a contractual obligation, "debtor's prison". He thought that the international community had also grown out of the days of Charles Dickens.

70. He trusted that the Commission would solve the critical issue of the distinction between "criminal" and "delictual" responsibility in the manner recommended by the Special Rapporteur and would succeed in completing the second reading of the draft articles during the current quinquennium.

71. Mr. ECONOMIDES said that State crimes were being represented in the Commission as something non-existent or indefinable. Yet aggression had been defined as a State crime in the Definition of Aggression contained in the annex to General Assembly resolution 3314 (XXIX), which had been adopted unanimously. Surely, the Commission was duty-bound to establish wherein lay the responsibility of an aggressor State.

72. In his view, Chapter VII of the Charter of the United Nations was closely related to the law on State responsibility. In the event of a serious breach by a State of international obligations that posed a threat to international peace and security, the international community as a whole, in the shape of the Security Council, was authorized to take preventive or other measures, including the use of force. Could the Council's action in authorizing, for example, the bombardment of Iraq be described as a civil sanction rather than a criminal penalty? Several members of the Commission had already recognized that State crimes formed part of the corpus of international law, and the concept was gradually gaining acceptance, even in ICJ. If the Commission overlooked that development, it would be failing in its duty.

73. Mr. YAMADA stressed that he had not denied that a concept of State crime was in the making. He was prepared to discuss the consequent criminal responsibility of States, albeit separately from the current discussion on State responsibility.

74. Mr. THIAM pointed out that General Assembly resolution 3314 (XXIX) had been adopted by consensus, without a vote, and not unanimously. Moreover, the draft Code contained no definition of aggression because of the enormous difficulty of defining such a concept.

75. Mr. ECONOMIDES submitted that consensus had the same effect as unanimity.

76. Mr. LUKASHUK noted some inconsistency in the view that, notwithstanding the lack of any concept of State crime in international law, the Security Council was authorized to take whatever measures it deemed necessary against Member States under the Charter of the United Nations. Surely, the right to adopt such measures was based squarely on relations of responsibility, since the Council was empowered to take action only in the event of the violation by a State of particularly important norms of international law.

77. Even if the phenomenon of aggression could not be defined in legal terms, it did not follow that there was no such thing as a crime of aggression. He cautioned against adopting a narrow legalistic and sterile approach.

78. Mr. THIAM said that, when he had sought to include a definition based on General Assembly resolution 3314 (XXIX) in the articles of the draft Code,[21] the majority of States had objected on the grounds that the resolution was a political text and not a legal instrument.[22]

79. Mr. ROSENSTOCK said that the Security Council did not act in terms of State responsibility and did not impose sanctions or penalties. When confronted with a situation that posed a threat to international peace and security, it was enabled to take appropriate military or non-military measures to redress the situation. Those measures might be contrary to the interests of an innocent State or might affect a State that had committed an act viewed as contrary to international law.

80. The idea of international crimes had no basis in State practice. Mr. Thiam's description of the purely political character of the situation with regard to a definition of aggression was accurate.

81. Mr. PAMBOU-TCHIVOUNDA said he shared the view that the Security Council was a political body which followed its own bent when it came to deciding when aggression had occurred. Again, it served no purpose to draw comparisons between two entirely different things—for example, the annexation by one State of part of the territory of another and a breach of a bilateral trade agreement.

82. Mr. HE said that many States, prominent scholars and lawyers had taken issue with the Commission when at its twenty-eighth session, in 1976, it had drawn a distinction in article 19 between international crimes and international delicts. The crux of the matter was whether the concept of State crimes could be established in the international law of State responsibility and, if so, whether there was any commonly accepted mechanism to decide on the existence of a crime and the requisite legal response.

83. There was no basis in State practice thus far for the concept of international State crimes. The principle of individual criminal responsibility had been established, on the other hand, in the Nürnberg[23] and Tokyo[24] International Military Tribunals and, more recently, in the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. It had also been codified in numerous international instruments and would be put into practice in the future international criminal court.

84. It had been suggested that traditional State practice should be brought into line with changing circumstances and that provision should be made for a concept of State crime. If the Commission chose to give priority in the area of State responsibility to progressive development of international law, it should make sure that it was acting in keeping with the wishes and concerns of States. Otherwise, the product of its efforts might fail to secure sufficient ratifications and the Commission's prestige would suffer accordingly. The Commission should seek to combine codification with progressive development, recognizing State practice as an element of customary international law.

85. It would be extremely difficult to transplant the penal concept of crime into the realm of international law. Criminal justice presupposed the existence of a judicial system to decide whether an offence had occurred and to determine guilt. But according to the maxim *par in parem imperium non habet*, there was no mechanism that had criminal jurisdiction over States in the international community as currently structured and no central authority that could determine and impute criminal responsibility or mete out punishment. The complex regime for handling accusations of State crime proposed by the previous Special Rapporteur had been rejected by the Commission as unworkable and contrary to the Charter of the United Nations.

86. The view of advocates of the concept of State crime, namely that it would serve as a deterrent and thereby strengthen international public order, had no sound legal basis and would not be acceptable to States. However, he saw some merit in the proposal regarding obligations *erga omnes* and urged the Commission to give it further consideration.

87. He endorsed the Special Rapporteur's criticism of the fatal defects of article 19 and his recommendation that articles 51 to 53 should be deleted and article 40, paragraph 3, reconsidered in order to deal with breaches of obligations *erga omnes*. He reserved his position regarding the suggestion that the concept of "international crime" required separate treatment by the Commission or another body. There was no need to develop such a concept in view of the provisions in the Charter of the United Nations for the maintenance of international peace and security and the current vigorous action by the Security Council under Chapter VII of the Charter. The need for such a concept would be further reduced by the establishment of the proposed international criminal court.

The meeting rose at 1 p.m.

2537th MEETING

Thursday, 28 May 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Later: Mr. Igor Ivanovich LUKASHUK

Present: Mr. Addo, Mr. Al-Baharna, 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. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr.

[21] See *Yearbook . . . 1985*, vol. II (Part One), p. 73, document A/CN.4/387, para. 87.

[22] See *Yearbook . . . 1987*, vol. II (Part One), document A/CN.4/407 and Add.1 and 2, and document A/42/484 and Add.1 and 2.

[23] See 2524th meeting, footnote 16.

[24] Charter of the International Military Tribunal for the Far East; *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.