CRIMINALIZING STATE RESPONSIBILITY

by

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I. INTRODUCTION

For a number of years the International Law Commission (hereinafter the ILC) has been working on a draft convention on the international responsibility of States. It is thus proposed to codify — and obviously also « progressively to develop » — yet another branch of customary international law, and one particularly ill-suited to such an operation. What indeed are the chances of codification of an anyway explosive matter at a time when States are intent on asserting their sovereignty as aggressively as ever ?

However that may be, the ILC and its Special Rapporteur, Prof. Ago, have embarked on a great scholarly work which had every chance of becoming a leading contribution on the subject, whether or not accepted as a convention. Indeed, Prof. Ago's first reports, with their enormous wealth of research and documentation, the solidity of their argument and their truly Latin clarity, assumed from the outset all the features of a great classic (1).

The break away from classicism was thus somewhat unexpected. Foreshadowed in Article 17 of the Fifth Report, it culminated in its Article 18 which reads :

Article 18. Content of the international obligation breached

> « 1. The breach by a State of an existing international obligation incumbent upon it is an internationally wrongful act, regardless of the content of the obligation breached.
>
> 2. The breach by a State of an international obligation established for the purpose of maintaining peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an « international crime ».

(1) *First Report, Yearbook of the ILC 1969,* vol. II, pp. 125-141; *Second Report, op. cit.,* 1970, vol. II, pp. 177-197; *Third Report, op. cit.,* 1971, vol. II, pp. 199-274; *Fourth Report, op. cit.,* 1972, vol. II, pp. 71-160.

3. The serious breach by a State of an international obligation established by a norm of general international law accepted and recognized as essential by the international community as a whole and having as its purpose :

(a) respect for the principle of the equal rights of all peoples and of their right of self-determination; or

(b) respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or

(c) the conservation and the free enjoyment for everyone of a resource common to all mankind

is also an « international crime ».

4. The breach by a State of any other international obligation is an « international delict » (2).

The article was taken over with modifications as Article 19 in the ILC's report to the General Assembly on the work of its twenty eighth session; it is this version which will be discussed below (3).

Whatever the differences between the two texts, their essential common proposition is partly to criminalize international law.

The possibility of a semantic confusion may be dismissed at the outset. Indeed, while it may be common — and permissible — for the layman to qualify in every day speech anything he intensely dislikes as « criminal », the lawyer enjoys no such liberty. When speaking of crime, he enters the field of penal law with all the consequences this entails, and it is no good telling the world that he introduces and handles notions of that law without really meaning it. Despite such occasional disclaimers (4), a refusal to take the proposition seriously would mean failing in courtesy to the Special Rapporteur and the Commission. It must therefore be considered and the discussion shall focus on the Special Rapporteur's draft rather than on the ILC's Report to the General Assembly which follows it very closely.

II. LEGAL NATURE OF THE INTERNATIONAL RESPONSIBILITY

To crioinalize the international responsibility of States is certainly a new venture. This novelty is borne out in a striking manner by the Report itself which analyzes at great length State practice, arbitral and judicial decisions

(2) *Fifth Report, op. cit.*, 1976; vol. II, Part One, pp. 4-54, at p. 54. Hereafter to be quoted as « Report ».

(3) See below.

(4) « ... some are of the view that « criminal » international responsibility of the State is precluded, since the concept of criminal international responsibility is for them necessarily linked to the existence of an international criminal jurisdiction, an idea which they refuse even to consider. Be that as it may, *we see no point in extending to international law the specific legal categories of internal law.* For the purposes contemplated here, we are interested not so much in determining whether the responsibility incurred by a State by reason of the breach of specific obligations does or does not entail « criminal » international responsibility as in determining

as well as the writings of publicists, to conclude in practically every case that they include nothing in support of its thesis but that things might possibly have been different from what they actually were (5). The methodological approach is thus equally new.

Thus, the Report itself bears witness to the complete absence of any penal elements in either the theory or the practice of international responsibility. The reader can therefore be referred to it for all the abundant material which directly contradicts its main proposition and which it would be redundant to reproduce here. It may, however, be important to recall Anzilotti's classical exposition of the question, not only because it has not been duly explicited in the Report but, above all, because it is believed to be as fundamental today as when it was formulated. It can briefly be summed up as follows : (a) the distinction between civil and penal responsibility is to be found exclusively in a highly developed legal order of a State but is unknown to, and incompatible with, international law (6); (b) the relationship arising out of an unlawful act in international law is one between the law-breaking and the injured State and not between the former and a superior entity (7); (c) the consequence of an unlawful act is either an agreement between the parties concerning reparation or, failing this, a dispute to be settled as any other dispute in international law (8); while the actual contents of the reparation may indeed be either compensatory or punitive (*e.g.* solemn apologies, religious or civil expiatory ceremonies, etc., intended as « satisfaction » as opposed to reparation *sensu stricto*) or both, no unwarranted conclusions as to the legal nature of the international responsibility should be drawn from such distinctions (9).

whether such responsibility is or is not « different » from that deriving from the breach of other international obligations of the State. » *Report*, p. 33, n. 154. Italics mine. Another passage of the Report emphasizes « how arbitrary it is to equate international conditions with domestic conditions », *ibid.*, p. 46.

(5) See in particular pp. 26-27, 30, 38-39, 44.

(6) « ... distinction entre la responsabilité civile et la responsabilité pénale, entre les dommages-intérêts et la peine; distinction inconnue, et même qui répugne au droit international, lequel reproduit plutôt, sur ce point également, les caractères d'une phase sociale désormais dépassée, dans laquelle, l'Etat n'étant pas encore suffisamment fort pour attirer à lui la protection du droit, ce droit se concrétisait dans une réaction de l'individu ou du groupe lésé contre l'auteur de la lésion... » COURS DE DROIT INTERNATIONAL, Trad. Gidel, Paris 1929, p. 468; *cf.* p. 522.

(7) *Ibid.*, pp. 467-468, *Cf.* p. 517 : « ... du fait illicite naît un rapport juridique qui se concrétise, en termes généraux, dans le devoir de réparer le tort commis et dans le droit correspondant d'exiger la réparation : le devoir incombe à l'Etat ou aux Etats auxquels le fait illicite est imputable; le droit appartient à l'Etat ou aux Etats qui pouvaient réclamer l'accomplissement du devoir dont l'inobservation constitue le fait illicite. Les autres Etats peuvent avoir un intérêt à ce que soit réparée l'injustice et rétabli l'ordre juridique lésé, mais ils n'y ont pas un droit : c'est exclusivement l'Etat auquel une promesse a été faite qui a un droit juridique contre l'Etat qui n'a pas exécuté la promesse. »

(8) *Ibid.*, pp. 521-522.

(9) « On a déjà observé que le droit international ne connaît pas l'opposition entre la responsabilité pénale et la responsabilité civile, entre la peine et la réparation, reproduisant plutôt, sur ce point aussi, les caractères d'une phase historique que dans le droit interne on

This view rests not only on the authority of a great name but is moreover strictly consistent with the reality of inter- State relations and with the basic difference of structure between municipal and international law. Indeed, what is and what is not criminal within the State is neither laid down by nature nor determined by a vague feeling of popular disapproval but is decided by the law-maker and enforced by the courts. In other words, the existence of a penal responsibility is conditioned by the existence of a central power, laying down heteronomous rules for the subjects and endowed with a monopoly of judgment and coercion in the common interest. Individuals, families or clans, divested by the State of all such previously held powers, are given in return legal security, a more than adequate compensation.

No such situation obtains in international law which makes a distinction between penal and civil responsibility impossible (10). There is thus no way to channel concepts of penal law into international law in the absence of all the pre-requisites for such a transfer. When faced with an attempt to smuggle into international law notions of penal law disguised as « general principles of law recognized by civilized nations » (Article 38 of the Court's Statute), M. Basdevant had this to say in a well known case before the Permanent Court :

> « Quelle est la branche du droit interne qui présente de plus grandes différences avec le droit international que le droit pénal, le droit pénal qui est un droit d'autorité établi dans chaque Etat selon ses conceptions propres, le droit pénal que l'on rencontre dans tous les Etats, mais dont nous n'avons pas l'équivalent dans l'ordre juridique international ?... Il est dangereux d'emprunter au droit pénal des concepts qu'on transporterait dans une matière où l'on ne mettrait plus en face l'un de l'autre un individu poursuivi au pénal et un Etat qui assure la répression, mais deux Etats. Le droit pénal, droit de hiérarchie et de subordination, peut difficilement inspirer le droit international, droit d'égalité et de coordination » (11).

considère généralement comme ayant été dépassée. La conception qui est à la base des rapports internationaux en cette matière est simplement celle de la réaction contre l'acte illicite. La réaction peut prendre et prend en fait des formes diverses, suivant surtout la nature de la norme violée et la gravité de la lésion; mais ces formes ne sont pas en opposition entre elles comme, dans le droit interne, sont en opposition aujourd'hui la peine et les dommages-intérêts : dans toutes se retrouve un élément satisfactoire et un élément réparatoire, l'idée de la punition de l'acte illicite et celle de la réparation du mal souffert : ce qui varie c'est plutôt la proportion entre ces deux éléments. Ces considérations expliquent pourquoi, parmi les conséquences de l'acte illicite international, on en trouve certaines auxquelles, avec les critères du droit interne, on peut attribuer le caractère pénal et d'autres qui demeurent plutôt sur le terrain de la responsabilité civile; ces considérations, en même temps, mettent en garde contre toute importance injustifiée que l'on pourrait être tenté d'attribuer aux distinctions que nous voudrions tracer. » *Ibid.*, pp. 522-523. *Cf.* GUGGENHEIM : « Les actes coercitifs que sont les représailles et la guerre, ainsi que les autres sanctions collectives, ne peuvent pas être considérés comme des « peines » au sens du droit pénal. Il leur manque pour cela le caractère rétributif et préventif. En outre, à l'encontre de la peine en droit pénal moderne, ils ne se distinguent pas de l'exécution forcée. » TRAITE DE DROIT INTERNATIONAL PUBLIC, Genève 1954, vol. II, p. 83.

(10) « ... l'absence d'une distinction entre la responsabilité pénale et la responsabilité civile n'est en droit international que la conséquence de l'absence d'autorité ayant pour fonction propre de défendre les intérêts communs. » Reuter, *Principes de droit international public,* HAGUE ACADEMY RECUEIL, 1961, vol. II, p. 586.

(11) *Phosphates in Morocco, PCIJ,* Series C N° 85, pp. 1060-1061.

Unlike civil responsibility, law of contracts, procedural law, etc., penal law is thus obviously *not* one of the branches of municipal law which can serve as a reservoir from which international law can keep borrowing new rules. The transferability of rules of penal law into international law, contested by M. Basdevant because of the basic difference of structure between the two legal orders, also founders on the truism that penal law deals necessarily with individuals, both in that its premices bear on individual psychology and in that its sanctions are applicable to individuals alone (12). No amount of anthropomorphism (13) can make the State an object of psychological analysis, just as it cannot make it liable to imprisonment or death by hanging.

III. SOME REFLECTIONS ON PENAL LAW

The above considerations should in fact render unnecessary a digression into penal law as such. Yet, some at least of the most fundamental features of that law must be recalled, if only as an additional warning against the proposal under discussion.

Such cursory and elementary reminder will necessarily be a listing of common-place truths, with no apologies offered. To quote Talleyrand : « cela va sans dire, cela va encore mieux en le disant. »

To begin with, there is the basic difference between the legal — and human — values which are at stake under civil and under penal law respectively. In civil proceedings, what is at stake is essentially a man's property; in criminal proceedings it may be a man's life, his freedom, his honour, his reputation, — with his property possibly to boot. The values in both cases are thus not of the same order. This is why the penal law of civilized States has developed highly sophisticated guarantees, both substantive and procedural, to protect the legal security of the individual.

Outstandig among these guarantees is the principle of legality, expressed in the formula *nullum crimen sine lege,* to be quite precise, *nullum crimen, nulla poena sine lege poenali anteriori.* No one can be punished for an act other than the one expressly determined by the law in force at the time of commission. In other words, the principle implies a most extreme precision in the formulation of punishable acts and, at the same time, rigorously excludes all recourse to analogy which civil law freely admits (14).

(12) This holds good even if the possibility of inflicting fines on juridical persons in penal administrative law is admitted. For the discussion of the problem of the criminal responsibility of juridical persons see LOGOZ, COMMENTAIRE DU CODE PENAL SUISSE, 2e éd., Neuchâtel - Paris, 1976, pp. 59-61.

(13) Expressions like « the State itself », used in the Report, seem to point dangerously in this direction. See pp. 33 and 54.

(14) A concrete example may be useful. Article 1 of the Swiss Penal Code says : « Nul ne peut être puni s'il n'a pas commis un acte expressément réprimé par la loi. » As against this, Article 1 of the Swiss Civil Code lays down : « La loi régit toutes les matières auxquelles se rapportent la lettre ou l'esprit de l'une de ses dispositions. A défaut d'une disposition légale applicable, le juge

Here is a principle without which no *Rechtsstaat* (State governed by the rule of law) is conceivable at all. It breaks down when the *Rechtsstaat* breaks down. Among examples of such breakdowns in Europe, hitlerite Germany takes pride of place : it was in the inherent logic of the most pathological of European totalitarian regimes to abolish the principle of legality, to authorize analogy and to introduce « *gesundes Volksempfinden* » (« sound popular feeling ») as a criterion of punishable acts not foreseen by law.

International lawyers will remember the — admittedly exceptional — case in which the international judge had to pronounce on this — admittedly internal — legal problem, *viz.* the case of the *Consistency of certain Danzig Legislative Decrees with the Constitution of the Free City* which came up before the Permanent Court of International Justice for an advisory opinion in 1935 (15). In that year, the Senate of the Free City of Danzig adopted two decrees amending respectively the Penal Code and the Code of Criminal Procedure, faithfully following the amendments already made in the Reich. The Court was asked by the Council of the League of Nations whether in its view the decrees were consistent with the Constitution of the Free City.

It may not be superflous to quote here the relevant excerpts of the Court's opinion even at some length.

> « The Penal Code in force in Danzig prior to the promulgation of the decrees, in its Article 2, paragraph 1, provided : « An act is only punishable if the penalty applicable to it was already prescribed by a law in force before the commission of the act. » This provision gives expression to the well-known twofold maxim : *Nullum crimen sine lege,* and *Nulla poena sine lege.* The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case. A penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy » (16).
>
> « Under the two decrees a person may be prosecuted and punished not only in virtue of an express provision of the law, as heretofore, but also in accordance with the fundamental idea of a law and in accordance with sound popular feeling.
>
> Whatever may be the relation between the two elements — whether it be, as suggested by the wording of the first decree, that the act to be punished must in any case fall within the fundamental idea of the law and yet escape punishment unless condemned by sound popular feeling, or whether it be, as suggested by the wording of the second decree, that attention is first to be paid to the question of what is condemned by sound popular feeling but no prosecution initiated or punishment imposed unless the act falls within the fundamental idea of some penal law — it is clear that the decision whether an act does or does not fall within the fundamental idea of a penal law, and also whether or not that act is condemned by sound popular feeling, is left to the individual judge or to the Public Prosecutor to determine. It is not a question of applying the text of the law itself — which presumably will be in terms equally clear both to the judge and to the person who is accused. It is a question of

prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur. Il s'inspire des solutions consacrées par la doctrine et la jurisprudence. »

(15) *PCIJ,* Series A/B N° 65.

(16) *Ibid.,* p. 51.

applying what the judge (or the Public Prosecutor) believes to be in accordance with the fundamental idea of the law, and what the judge (or the Public Prosecutor) believes to be condemned by sound popular feeling. A judge's belief as to what was the intention which underlay a law is essentially a matter of individual appreciation of the fact, so is his opinion as to what is condemned by sound popular feeling. Instead of applying a penal law equally clear to both the judge and the party accused, as was the case under the criminal law previously in force at Danzig, there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.

Nor should it be overlooked that an individual opinion as to what was the intention which underlay a law, or an individual opinion as to what is condemned by sound popular feeling, will vary from man to man. Sound popular feeling is a very elusive standard. It was defined by the Agent of the Free City as *« une conviction correspondant aux strictes exigences de la morale »*. This definition covers the whole extra-legal field of what is right and what is wrong according to one's ethical code or religious sentiments. Hence it follows that sound popular feeling may mean different rules of conduct in the minds of those who are to act in accordance therewith. It is for this reason that legislation is necessary in order to lay down the precise limits between *morale* and law. An alleged test of sound popular feeling, even when coupled with the condition providing for the application of the fundamental idea of a penal law, could not afford to individuals any sufficient indication of the limits beyond which their acts are punishable » (17).

The Court then went on to say that the Constitution of the Free City was one of a *Rechtsstaat* and, after analyzing that concept, concluded that the two penal decrees were inconsistent with the Constitution, *i.e.,* with the *Rechtsstaat.*

Such is the fundamental principle of legality of penal law in a *Rechtsstaat* and, indeed, in any community with the slightest claim to civilization. Nor should other guarantees be forgotten : the non-retroactivity of the penal law, implicit in the principle *nullum crimen;* the clear statement of sanctions to be applied to every punishable act, even though a measure of discretion is left here to the judge within the limits of the law; the principle of personality which demands that the author of the act and the subject of sanction be identical, thus excluding any form of collective or vicarious responsibility; the presumption of the innocence of the accused person which lays the burden of proof on the prosecution; the principle *in dubio pro reo,* to mention the most important ones. However much details may vary from one legislation to another, there remains in all civilized systems of law this imposing *corpus* of legal guarantees to protect the highest values of the human being against lawlessness, arbitrariness and, as far as possible, even error.

No person, says a great constitutional text, shall « be deprived of life, liberty, or property, without due process of law ». (U.S. Constitution, Fifth Amendment).

(17) *Ibid.,* pp. 52-53.

IV. ARGUMENTS IN FAVOUR OF A CRIMINALIZATION OF INTERNATIONAL RESPONSIBILITY

It is in the light of these principles of penal law that the suggested criminalization of international responsibility must be examined in greater detail, the obvious questions being : *Quid,* in the first place, of the legal security of the future « accused » States ? *Quid,* to repeat the terms of the Permanent Court, of the « sufficient indication of the limits beyond which their acts are punishable » ? (18) *Quid,* in other words, of that basic bulwark of civilization and, indeed, common decency, which is embodied in the principle *nullum crimen sine lege ?* How is the system to work ? What other sanctions than those already provided for by international law are to be applied to the « culprit » State ?

Faced with such formidable problems, the Special Rapporteur and, after him, the ILC obviously mustered all possible arguments in favour of their position. It is therefore to these arguments that we must now turn.

Predictably enough, the Report's reasoning is laborious. A highly emotional passage on how bad war and colonial domination are, leads to the first conclusion that « some new rules of international law have appeared, others in the process of formation have been definitively secured, and still others, already in existence, have taken on a new vigour and a more marked significance » (19). It would not be easy to fit this argument into any coherent theory of sources; while the « appearance of new rules » does convey a definite meaning, it is difficult to see how they differ from « other » rules « definitively secured », (all the more so as they are at the same time only « in the process of formation »), or what is meant by « new vigour » and a « more marked significance » of a third group. In any event, all three groups of rules are supposed to impose on individual States obligations to the « entire international community ». This has apparently led to the conviction that a breach of these obligations is not « like any other » and must therefore be subject to a different regime of responsibility.

This conviction in turn is evidenced by *(a)* the *jus cogens, (b)* the individual criminal responsibility of individuals-State organs under international law, and *(c)* the prohibition by the U.N. Charter of the threat and use of force (20).

(a) It will be sufficient to refer here to the existing critical literature (21), as

(18) See above.

(19) *Report,* p. 31.

(20) *Ibid.*

(21) *E.g.* Schwarzenberger's famous article, *International* Jus Cogens, TEXAS LAW REVIEW, 1965, p. 477; REUTER, LA CONVENTION DE VIENNE SUR LE DROIT DES TRAITES, Armand Colin, Paris 1970, pp. 20-23; Marek, *Contribution à l'étude* du jus cogens *en droit international,* RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM, Genève 1968, pp. 426-459. See above all the unanswerable observations by ROUSSEAU : « ... il n'existe en doctrine aucun accord général sur la nature du *jus cogens* — certains auteurs différenciant à cet égard les règles « obligatoires » des règles « impératives » — ni sur son contenu, dans lequel on a rangé tour à tour les principes de la morale

well as to the equally critical official comment (22) on *jus cogens*. Defying all intellectual rigour, lacking any clear meaning, ready-made for use and abuse, this fashionable notion is an ideal instrument of legal insecurity. Indeed, after having been employed to introduce insecurity into the law of treaties (23), it is now invoked for the same purpose with regard to international responsibility.

One obscure notion — that of *jus cogens* — is thus to serve as a basis for another obscure notion — that of international criminal responsibility —, an operation known as defining *ignotum per ignotum*. How much further can this method be indulged in without finally undermining the fundamental structures of international law ? (24)

(b) The controversial issue of the trials of war criminals, bearing as it does on the punishment of *individuals* under international law, is strictly irrelevant to the problem of « punishment » of States.

(c) To claim any effectiveness for the Charter provisions on the prohibition of the threat and use of force is sheer fantasy. Facts being what they are,

universelle, les règles de droit international général ayant un objet humanitaire, les principes de la coexistence pacifique, la non reconnaissance des situations de fait établies en violation du droit international, les dispositions de la Charte des Nations Unies concernant l'interdiction du recours à la force, c'est-à-dire un ensemble de normes dont les unes ont et dont les autres n'ont pas une force d'application effective. » DROIT INTERNATIONAL PUBLIC, Tome I. Introduction et Sources, Sirey, Paris 1970, p. 150. *Cf.* in particular his comment en Article 53 of the Convention on the Law of Treaties, bearing on the *jus cogens :* « Cette formule est peu satisfaisante en ce qu'elle répond à la question par la question. Dire qu'une norme internationale est impérative parce qu'elle n'est pas susceptible de dérogation n'est pas une réponse très sérieuse au problème posé. Il resterait en effet à rechercher pourquoi il n'est pas possible de déroger à une telle norme et il est à craindre que la seule réponse valable soit précisément tirée du caractère impératif attribué à la norme en question. Le débat est dès lors insoluble, à moins de faire appel à des considérations de droit naturel ou — ce qui serait pire — *à des considérations d'ordre politique ou idéologique imposées par voie majoritaire et abusivement érigées en règles pseudo-juridiques. » Ibid.*, p. 151. Italics mine.

(22) Qualified as « Pandora's box » by the United Kingdom delegate — UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, FIRST SESSION, OFFICIAL RECORDS, p. 330 - the proposed article on *jus cogens* was subject to vigorous criticisms at both sessions of the Vienna Conference. See *e.g.* comments by the United Kingdom, *ibid.*, pp. 304-305, New Zealand, *ibid.*, p. 312, Australia, *ibid.*, p. 316, Monaco, *ibid.*, p. 324, Norway, *ibid.*, p. 325. The criticism continued at the second session. The French delegate in particular insisted on the keynote of the proposed article being « imprecision, imprecision as to the present scope of *jus cogens,* imprecision as to how the norms it implied were formed and imprecision as to its effects. » SECOND SESSION, OFFICIAL RECORDS, p. 94.

(23) « ... [de faire] pénétrer, à titre permanent, la contestation dans le droit des traités. » French observations on the *jus cogens,* LA DOCUMENTATION FRANÇAISE, NOTES ET ETUDES DOCUMENTAIRES, 25.9.1969, N° 3622. *Cf.* the statement of M. Bindschedler (Switzerland) at the second session of the Vienna Conference on the Law of Treaties : « To introduce the notion of peremptory norms of international law without providing any definition of those norms was calculated to give rise to serious legal dangers. » SECOND SESSION, OFFICIAL RECORDS, p. 123.

(24) « ... des forces nouvelles travaillent avec des arrière-pensées politiques et dans la confusion; ce sont ainsi des structures fondamentales de la société internationale qui sont mises en cause. » REUTER, *op. cit.*, p. 21.

discussion of this point can be dispensed with. Nor is it possible to assert the existence of a customary rule of that content. Some prominent authors (Kelsen, Guggenheim) have indeed claimed at a certain time that customary rules can arise out of practice alone, without the *opinio juris sive necessitatis.* Are we now invited to believe that they can arise out of the *opinio juris* alone, without any corresponding practice, nay, in face of a practice to the contrary ?

But, one wonders, is there even so much as a genuine *opinio juris* — as distinguished from mere lip service — concerning the prohibition of the use of force ? The negative answer results from the actual conduct of States, not from their verbal exercises; suffice it to refer to the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, — unless we accept the extraordinary idea of a law-maker legally regulating the performance of unlawful acts.

Notwithstanding such considerations, the Special Rapporteur then goes on to ask whether *apartheid,* racial discrimination and colonial rule are to be assimilated to acts for which the Charter provides a special system of reaction, *i.e.* a threat to the peace, a breach of peace or an act of aggression (25). Judging from the superabundant production of the General Assembly, the answer should be « yes ». However, the Special Rapporteur himself recognizes that there are quite a few difficulties with States who beg to differ. Thus, we are told that « it would probably be premature to conclude that most States consider that such breaches should lead to the application of each one of the enforcement measures provided for in the Charter for the prevention and suppression of threats to the peace, breaches of the peace and acts of aggression », that the idea of the Charter legitimizing « the application, by third States, of enforcement measures involving the use of force against State practising *apartheid* or maintaining colonial domination over other countries is seriously questioned by a considerable number of States », that « some Governments doubt whether the General Assembly — or even the Security Council — has the power to remove by recommendations alone the prohibition of the use of force established by the Charter... », etc. (26). In spite of such misgivings, the Report unexpectedly concludes that « the international community as a whole now seems to recognize that acts such as the maintenance by force of *apartheid* and colonial domination constitute internationally wrongful acts and particularly serious wrongful acts », whatever the measures with which they are to be countered.

But, however that may be, whether or not the Charter provides any legal basis for this position, does not in fact really matter. For, « even if the Charter is not taken in acount, [there are] principles which are now so deeply

(25) *Report,* p. 35.
(26) *Ibid.,* p. 37.
(27) *Ibid.,* pp. 37-38.

embedded in the consciousness of mankind that they have become particularly important rules of general international law » (28).

The statement is certainly a novelty in the theory of sources of international law : it would thus appear that it is enough for certain « principles » to be « deeply embedded in the consciousness of mankind » to become *ipso jure* binding — and, moreover, « particularly important » — rules of international law, without any further procedure, one is tempted to say, without more ado. It would probably be indelicate to ask how deeply they should be embedded, how the consciousness is to be ascertained or who speaks for mankind. The latter notion, whether under the present label or under that of « international community as a whole » will have to be discussed in greater detail at a later stage (29). The universal consciousness, however, which, *faute de mieux,* constitutes the ultimate foundation of the reasoning analyzed, calls for immediate comment.

The most striking feature of this consciousness seems to be its strict limitation *ratione materiae,* consequently also *ratione personae,* bearing as it does on *apartheid,* racial discrimination and colonial domination. Regarding more particularly the latter, the obvious question is whether the remaining number of relevant cases justifies both this general sensitivity and the laying down of a general rule. Nevertheless, the problem looms large in the Report as the most burning single issue. The following is one of many typical statements on the subject :

> « The maintenance of one country's colonial domination over another appears intolerable today not only to the people that is the victim of that domination but to the totality of an inter-State society actively aware of the equality of all peoples and of their right, equally possessed by all, to organize their political and social life in a completely independent manner » (30).

The conclusion is implicit but inescapable : all other forms of domination and human suffering are considered tolerable and leave the universal conscience at peace. The point shall be left uncommented upon.

Even so limited in its feelings, how general is this consciousness of the peoples ? Summing up the debates on the ILC draft in the Sixth Committee, the Report quotes supporting statements by Iraq, the German Democratic Republic, the USSR, Cyprus, the Byelorussian SSR, the Ukrainian SSR, Syria and Hungary (31). The sample roughly corresponds to the list of contemporary writers favouring the notion of international crimes (32). *Sapienti sat.*

Such are the developments of the Report which lead to the following ominous statement :

(28) *Ibid.,* p. 39.
(29) See below.
(30) *Report,* p. 52.
(31) *Ibid.,* pp. 39-40.
(32) *Ibid.,* pp. 45-50.

« Even if, in the article we now propose to adopt, we were to specify individually the categories of international obligations whose breach is an international crime, *there would nevertheless remain a considerable margin of uncertainty concerning the question whether an act of a State should be categorized as* an " international crime " » (33).

That these developments have resulted in a « considerable margin of uncertainty » is not surprising and would in itself not even be particularly important if the uncertainty were not part and parcel of a proposed international *penal* law. As it is, in the admitted impossibility of identifying the « criminal » acts, the uncertainty is organically built into the proposed new system, in sheer defiance of all principles of civilized penal law (34). To put it in the simplest terms : it is proposed to qualify as criminal and accordingly to punish certain acts without being able clearly to say what they are.

This then is what remains of the principle *nullum crimen sine lege* in the proposed international penal law. It is bad enough. And the constant reference to the « consciousness of peoples » as a criterion to use in the absence of all precise determination of punishable acts is worse still. It calls to mind the « gesundes Volksempfinden » — the « sound popular feeling » (35) — in action.

Such is the foundation of Article 18 proposed by the Special Rapporteur (36). This article has been approved as amended by the ILC and now appears as Article 19 in the ILC draft. It is this final version of the Commission which will be analyzed.

V. ARTICLE 19 OF THE ILC DRAFT

Article 19 reads :

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia,* from :

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(33) *Ibid.,* p. 53. Italics mine.

(34) See above.

(35) See above.

(36) See above.

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid;*

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict (37).

It will be noted at the outset that the « considerable margin of uncertainty » as to what is and what is not an « international crime », regretfully admitted by the Special Rapporteur (38), is here proclaimed without regrets, indeed, with a vengeance.

Uncertainty begins immediately in paragraph 2, purporting to define the « international crime ». It does so in flagrant breach of the principle *nullum crimen sine lege,* according to which « the law alone determines and defines an offence » (39). The offence here is not determined by law, it has no relation to law, it is determined by two vague and subjective criteria : (1) a certain « quality » of the obligation breached (« essential for the protection of fundamental interests of the international community ») and (2) the recognition of the act as criminal by the « international community as a whole ».

The two criteria are linked together by the latter notion whose introduction into Article 53 of the Vienna Convention on the Law of Treaties on *jus cogens* raised more questions than it solved. This is how these questions were formulated at the Vienna Conference by the delegate of France :

« What was meant by norms defined as norms « accepted and recognized by the international community of States as a whole » ? Did that mean that the formation of such norms required the unanimous consent of all States constituting the international community, or merely the assent of a large number of States but not of them all ? If the latter, how large was the number to be and what calculations would have to be resorted to before it would be admitted that it had been reached ? Who would decide in the event of a dispute ?... In fact, if article 50 [that was the numbering of article on *jus cogens* at the time] was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes,* then the result would be to create an international source of law subject to no control and lacking all responsibility » (40).

As these questions have never been answered, they continue to apply in the present context and can be reformulated in the following enlarged manner.

(a) Is there an international community ?

« La doctrine classique du droit des gens — says Charles De Visscher — reposait sur un postulat : celui d'une société organique des Etats, d'une synthèse des souverainetés étatiques et de la communauté internationale conçue comme la base d'un

(37) Yearbook of the ILC 1976, vol. II, Part Two, p. 75.

(38) See above, p. ?

(39) *PCIJ,* Series A/B 65, p. 51.

(40) OFFICIAL RECORDS, SECOND SESSION, p. 94.

ordre juridique universel. C'est là une vue des choses dont on a pu dire qu'elle exige, par les temps actuels, un certain sens de l'humour, et dont nous nous sentons singulièrement éloignés » (41).

And more recently :

« La communauté internationale est un ordre en puissance dans l'esprit des hommes; elle ne correspond pas à un ordre effectivement établi » (42).

If then the notion of « international community » is seriously questionable, the words « as a whole » can hardly make matters any clearer.

(b) Even admitting, for the sake of argument, the existence of such a community, does it in fact possess common fundamental interests or is it, on the contrary, torn by contradictory interests which it is precisely the foremost function of international law to conciliate ? Max Huber answered this question in the *Island of Palmas* arbitration and his answer seems as true today as it was then :

« International law, like law in general, has the object of assuring the coexistence of *different* interests which are worthy of legal protection » (43).

Moreover, — once again *posito sed non concesso* — are such interests, whether common or different, always *legal* interests ?

The question loomed large in the *Nuclear Tests case* before the International Court of Justice. Was the — very real — interest of Australia and New Zealand not to be exposed to possible dangers resulting from the French nuclear tests in the Pacific a *legal* interest ? Were the French tests an undesirable or an *unlawful* act ? In other words, was there a legal rule governing the matter ?

As the Court failed to consider this question (despite its crucial importance for the admissibility of the application), it was taken up and answered in the negative in several dissenting and separate opinions. Thus, Judge Ignacio-Pinto, declaring himself « strongly opposed » (the original French wording « *adversaire acharné* » is much more forceful) to « all such tests » (44), had this to say on the subject :

« In the present state of international law, the « apprehension » of a State, or « anxiety », « the risk of atomic radiation », do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests.

(41) *Discours présidentiel,* Institut de droit international, session de Bruxelles 1948, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 1948, pp. 139-140.

(42) THEORIES ET REALITES EN DROIT INTERNATIONAL PUBLIC, 4th ed., Pedone, Paris 1970, p. 123.

(43) United Nations, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, vol. II, p. 870. Italics mine.

(44) *Nuclear Tests (Australia v. France), Interim Protection,* Order of 22 June 1973, *ICJ Reports 1973,* p. 33.

> Those who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of the law » (45).

The same attitude was taken by Judge Petrén who said :

> « ... what is first and foremost necessary ... is to ask oneself whether atmospheric tests of nuclear weapons are, generally speaking, already governed by norms of international law, or whether they do not still belong to a highly political domain where the norms concerning their international legality or illegality are still at the gestation stage.
>
> Certainly, the existence of nuclear weapons and the tests serving to perfect and multiply them, are among the foremost subject of dread for mankind today. To exorcise their spectre is, however, primarily a matter for statesmen. One must hope that they will one day succeed in establishing a state of affairs, both political and legal, which will shield the whole of mankind from the anxiety created by nuclear arms. Meanwhile there is the question whether the moment has already come when an international tribunal is the appropriate recipient of an application like that directed in the present case against but one of the present nuclear Powers » (46).

To sum up : not every interest, however vital or possibly even respectable, is a legal interest.

(c) Finally, there remains the question in what orderly procedure is the recognition by the « international community as a whole » of an act as criminal to be ascertained. To this question, the stipulation examined provides no answer whatsoever.

Thus, paragraph 2 of Article 19 reveals itself to be a model of imprecision, a real *mare tenebrarum.* Is there any *lux post tenebras* to be found in what follows ?

There is none. A crime so « defined » may, according to paragraph 3, result *inter alia* from a number of breaches there listed. The *« inter alia »* in a text purporting to be penal law surely is a historical achievement. The reader is invited to make his own reflections on a penal code whose Special Part would begin by an *« inter alia »* clause.

The « catalogue of crimes » — subparagraphs (a) to (d) —, probably meant to correspond to what is precisely the Special Part of a penal code, is thus declared not exhaustive and freely extensible — in what manner ? by whom ? to cover what ?

The enumeration, which follows, of punishable acts, states in each case the existence of an alleged obligation, invariably followed by the words « such as », the obligations being obviously only one of the possible instances of the alleged rules whose breach results in crime. The general extensibility announced at the outset by the *« inter alia »* clause is thus made operative in

(45) *Ibid.*, p. 132.

(46) *Ibid.*, p. 127. *Cf.* Judge Petrén's separate opinion in the judgment on the merits, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *ICJ Reports 1974*, pp. 302-303. *Cf.* also the separate opinions of Judges Gros and De Castro, pp. 286-297 and 387-388.

every particular case. There is no limit to further criminalization and the advance knowledge of what may or may not be recognized as criminal is withheld from the future « accused » State. It may be wondered why, in view of the « *inter alia* » and the « such as », the drafters of this rubber text have bothered at all to proceed to an enumeration.

But proceed they did. Therefore, though this is neither the place nor the time to examine in depth the chosen examples of « international crimes », a few words at least must be said about each of the four « such as » examples.

(a) the notion of aggression has proved so ill-suited to all attempts at definition undertaken by two international organizations for over fifty years that it has been more than once declared undefinable (47). It remains more undefined than ever in spite of — or because of ? — the Draft Convention on the Definition of Aggression, adopted by the General Assembly on December 14th, 1974 [Res. 3314 (XXIX)]. Readers who may be startled by this assertion are referred to Professor Stone's brilliant analysis of this « remarkable text » which « appears to have codified into itself (and in some respects extended) all the main « juridical loopholes and pretexts to unleash aggression » available under preexisting international law, as modified by the UN Charter » (48). A text-book example of « conflict through consensus », building « into itself the head-on conflicts in the standpoints of states » (49), culminating in the « saving clause » of Article 7 (50), the Draft Convention is in fact « *an agreement on phrases with no agreement as to their meaning* » (51).

(47) « La détermination du cas d'agression n'apparaît pas susceptible dans les conditions de la guerre moderne de recevoir une solution même théorique. » Report on the Draft Treaty of Mutual Assistance, submitted by M. Benès to the IV League of Nations Assembly in 1923. Quoted by Bourquin, *Le problème de la sécurité internationale,* HAGUE ACADEMY RECUEIL, 1934, vol. III, p. 506 (38). *Cf.* Second Report by M. J. Spiropoulos, ILC Special Rapporteur on a Draft Code of Offences against the Peace and Security of Mankind : « ... our conclusion is that the notion of aggression is a notion *per se,* a primary notion, which, by its very essence, is not susceptible of definition. » Yearbook of the ILC 1951, vol. II, p. 69. *Cf.* also STONE, AGGRESSION AND WORLD ORDER, London, Stevens & Sons Ltd., 1958, *passim.*

(48) Stone, *Hopes and Loopholes in the 1974 Definition of Aggression,* 71 AJIL (1977), pp. 224-246.

(49) *Ibid.,* p. 224.

(50) *Ibid.,* p. 225.

(51) *Ibid.,* p. 243. « On no matter are the post-consensus assertions of contradictory interpretations more numerous and vociferous. » *Ibid.,* p. 234. « So far as the perpetrator of aggression was concerned, Third World states, championing the right of peoples to struggle *by armed force* for self-determination, were, of course, determined that *their* use of armed force should not stigmatize *them* as aggressors — that is, that « a State » should not (for this purpose) be interpreted to include such a « people ». So far as the *victim* of aggression was concerned, the same advocates were no less obviously resolved that « State » should be read to include « a people » so struggling. Western states were opposed to this latter dispensation for non-state entities to use armed force, especially since it was proposed to extend it to any third states which chose to assist them in such armed struggles. The Soviet Union and the Soviet bloc states wished both to insist on the state-to-state requirement and to support the use of armed force in " wars of liberation ". » *Ibid.,* p. 234. « Communist bloc states, of course, gave strong support to the claims that force may be used in struggles for self-determination. But they also tried to secure the best of

The « crime » determined with such precision is said to result from the breach of the obligation to maintain international peace and security. The effectiveness of that alleged rule has already been discussed (52).

(b) The « maintenance by force of colonial domination » is here raised to the rank of an « international crime » at a time when decolonization has practically been completed, except for a few well-known cases which call for individual decisions, not for a general rule (53). As to an « establishment » of such domination, it is nowhere in sight, — unless one considers other types of « colonial domination », but this is not what is meant here.

This « crime » is supposed to result from the breach of an obligation to safeguard the right of self-determination of peoples. It may be worth recalling that this alleged right is a political principle (54) which may serve both noble and destructive ends but which, by its very nature, is not and cannot be formulated as a legal rule (55).

(c) Ever since Saudi Arabia became the last State in the world to abolish officially slavery in 1962 (56) the problem can be considered as non-existent, provided it is not confused with other forms of human oppression of which examples abound, even though, as has been seen, they do not unduly disturb the « conscience of peoples » (57). The obligation to abstain from mass murder is indeed a principle « recognized by civilized nations as binding on States, even without any conventional obligation » (58). After the Second World War, those guilty of mass murder were punished, in many cases by death, both on the international and municipal level. It was the only conceivable punishment of *individuals,* not of *States,* and the same solution of individual penal responsibility is, reasonably enough, proclaimed even by the otherwise unfortunate Convention on the Prevention and Punishment of the Crime of Genocide (59). The same solution is adhered to by the Convention on the Suppression and Punishment of the Crime of Apartheid, the

both worlds by stressing that only struggles against *« colonial »* or *« racist »* oppressors were saved by Article 7 and also... that « police action » by an established state within its sovereign domains remained lawful. » *Ibid.,* p. 234.

(52) See above.

(53) See above.

(54) See the *Aaland Islands case,* League of Nations, Official Journal, Special Supplement N° 3, October 1920.

(55) « ... juridically, the notion of a « legal » right of self-determination is nonsense... » SIR GERALD FITZMAURICE, THE FUTURE OF PUBLIC INTERNATIONAL LAW AND OF THE INTERNATIONAL LEGAL SYSTEM IN THE CIRCUMSTANCES OF TODAY. Special Report, Institut de Droit international, Genève 1973, p. 38. See also Marek, *Reflections on Contemporary Law-Making in International Law,* in INTERNATIONAL RELATIONS IN A CHANGING WORLD, Institut universitaire de hautes études internationales, Genève 1977, p 378, for the literature quoted.

(56) See DESCHAMPS, HISTOIRE DE LA TRAITE DES NOIRS DE L'ANTIQUITE A NOS JOURS, Fayard 1971, p. 303.

(57) See above.

(58) *Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951,* p. 23.

(59) See the Special Rapporteur's own comment on the Convention, *Report,* p. 38.

object of which differs radically from that of the Genocide Convention, bearing as it does on one isolated type of practice in one single State (60).

All three, slavery, genocide and *apartheid,* are supposed to be examples of violations of the obligations to safeguard « the human being ». Suffice it to say that, contrary to specifie regional solutions (the European Convention for the Safeguarding of Human Rights, with its highly developed enforcement mechanisms, and, within incomparably more modest limits, the Inter-American Commission on Human Rights) (61), no protection of human rights can seriously be said to exist on the international plane (62).

(d) Regarding pollution, there seem to be no customary rules on the subject other than those resulting from the principle of good neighbourliness (63) and, consequently, requiring in every case the clear identification of the injured, *i.e.,* potential plaintiff State, — a requirement which can hardly be met for example in most instances of pollution of the high seas (64). As for the numerous conventions, they are all limited either *ratione personae* or *ratione materiae* or *ratione loci* (65). Particularly interesting is the weakness, in most cases, of the relevant mechanisms for invoking and determining the international responsibility of a would-be culprit State. To quote an example : the 1958 Geneva Convention on the High Seas lays down, in Articles 24 and 25, rules to prevent pollution, however limited *ratione materiae* they may be (66). The Convention is now in force between 56 States; however, only 34 States have acceded to the Optional Protocol, appended to the Convention and providing for the compulsory jurisdiction of the Court. States have thus once

(60) Note the Special Rapporteur's comment on this Convention not receiving « the same broad and unconditional unanimous support as the Convention on Genocide. » *Ibid.* Indeed, it entered into force on July 18th, 1976, owing to the required number of ratifications, forthcoming exclusively from the Communist and Third World States.

(61) See SCHREIBER, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Sijthoff/Leyden 1970. Since this has been written, the American Convention on Human Rights, signed in 1969 in San José, Costa Rica, has come into force on July 7th, 1978, following the deposit of the 11 ratifications required (Columbia, Costa Rica, Ecuador, Haiti, Honduras, the Dominican Republic, Venezuela, Guatemala, El Salvador, Panama, Grenada). Its mechanisms, modelled on the European Convention, have not yet begun to function. I am indebted for this information to Dr Oscar Godoy, Director of the European Office of the Organization of American States in Geneva.

(62) For comment on the reality of the UN Covenants on Human Rights of 1966, see Jenks, *The United Nations Covenants on Human Rights Come to Life,* in RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM, Genève 1968, p. 809. The activities of the UN Rights Commission had better be charitably passed over in silence.

(63) See the *Trail Smelter Arbitration,* UNITED NATIONS, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, vol. III, pp. 1905-1982.

(64) See Caflisch, *International Law and Ocean Pollution : The Present and the Future,* REVUE BELGE DE DROIT INTERNATIONAL 1/1972, pp. 16-17 and 23.

(65) *Ibid.,* pp. 22, 25, 27-28.

(66) *Ibid.,* p. 22.

again shown the contemporary reluctance to submit even to the « classical » mechanism of the « classical » responsibility (67).

This being the case concerning both the substantive rules and the acceptance of dispute settlement mechanisms, a criminalization of acts of pollution appears miles away from the actual reality.

It may further be noted that there is no trace of « criminal » activities and their « criminal » consequences in matters of pollution in the Informal Composite Negotiating Text of the Third U.N. Conference on the Law of the Sea (68) which certainly deals very extensively with the problem.

VI. LEGAL CONSEQUENCES OF AN UNLAWFUL ACT

1. As the Special Rapporteur rightly points out, a differentiation of international unlawful acts into ordinary delicts and crimes is meaningful only if it leads to different consequences, *i.e.,* to two different « systems of responsibility » (69). It would appear from his further developments that the system of reparation is good enough for « delicts », whereas « crimes » would require a system of sanctions, in fact, « a far stricter régime of penal sanctions » (70).

This would seem to be an illustration of a frequent confusion in the matter, namely, of the idea that two paths lead from the unlawful act, one to reparation, the other to sanction. But there is in fact only one path with two possible — but not necessary — stages : (1) reparation and (2) sanction. While reparation is a possible — and desirable — consequence of an unlawful act, it is *not* a sanction, if the latter term is correctly taken to mean a unilateral act of coercion, a harm inflicted on the State author of the unlawful act. Far from being unilateral, reparation is on the contrary the result of an agreement between the author of an unlawful act and the injured State, an agreement reached either directly or indirectly, through the intermediary of the judge or the arbitrator. Only if there is no agreement, does the unilateral act of sanction take place, which it is precisely the purpose of the reparation to avoid.

This view, represented by most distinguished authors (71), corresponds to a consistent practice of States and international tribunals. Suffice it to quote

(67) See, however, Articles 288 and 296 (2) (b) and (c) of the Informal Composite Negotiating Text (ICNT) of 15 July 1977, discussed by the Third UN Conference on the Law of the Sea. The ICNT is reprinted in the Official Records of the Conference, vol. VIII (document A/CONF. 62/WP. 10).

(68) See note 67.

(69) *Report,* p. 26.

(70) *Ibid.,* p. 45.

(71) See in particular Kelsen, *Unrecht und Unrechtsfolge,* ZEITSCHRIFT FUR ÖFFENTLICHES RECHT, Bd. XII, Heft 4, 1932, pp. 545-560; GUGGENHEIM, *op. cit.,* (see note 9), pp. 63-65 and 82-83.

here by way of example the case of *Naulilaa,* a text-book illustration, summed up with all desirable clarity in the Report (72).

There are thus no « two systems of responsibility » in international law, one limited to reparation and another operating with sanctions. There is but one sole system encompassing both reparation and sanction, the latter intervening in cases when reparation has been duly asked for and refused.

No less interesting is the actual *content* of the special « penal » sanctions which the Special Rapporteur and the ILC have so far withheld from our knowledge. What can be done to the « criminal » State, over and above the classical sanctions which have been resorted to in practice, which have been listed by the doctrine and were incorporated into both the Covenant of the League of Nations and the UN Charter ? In view of the already mentioned impossibility of having a State put in prison or executed, it is indeed difficult to imagine a new type of sanction to fit an international crime, which would be different from « complete or partial interruption of economic relations and of rail, sea air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations », with possibly non-recognition or withdrawal of recognition to boot, or « action by air, sea or land forces » including « demonstrations, blockade, and other operations by air, sea, or land forces... » The list of sanctions seems thus less extensible than that of « crimes », and it is not up to the present writer to speculate what extra horrors the ILC may keep in store for the future culprit. If none, the *raison d'être* of the whole differentiation between « delicts » and « crimes » falls flat and the whole exercise proves redundant.

2. The second question under this heading concerns the legal relationship resulting from an unlawful act. It has been seen (73) that this relationship is only and exclusively one between the State author of such an act and the injured State, this in turn being the simple consequence of the absence of a central power in international law. As against that, the Report claims that there exist obligations of individual States towards the international community as a whole and that, consequently, their violation entails a legal relationship between the State in question and this community. To justify such an assertion, the Report relies *inter alia* on a *dictum* of the ICJ in the case of *Barcelona Traction* on page 32 of the judgment (74) and it may be regretted that it stops short of quoting another *dictum* in the same judgment on page 47 which is exactly to the contrary. The two passages may therefore be reproduced.

> « When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These

(72) *Report,* p. 28. *Responsibility of Germany arising out of damage caused in the Portuguese colonies of Southern Africa (Naulilaa incident),* UNITED NATIONS, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, vol. II, p. 1025 ff.

(73) See above.

(74) *Report,* pp. 28-29.

obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951,* p. 23); others are conferred by international instruments of a universal or quasi-universal character » (75).

This is the affirmation. The counter-affirmation follows a few pages later :

« With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality » (76).

This is, to say the least, somewhat embarrassing, as some members of the Court at least must have realized. Thus, Judge Petrén reverted to the subject in the *Nuclear Tests* case :

« It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights at all, including their own nationals, an obligation under international law towards all States members of the international community. The Court alluded to this in its Judgment in the case concerning the *Barcelona Traction, Light and Power Company, Limited (ICJ Reports 1970,* p. 32). It is certainly to be regretted that this universal recognition of human rights should not, up to now, have been accompanied by a corresponding evolution in the jurisdiction of international judicial organs. For want of a watertight system of appropriate jurisdictional clauses, too many international disputes involving the protection of human rights cannot be brought to international adjudication. This, the Court also recalled in the above-mentioned Judgment (*ibid.,* p. 47), thus somewhat reducing the impact of its reference to human rights and thereby leaving the impression of a self-contradiction which has not escaped the attention of writers » (77).

However blatant the « self-contradiction », the first passage of the Court suggests (1) the existence of the « international community as a whole »

(75) *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970,* p. 32. *Cf.* comment by Seidl-Hohenveldern : « Es kann hier nicht näher auf die erschreckende Selbstverständlichkeit eingegangen werden, mit der das Urteil hier das Eigentumsrecht aus der Reihe der Menschenrechte wegzaubert, obwohl die Allgemeine Erklärung der Menschenrechte der Generalversammlung der Vereinten Nationen vom 10. Dezember 1948 in ihrem Artikel 17 das Eigentumsrecht noch als Menschenrecht anerkannte... » Actio popularis *im Völkerrecht ?,* in COMUNICAZIONI E STUDI, XIV, 1975, Studi in onore di Gaetano Morelli, p. 804.

(76) *Barcelona Traction,* etc. p. 47.

(77) *Nuclear Tests (Australia v. France), Judgment of 20 December 1974, ICJ Reports 1974,* p. 303. The « self-contradiction » has indeed not escaped the attention of writers; see Seidl-Hohenveldern, *op. cit.,* pp. 804-805 and REUTER, *op. cit.,* p. 20.

which is a bearer of rights arising out of the obligations of States, contracted *erga omnes,* and (2) the existence in international law of an *actio popularis,* since such obligations are « the concern of all States ».

1. The notion of the « international community » — whether or not « as a whole » — has already been examined and found wanting (78). But even when the idea of such a mysterious subject of law is dispensed with, there certainly remains the international organization whose legal existence and factual reality are not open to challenge (79). It is equally true that both international organizations, political in character and universal in purpose, the League of Nations and the United Nations, have attempted the historical feat of centralizing the international sanction. Both have failed. Following the Special Rapporteur's example, we shall give up the attempt either « to recapitulate the history of the circumstances which have prevented the establishment of that system » or « to consider to what extent the Security Council's *de facto* inability to take action by means of decisions which are binding on Members » has been partially remedied by other devices (80). The only thing that matters is that this double failure has left international law as it had been before, *i.e.* a decentralized legal order.

This being so, all analogy with municipal penal law breaks down once again. It may be recalled that the inter-party legal relationship resulting from an unlawful act has been replaced, in municipal law, by a relationship between the author of the unlawful act and precisely the State, endowed with central power and with the monopoly of judgment and coercion. To substitute to this orderly process a relationship in international law between the author of the unlawful act and an undefined « international community » is not to replace the injured party by the State acting through its law-courts under all legal guarantees, but to invite mob-justice (81).

This is a terrifying conclusion. But it results inevitably from the whole reasoning. It is clearly implied in the ominous phrase, claiming to be a conclusion of the one-sidedly quoted opinion of the Court in the *Barcelona Traction* case : « Every State, even if it is not immediately and directly affected by the breach, should therefore be considered justified in invoking the responsibility of the State committing the internationally wrongful act » (82). It is even more threateningly implied in the suggested exclusion of

(78) See above.

(79) « ... the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression. » *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971,* p. 16, Dissenting Opinion of Judge Sir Gerald Fitzmaurice, p. 241.

(80) *Report,* p. 34.

(81) It is moreover obvious that such mob-justice will operate according to the world power structure and that no Great Power, however wicked, will ever be made subject to it, unless it succumbs in a world war.

(82) *Report,* p. 29.

judicial bodies from the process. Thus, when justifying the absence from international judicial decisions of any differentiation of two regimes of responsibility, the Report has this to say : « A State... is most unlikely to seek authorization from such a judge or arbitrator to exercise its rights to apply a sanction to the State concerned. The latter, for its part, might agree that a tribunal is competent to determine whether it has an obligation to make reparation, if such is the case, but not to authorize another State to apply a sanction against it » (83). In another context, commenting on a certain penal law school of thought in international law, the Report says : « But... the authors belonging to this group make the idea of the recognition of more serious international responsibility for such offences subject to the somewhat unrealistic condition that such responsibility should be established in each specific case by an international criminal court » (84).

The establishment of an international criminal court may indeed be « somewhat unrealistic ». So is the criminalization of international responsibility. But the proposal to do so without even attempting to provide some institutional devices, may, while clearly excluding judicial guarantees, fails in more than realism alone.

2. Since both the finding of « criminality » and the application of « penal sanctions » are withdrawn from the jurisdiction of courts, the passing mention of the *actio popularis* in the Report (85) seems sadly out of place. It is almost embarrassing to insist on the obvious truth that the *actio popularis,* far from being mob-justice, is precisely an *actio,* i.e., an orderly legal proceeding before a court of law whose existence it presupposes. It is no more than a grant of *locus standi* as a plaintiff to someone who otherwise would not have it for lack of personal legal interest. This is why, ever since the notion has become fashionable, it has been discussed exclusively either by the Court, or by individual judges or in connexion with the Court. In this discussion, the notion of *actio popularis* in international law had, as is well known, the weight of the opinion against it (86).

(83) *Ibid.,* p. 27.

(84) *Ibid.,* p. 46.

(85) *Report,* p. 50.

(86) « ... the argument amounts to a plea that the Court should allow the equivalent of an *« actio popularis »,* or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present : nor is the Court able to regard it as imported by the « general principles of law » referred to in Article 38, paragraph 1 *(c)* of its Statute ». *South West Africa, Second Phase, Judgment, ICJ Reports 1966,* p. 6, at p. 47. *Cf.* the Dissenting Opinion of President Winiarski in *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of December 1962 : ICJ Reports 1962,* p. 319, at p. 452. *Cf.* also the Separate Opinion of Judge Gros, the Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock in the *Nuclear Tests Case, Judgment of 20 December 1974, ICJ Reports 1974,* at pp. 288, 386-387 and 370 respectively. *Cf.* Seidl-Hohenveldern on the crucial point of how an *actio popularis* can be discussed at all in a system lacking compulsory jurisdiction. *Op. cit.* pp. 806 and 809. Conceivable only within a system of compulsory jurisdiction, it is further conceivable only

This being the case, any discussion of *actio popularis* outside a judicial process would be worse than superflous : it would only add to the already prevailing confusion.

VII. CONCLUSION

Here then is a proposal to introduce into positive international law criminal responsibility of States, *i.e.* indeterminate crimes, declared as such by unspecified bodies outside all due process of law and leading to unknown consequences; a proposal lightly brushing aside all historical experience, all considerations of realities in the inter-State world, all fruits of a highly sophisticated scientific thought and, above all, all legal security. The admittedly imperfect and certainly improvable, yet reasonably functioning system of international responsibility is to be turned into a *bellum omnium contra omnes.*

The primary function and the main value of law is to provide security in human relations. This is why the worst system of law is still better than lawlessness, in that it offers a minimum of security, a minimum of predictability, a minimum of guidelines to enable human beings to escape disaster.

The persistent trend to undermine legal security in the contemporary world is therefore a perversion of the very phenomenon of law. It is bad enough to see it embodied in declamatory statements without binding force, since they introduce and legitimize loose thinking and loose talk. But it is profoundly disturbing to find it in what is offered as future positive law. Both categories however are symptoms of disintegration in that they do away with rigour on the intellectual and with restraints on the practical level, the two being strictly interconnected.

International law is a fragile legal order. The restraints it has built up, the institutions it has developed are the outcome of long, patient, difficult labours. Compared with municipal law, they remain modest and limited. But such as they are, they ensure a minimum of security and decency in international relations. It is the prime duty of those concerned with international law — scholars, statesmen and legislators alike — to improve or, at least, to preserve them, but certainly not to contribute to their progressive disintegration.

where the classical condition of a personal legal interest is to be found, in a different form, in an ascertainable common legal interest, such as results *e.g.* from the legal nature of the high seas being *res omnium communis. Cf.* in this context suggestions made *de lege ferenda* by Caflisch for the creation of an *actio popularis* against acts of pollution of the high seas. *Op. cit.*, p. 33. *Cf.* Caflisch, *Some Aspects of Oil Pollution from Merchant Ships,* in ANNALS OF INTERNATIONAL STUDIES, published by the Alumni Association of the Graduate Institute of International Studies, Genève 1973, p. 221.

The contemporary trend is following a dangerously different direction. It gives rise to a disturbing paradox : the more fictitious alleged rules are being proclaimed, the more effective and proven restraints are being torn down. Witness the invention of undefined « imperative » norms and the simultaneous extension of grounds of nullity of treaties, undermining a reasonable minimum of security in treaty relations; witness the proclamation of an allegedly legal right of self-determination of peoples and the abandonment of time-honoured devices restraining barters in territory and population, such as plebiscites or, at least, option; witness the alleged prohibition of the use of force and the simultaneous extension of the *facultas bellandi* and the consecration of intervention, legitimizing new forms of violence. Practical results are not slow to materialize : uncomfortable treaties are declared null, foreign expeditionary corps are in action over large spaces of the globe and criminals invoke combatant status before courts of law. It would seem as if, in a sort of frenzy, all efforts were bent on bringing insecurity everywhere : insecurity into the law of treaties, insecurity into the laws of war, insecurity into the basic rules of inter-State relations. It is now proposed to extend this insecurity into the field of international responsibility.

Such insecurity is further intensified by the tendency to use international law as a tool of ideology. But ideology spells the death of international law whose function is to govern relations between States professing or practising the most varied moral, political, religious and cultural creeds. Ideology is unilateral but international law is anything but unilateral. If it were made a servant of any State or bloc of States, of any creed or ideology, it would become the enemy of another State or bloc of States, of another creed or ideology and therefore useless as an instrument of coexistence and conciliation of diverging interests.

However distressing, the problem is not new and it may be helpful to replace it in a historical perspective. The so-called Holy Alliance tried to make international law into an ideological weapon, an attempt which ended in failure. The « ideology » of earlier times was religion, of which international law was to be made the tool. This failed too, and this is what Vattel had to say about it :

> « La loi naturelle seule régit les traités des nations; la différence de religion y est absolument étrangère. Les peuples traitent ensemble en qualité d'hommes, et non en qualité de chrétiens ou de musulmans. Leur salut commun exige qu'ils puissent traiter entre eux, et traiter en sûreté. Toute religion qui heurterait en ceci la loi naturelle, porterait un caractère de réprobation : elle ne saurait venir de l'auteur de la nature, toujours constant, toujours fidèle à lui-même. Mais si les maximes d'une religion vont à s'établir par la violence, à opprimer tous ceux qui ne la reçoivent pas, la loi naturelle défend de favoriser cette religion, de s'unir sans nécessité à ses inhumains sectateurs; et le salut commun des peuples les invite plutôt à se liguer contre des furieux, à réprimer des fanatiques qui troublent le repos public et menacent toutes les nations » (87).

(87) Livre II, ch. XII, par. 162.

Let us leave to Vattel his natural law; what he says holds good with or without it, for his time as for any time. It could therefore be repeated with equal force in our time by another great Swiss lawyer :

> « Le droit des gens positif est donc fatalement un droit sécularisé, laïque, indifférent à l'égard des doctrines religieuses. Il ne peut en être autrement, si l'on tient compte de la variété des conceptions morales et religieuses qui sont celles de différentes communautés constituant la société internationale » (88).

Some hope is thus to be found in history, as it is to be found, not in natural law, but in what may be called the nature of things. But history is not something to be relied on automatically; it is made by living forces and it is up to the best of them to ensure that the world is not reduced to live *sine lege certa, sine jure certo* (89).

(88) Guggenheim, *Principes de droit international public,* HAGUE ACADEMY RECUEIL 1952, I, pp. 32-33.

(89) L. 2 § 1 D de origine juris (1.2) (Pomponius).