Document:-
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Summary record of the 2537th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

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.

Cooperation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN, recalling that the Commission had long-standing ties of cooperation with the Asian-African Legal Consultative Committee, welcomed the Secretary-General of the Committee and invited him to make a statement to supplement the text that had been distributed to the members of the Commission.

2. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that there were many examples of the Committee's relations with the Commission which showed how the two bodies exchanged representatives at their respective sessions. The Committee had held its thirty-seventh session at New Delhi from 13 to 18 April 1998. It had had before it 14 substantive items, but had been able to consider only some of them, including the work of the Commission at its forty-ninth session.

3. On the question of State responsibility, the Committee had considered that the draft articles on countermeasures dealt with the most difficult and controversial aspect of the whole regime. In its view, the first countermeasure which the injured State could take was not to comply with one or more of its obligations towards the wrongdoing State. Secondly, the injured State should not resort to countermeasures based on a unilateral assessment. If its assessment was incorrect, the State was running the risk of incurring responsibility for a wrongful act. A neutral State, if asked to pass judgement, would not necessarily make the same assessment as the injured State. But proper evaluation of the subject was still required in order to determine the extent to which the right of an injured State to resort to countermeasures was circumscribed by that State's permissible functions and the aims to be achieved by such measures.

4. The law relating to countermeasures had also been discussed at the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties, organized by the Committee at Tehran from 24 to 25 January 1998. The participants had generally agreed that the rules of prohibited countermeasures as formulated by the Commission in its draft articles on State responsibility must be applied to determining the legality of the countermeasures that were purportedly effected by the extraterritorial application of two Acts of the United States of America entitled, "Iran and Libya Sanctions Act of 1996"[1] and "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996" (Helms-Burton Act).[2] Those Acts covered the prohibition of injury to third States, proportionality and the prohibited countermeasures listed in article 50 (Prohibited countermeasures) of the Commission's draft articles on State responsibility.[3]

5. As to unilateral acts of States, the Committee had observed that the Commission's objective should be to identify the constituent elements and effects of unilateral legal acts of States and to formulate rules generally applicable to them. The question of unilateral acts of States was closely linked to the question of the extraterritorial application of national laws, a subject which the Committee had recently considered and of which it had affirmed the significance, complexity and important implications. It had requested its secretariat to examine the executive orders by which sanctions were imposed on certain States, a topic that had been on its agenda since its previous session. The deliberations at the Seminar at Tehran had revealed general agreement that the validity of any unilateral imposition of economic sanctions through the extraterritorial application of national legislation must be tested against accepted norms and principles of international law: sovereignty, territorial integrity, sovereign equality, non-intervention, self-determination, freedom of trade and, specifically, the right to development and permanent sovereignty over natural resources.

6. The Committee's secretariat recognized that the extraterritorial application of national legislation was necessary in certain instances and that contemporary international law provided for its application in such instances as the performance of consular functions and the control of drug trafficking. The secretariat study was not restricted to the analysis of the legality or otherwise of any particular legislation or to the examination of the legislation of any particular State. Rather, the secretariat's task was to study the general theoretical principles of the jurisdiction of States in order to extract prescriptive principles to enable the Committee to adopt its own opinion. It could not be overemphasized that the canvas was rather large and that there had been an exchange of views at the Tehran Seminar on the legislation of a particular State only to illustrate the extraterritorial ramifications of municipal legislation.

7. Referring to reservations to treaties, he said that the Committee had organized a special meeting on the subject in the context of its thirty-seventh session at New Delhi. It had considered the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission at its forty-ninth session[4] and a number of documents prepared by the Committee's secretariat. Recognizing the significance and complexity of the topic, the Committee had stressed the universal applicability of the regime established by the Vienna Conventions and had proposed that the ambigu-ities should be removed and the gaps filled by commentaries on the existing provisions of those texts. It had recommended that the Commission should continue with its work on the topic on the basis not only of "intuitive feeling", but also of an empirical study of the behaviour of States. It had taken the view that the Commission should study the motives underlying reservations to treaties and thereafter seek to develop the reservations regime by way of "interpretative codification".

8. The Committee had raised the question whether reservations to human rights treaties were different from

[1] ILM, vol. XXXV, No. 5 (September 1996), p. 1274.

[2] Ibid., No. 2 (March 1996), p. 359.

[3] 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.

[4] *Yearbook . . . 1997*, vol. II (Part Two), p. 56, para. 157.

reservations to other normative treaties. The view had been expressed that almost all treaties contained normative and contractual obligations. The Committee had also asked the question whether human rights treaties deserved to be classified in the category of treaties which admitted of no reservations. It had been pointed out that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights had been adopted a good two years before the United Nations Conference on the Law of Treaties in 1968,[5] and that that Conference had not deemed it necessary to differentiate between human rights treaties and other normative instruments. The Commission could not do what a conference of plenipotentiaries had not done. Nevertheless, the members of the Committee had agreed that a distinction needed to be drawn between the two categories of instruments with respect to the regime of reservations, but they had not been able to agree with the formulation in paragraph 3 of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission.

9. The participants in the Special meeting on Reservations to Treaties had also debated the functions, role and competence of the monitoring bodies in assessing or determining the admissibility of a reservation. Although the view of the Commission that the legal force of the findings of such bodies could not exceed that resulting from the powers given to them had met with approval, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring bodies for assessing or determining the admissibility of reservations had encountered resistance. The view had also been expressed that a strict regime of reservations with a monitoring body at its apex would detract from the objective of universal participation in the treaty, whereas the aim should instead be to promote and encourage the ratification process.

10. Paragraph 5 of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission relating to the role of the monitoring bodies of human rights treaties had been considered unacceptable. Exception had been taken to the use of the term "monitoring body", which implied an element of surveillance, and it had been proposed that it should be replaced by the term "supervisory body". The opinion had also been expressed that the proposed role of the monitoring bodies was a dangerous proposition because States would not accept that such a body passed value judgements on the admissibility of their reservations or on their practice: that would open Pandora's box. It had also been stated that the formulation of a reservation to a treaty constituted a sovereign right of a State and that paragraph 5 contradicted that cardinal principle of the law of treaties.

11. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Committee had observed that the Commission had yet to find proper direction in furthering its work. It was to be hoped that the Working Group on the topic would chart out a course of action for it. Although the title was confusing, the content of the topic was very clear. The Commission's work on the sub-topic of prevention of transboundary damage from hazardous activities should also cover the issues of liability and compensation. The Committee had concurred with the conclusion of the Special Rapporteur on the topic, namely, that the duty of prevention required States to identify activities that were likely to cause significant transboundary harm and notify the concerned States thereof and that that duty to notify included the obligation of consultation and negotiation. It agreed with the Special Rapporteur that a distinction should be drawn between a State's duty of prevention and the duties incumbent upon the operators of activities at risk. However, the Commission should give consideration to the idea of dealing with the consequences of the failure to comply with those obligations within the framework of its topic on State responsibility.

12. Mr. GOCO asked to what extent the Asian-African Legal Consultative Committee would participate in 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.[6]

13. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that the Committee would be represented at the Conference by a delegation of several persons. He wanted to attend in order to be able to hold consultations with a number of States on subjects of particular concern to the countries of Africa and Asia. The Committee's secretariat had already made the necessary arrangements with the United Nations Secretariat.

14. Mr. YAMADA said that he had represented the Commission at the Committee's thirty-seventh session at New Delhi, where he had given an extensive account of the Commission's work in the past year. He had also asked the members of the Committee to comment on the discussions which the Commission had on topics referred to it. The record of his statement would appear in the report on the Committee's session.

15. Mr. Sreenivasa RAO said that he had also attended the Committee's thirty-seventh session at New Delhi. The Committee's discussions had been closely followed and several ministers of justice and senior officials of member States had spoken. The subject of reservations to treaties, which was very important for States, had been discussed at length by the specialists, as indicated in the written communication of the Committee's Secretary-General. But the most salient feature of the session had been the cooperation between the representatives of the member States and the excellent regional team of specialists brought together for the occasion. That had been an excellent initiative which had been repeated by the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties.

16. It was good to know that the Committee would soon have its headquarters in New Delhi, thereby offering a forum for dialogue not only to the States of Africa and Asia, but also to countries of other regions.

[5] See 2526th meeting, footnote 17.

[6] See 2533rd meeting, footnote 8.

17. Mr. THIAM asked what efforts had been made to promote greater participation by French-speaking countries, particularly African ones, in the Committee's work.

18. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that the Committee had contacted a number of French-speaking countries through various channels; he hoped that the session to be held the following year in Ghana would be an occasion for establishing links with the countries of western Africa.

19. Replying to a question by Mr. SIMMA on reservations to human rights treaties, which had been considered in the course of the special meeting in the framework of the Committee's thirty-seventh session, he said that the Committee had not taken any official decision and that, in his statement, he had given an account only of the opinions expressed by the experts in their personal capacity.

State responsibility[7] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[8] A/CN.4/490 and Add.1-7,[9] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

20. Mr. MIKULKA said that the conceptual approach adopted by the Commission in 1962 on the recommendation of the former Special Rapporteur, Mr. Ago, which had been to give priority to a definition of general rules of international State responsibility, irrespective of the content of the substantive rule breached in any given case, was, in view of its relevance, still valid.[10] Likewise, the distinction drawn between primary and secondary rules, despite all its imperfections, had considerably facilitated the Commission's task by freeing it from the burdensome legacy of doctrinal debate on the existence of damage or the moral element as a condition of responsibility. It would be difficult and, above all, pointless to seek another principle on which to base the structure of the draft articles.

21. By deciding to leave aside the specific content of the "primary" rule breached by a wrongful act, the Commission, as the Special Rapporteur noted in paragraph 13 of his first report (A/CN.4/490 and Add.1-7), had not intended to disregard the distinction between the various categories of primary rules—including the distinction which imposed itself almost of necessity between the rules of *jus dispositivum* and rules of *jus cogens*—or, as a result, the various consequences which their breach could entail. However, for more than two decades the Commission had studied State responsibility for "ordinary" wrongful acts and had also confined itself to bilateral relations. Article 19 (International crimes and international delicts), which had introduced a distinction between "delicts" and "crimes", had long remained the sole provision indicating the existence of a "qualitative" distinction between secondary rules as a function of the content of the primary rules breached by the wrongful act, by reference in particular to the fundamental interests of the international community which were protected by those primary rules. But the real debate on the specific nature of those "secondary rules" had been postponed from year to year. Hence, since its twenty-eighth session, in 1976, the Commission had not been able to define the regime of so-called "crimes"—not, as some maintained, because such a task was impossible, but because the debate had not taken place. It was not until the forty-seventh session, in 1995, that it had begun to consider the question of the "content of responsibility" stemming from a breach of a primary rule whose purpose was to protect fundamental interests of the international community as a whole, as opposed to a breach of a primary rule which was not of that nature. From that time on, the debate on "crimes" had been limited to the framework of part two of the draft.

22. Thus, the provisions of part one, which, apart from article 19, had all been drafted exclusively for the purpose of dealing with "delicts", had suddenly become applicable to "crimes" as well, without the Commission having ever given further consideration to whether, in the case of "crimes", certain rules of part one should not be reformulated. That was the case, for example, with provisions relating to circumstances precluding wrongfulness. Whereas the case covered in article 19 called for "specific" consequences for crimes, moreover, article 51 (Consequences of an international crime) spoke only of "further" consequences.

23. Contrary to what was argued by some, the existing state of affairs could not be explained exclusively by the complexity of the issues arising from breaches of obligations essential for the protection of the fundamental interests of the international community and still less by the absence of such breaches in international life; it was largely the result of the lack of consistency in the approach adopted by the Commission, which, after dealing with "ordinary" breaches—"delicts"—had failed to devote sufficient attention to "crimes" on first reading. On the second reading of the draft articles, the Commission should therefore take account of a number of factors.

24. Above all, the existence of rules of international law essential for the protection of the fundamental interests of the international community as a whole and the fact that those rules were quite often breached were generally admitted today and, while it was true that the distinction established in article 19 had not been followed up in international jurisprudence, fundamental interests of the international community that were threatened by a particular wrongful act were often mentioned in various international bodies. The consideration of the consequences arising from a breach of a rule essential for the protection of those interests was covered by the mandate which the Commission had received and which it was required to fulfil. The idea of the existence of such a category of wrongful acts embodied in article 19, paragraph 2, should be maintained; article 19, paragraph 3, on the other hand, should quite simply be deleted. Although words had the meaning that was given to them and the concept of "State crime" did not intrinsically have penal connotations, the Commission might, in order to overcome the obstacles which were unnecessarily dividing it as a result of the

[7] See footnote 3 above.

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

[9] Ibid.

[10] See 2536th meeting, footnote 16.

many misunderstandings to which the terminology of article 19 gave rise, resort to drafting techniques that made it possible to settle questions of substance without using a specific terminology.

25. The question of the specific characteristics of the "secondary rules" connected with breaches of the "primary rules" essential for the protection of the fundamental interests of the international community as a whole should be raised in relation to the whole of the draft and not only to part two. Thus, it was obvious that certain articles in part one could not be readily applied to breaches of a multilateral obligation and still less readily to breaches of obligations *erga omnes*, a category of obligations which was, incidentally, wider than that referred to in article 19, paragraph 2, given the "qualitative" differentiation between *erga omnes* rules depending on whether or not they were peremptory norms. Nevertheless, in view of the "technical" nature of the rules embodied in part one, the question arose whether, within the category of *erga omnes* rules, a differentiation based on a "qualitative" distinction of their "content" was still necessary or, more precisely, in what cases it was necessary. The second reading of the draft should make it possible to assess, article by article, to what category of "primary rules" the secondary rule embodied in the article applied.

26. As to the "content" of State responsibility for wrongful acts and, in particular, the "qualitative" distinction between the consequences of wrongful acts which endangered the fundamental interests of the international community as a whole and the consequences of other wrongful acts, he entirely endorsed the arguments put forward, in particular, by Mr. Economides, Mr. Pambou-Tchivounda and Mr. Pellet. The draft articles were and must remain not only general, but also residual; in the case of "delicts", the "specific" regime could be established by a convention designed to become universal, but it could also be established by a bilateral treaty. Likewise, the draft articles would be residual with respect to "crimes", more particularly because they could not provide in detail how State responsibility should be implemented through action on the part of the international community; in that respect, there could be different specific regimes attaching respectively, to particular "primary" rules.

27. In conclusion, referring to the problem of consistency raised in paragraph 25 of the first report and to the question considered by ICJ in paragraph 47 of its judgment in the *Gabčíkovo-Nagymaros Project* case, he stressed that the relationship between the draft articles to be produced by the Commission and the provisions of the 1969 Vienna Convention had to be clearly explained.

Mr. Lukashuk took the Chair.

28. Mr. CRAWFORD (Special Rapporteur) said that the expression "so-called crimes" used by Mr. Mikulka was an additional reason to hope that progress might be made in the debate.

29. Mr. Sreenivasa RAO pointed out that the Commission had grappled with the problem of article 19 since its adoption in 1976; the constituent elements of a crime, its very definition, had been strongly challenged, in particular by the Special Rapporteur. He did not think that any of the arguments advanced, whether they concerned *erga omnes* or *jus cogens* obligations or the recognition of an internationally wrongful act as a crime by the international community as a whole, was fundamental and convincing to the point of justifying the deletion of article 19, although he agreed that its wording could be polished up. Moreover, the article defined certain important flagrant breaches of international law that could never be classified as ordinary wrongful acts. That was true, for example, of aggression, genocide and apartheid, which should be called by their name and, if they had to be qualified as crimes, they should be so qualified without hesitation.

30. The Commission had discussed at length whether wrongful acts of that kind and their consequences should be within the competence of the Security Council and the regime established by the Charter of the United Nations. But, as some had remarked, the Council, being a political organ entrusted with the maintenance of peace and security, would deal with those matters from the political angle only, since it was not a judicial organ with authority to punish. Could it be asserted that, in the absence of a competent court, such facts could be dealt with only from a political angle and that no measures of a judicial nature could be taken? The Commission could not accept such a view. In that connection, it should be noted that those who defended it had resolutely supported the idea of the competence of the future international criminal court in respect of individuals. Yet what applied to individuals should also be applicable to States.

31. The concepts developed in article 19 retained their full value. In listing the most serious crimes commonly accepted as such, the Commission had acted advisedly. The argument of generalization could not be invoked in order to demolish those concepts. Generalization permitted flexibility, made it possible to go forward. The fact that article 19 was general did not mean that it had lost its *raison d'être*.

32. He was convinced that, if only it had the will to do so, the Commission could agree on a set of common, uniform and objective standards that would apply to all nations, powerful or weak. There was no question of compromise, but only of taking account of realities. The point at issue was to prevent the suffering of peoples and, in that sense, only the concept of "crime" could play a deterrent role. Moreover, although, in the present instance, the Commission baulked at the idea of defining that concept it did not baulk at the idea of "punishing" States, admittedly through specific measures. The fact was that the Commission had to act in order to avoid arbitrariness and measures taken unilaterally.

33. That being said, he could accept the Special Rapporteur's proposal that international crimes should be dealt with separately, possibly at a later stage.

Mr. Baena Soares resumed the Chair.

34. Mr. GOCO said it was inconceivable that a State could be charged with and held responsible for a crime. A State was an abstract entity and only ever became a "criminal" State in the eyes of the international community through acts committed by individuals. How could it then be convicted, independently of the authors of a wrongful act? He cited as an example, among many

others, his own country, the Philippines, where, in the past, certain acts had been committed under martial law, apparently with the backing of the then lawful authorities, from which individuals had suffered.

35. Mr. Sreenivasa RAO said that Mr. Goco's comments went to the heart of the issue. The examples of international crimes listed in article 19 showed clearly that such acts did not result from individual conduct: they came about as a result of State policy. It would be illogical to punish such acts solely at the individual level. On the other hand, the example cited by Mr. Goco was a matter of internal constitutional law and the State could not be held accountable.

36. Mr. PELLET said that the problem of attribution was not peculiar to crimes, but arose in exactly the same terms in the case of delicts. Moreover, he did not share Mr. Sreenivasa Rao's view that the idea of "punishing" States was not unacceptable. Words did not have the same meaning in international law as in domestic law. It was not a matter of sanctions, since a sanctions regime existed under the Charter of the United Nations and the Commission had no call to concern itself with that regime in a study of State responsibility, unless it reverted to a criminal approach. The Commission must simply find a way of showing that breaches of international law were not all on the same plane and that there were basic rules affecting the international community as a whole, the breach of which entailed specific consequences.

37. He also took issue with Mr. Sreenivasa Rao, who, after dwelling at length on the importance of the notion of crime, concluded that its consideration should be deferred. That was unacceptable because the Commission would be repeating the mistake it had made under its previous Special Rapporteur, namely, beginning with a study of State responsibility in general and then considering crimes and their consequences. If it followed the same course, it would once more find itself at a dead end. He thought that the Commission should, at all costs, reach a quick decision on the question.

38. Mr. THIAM asked the Special Rapporteur what was meant by "separate treatment of crimes". He asked whether the idea was to treat it as a separate topic with a separate Special Rapporteur.

39. Mr. CRAWFORD (Special Rapporteur) said that some members of the Commission certainly seemed to support the idea of separate treatment of crimes, but no one wanted to exclude any category of wrongful acts of States from the draft articles, thereby casting doubt on the unitary conception of State responsibility.

40. Mr. ROSENSTOCK, referring to Mr. Goco's comment, said that punishing a State that was not a democracy was tantamount to punishing innocent people and forcing them to bear a burden of guilt for generations for an act in which they had in no way been implicated. While he agreed with Mr. Pellet that a decision should be taken on article 19, he feared a repetition of the past mistake of accepting the notion of crime and only afterwards, in part two, dealing with its consequences. No one denied that there were more and less serious wrongful acts, but he challenged the idea that there was a qualitative distinction between two categories. The Special Rapporteur had shown that it was possible, without making such a distinction, to deal with the question of more or less serious breaches of international law, without drifting too far from the existing draft articles, by making substantial amendments to article 40 (Meaning of injured State). Lastly, he felt that the notion of crime had domestic criminal connotations for the vast majority of people.

41. Mr. AL-KHASAWNEH said that a qualitative distinction was necessary, if only from the point of view of reparation. Pecuniary compensation was inappropriate in the case of certain serious crimes such as genocide. As for the question of guilt, the Special Rapporteur had raised the possibility in his first report of a regime that would provide for gradual relief from the burden of guilt. It was a moral imperative for the Commission based on its sense of justice to consecrate the notion of crime; abandoning it would lay the Commission open to criticism of the integrity of its work.

42. Mr. Sreenivasa RAO, replying to Mr. Pellet, said he had perhaps been misunderstood: he was not by any means advocating the transposition of domestic criminal law to the international level. However, the most serious violations of international law needed special treatment not only in political, but also in legal terms. Besides, to ensure that the notion of crime was applied with the requisite guarantees against arbitrariness, it would be necessary to develop a system and that could be an extremely lengthy process. It would require, in addition, a community of values in the international community and a certain degree of integration which seemed to be lacking at present.

43. Mr. PELLET said that Mr. Simma and Mr. Tomuschat had shown in their courses at the Academy of International Law that "international community" was a relative idea.[11] The fact was that international society could no longer be viewed as an anarchic mass and there were traces of "community spirit" in, for example, the notion of *jus cogens*, which was embodied in the 1969 Vienna Convention. The notion of crime should be another example. Even if that notion was not to be used in practice, the Commission had a duty to take account of such manifestations of international community spirit at the level of State responsibility. Otherwise, it would have failed in its mandate, certainly in respect of the development of the law, but also in respect of its codification.

44. Mr. Sreenivasa RAO said that he was not denying the existence of an international community, but he thought that the degree of integration varied in terms of the ends pursued. For the purpose of the notion of crime, a higher degree of integration was necessary and there was nothing to say that the process of development would not be rapid, for example, if the proposed international criminal court was actually established at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to be held the following month at Rome.

[11] B. Simma, "From bilateralism to community interest in international law", *Collected Courses of the Hague Academy of International Law, 1994-VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, pp. 217-384; and C. Tomuschat, "Obligations arising for States without or against their will", ibid., *1993-IV* (Dordrecht, Martinus Nijhoff, 1994), vol. 241, pp. 195-374.

45. Mr. SIMMA, endorsing all of Mr. Pellet's comments, said he thought that the Commission was within a hair's breadth of a solution. The protagonists of the notion of crime seemed willing to consider any proposals by their adversaries that took their concerns into account. The latter group would therefore do well to explore the consequences for them, in terms of responsibility, of the notions of *jus cogens* and *erga omnes* obligations and to make proposals to the other camp. The question of whether or not to keep article 19 could be settled afterwards.

46. Mr. ROSENSTOCK said that he found Mr. Simma's proposal to reverse the burden of proof somewhat curious: it was not for those, such as himself, who held that State crimes did not exist to prove the usefulness of a distinction that they challenged. It would be reasonable, in his view, to delete article 19 at once and work on part two of the draft articles, with the option of returning to part one if the advocates of the notion of crime made constructive proposals on the consequences of the distinction they upheld.

The meeting rose at 1 p.m.

2538th MEETING

Friday, 29 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: 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. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. THIAM said that, notwithstanding the endeavours of the authors of article 19 (International crimes and international delicts), lawyers would continue to associate the word crime and the distinction between a crime and a delict with the field of criminal law. It was inappropriate to use such terms to denote a phenomenon that was unrelated to crime. He wondered what the consequences would be if, as had been suggested, the word crime was replaced by "serious breach of an international obligation". According to article 53 (Obligations for all States), when a State committed an international crime, other States must not recognize the situation thus created. Surely, the same applied to any breach of an international obligation. States were furthermore required to cooperate in withholding assistance from the perpetrator. Such consequences were, in his view, derisory. If a crime had been committed, commensurate action should be taken, but the risk then arose of encroaching on the area of responsibility of the Security Council, which was a political body.

2. He had not found a single Government comment in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) that was staunchly in favour of the notion of State crime. Most States expressed serious reservations on the grounds that the concept had no basis in international law. Some even viewed it as a threat to the Commission's work of codification. Under those circumstances, it might be advisable to abandon the idea entirely. Alternatively, as suggested by the Special Rapporteur, it could be taken up as a separate topic but that would require General Assembly approval and the appointment of a new special rapporteur.

3. While he understood that some members wished to take a revolutionary step comparable to that involved in the recognition of the individual as a subject of international criminal law, he feared they had little chance of success. Under article 4 of the draft Code of Crimes against the Peace and Security of Mankind,[4] action could be taken to establish the criminal responsibility of a State where its agents had committed a crime. Such a State could be prosecuted on the grounds of international responsibility in the traditional sense of the term, but a State could not itself commit a crime.

4. Mr. MIKULKA asked Mr. Thiam whether, in his view, States were capable of committing a wrongful act that could jeopardize the fundamental interests of the international community as a whole and, if so, whether the consequences of such a wrongful act were comparable to the consequences of, for example, a breach of a trade agreement.

5. Mr. THIAM said that a State, as a legal person, could not be the direct perpetrator of a crime. It acted through its organs, consisting of natural persons, and bore responsibility for the consequences.

6. Mr. MIKULKA said that the adversaries of the ideas of the former Special Rapporteur, Mr. Roberto Ago, clearly felt a greater need to use the word crime than did their defenders. Would Mr. Thiam agree that certain norms of international law were essential for the purpose of safeguarding fundamental interests of the international community as a whole and that breaches of such norms had occurred?

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

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

[3] Ibid.

[4] See 2534th meeting, footnote 10.