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Summary record of the 2391st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

that, while priority should be given to part three, if time permitted, consideration could also be given to article 12 and perhaps article 11.

73. In fact, article 12 as such had not been referred to the Drafting Committee. The report stated that the Commission "had deferred taking action on article 12", that "article 11 might have to be reviewed in the light of the text that would eventually be adopted for article 12"[14] and that, pending adoption of article 12, the Commission had decided not to formally submit articles on countermeasures to the General Assembly in 1994 but expected to be able to do so in 1995.[15] That did not mean the Drafting Committee should rearrange its priorities. On the other hand, it should not rule out the possibility of making an effort to comply with the Commission's recommendations.

74. Mr. ROSENSTOCK said there was no doubt that article 12 was not before the Drafting Committee unless the Commission now decided to refer it. Such a decision would be wrong and he would insist on a vote on the issue. If the Commission voted to refer article 12 to the Drafting Committee the Commission would bear a cumulative responsibility for the outcome.

75. Mr. TOMUSCHAT said that he sympathized with Mr. Rosenstock's position but thought that some corrections to earlier articles might be needed in the light of new articles 15 to 20. Some review of the articles already adopted, perhaps only a technical one, therefore seemed inevitable. But the Drafting Committee should certainly begin its work with part three.

76. Mr. ROSENSTOCK said that the need for a review would apply without distinction to articles 1 to 14. The implications of that were horrendous. Article 12 should not be given special treatment. In any event, the Commission's decision must be a formal one. On that understanding, he could go along with Mr. Tomuschat's position.

77. The CHAIRMAN asked the Chairman of the Drafting Committee whether he needed a decision on the matter immediately or whether the Drafting Committee could begin its work on part three of the draft articles pending further consultations on the fate of article 12.

78. Mr. ROSENSTOCK, speaking on a point of order, said that the Commission needed to bite the bullet and not waste more time by putting off a decision. It was most regrettable that the whole problem had resurfaced despite the gentlemen's agreement reached in 1994.

79. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the wisest thing would be to let the Drafting Committee begin its work on part three and, as the Chairman had suggested, leave the question of article 12 open without biting any bullets. The Drafting Committee would be able to decide whether to revert to any of the articles adopted earlier, with a view to making minor changes.

80. Mr. EIRIKSSON said that the current discussion in plenary had not uncovered the whole history of the issue. Perhaps the question of reopening it should be left open.

81. Mr. MAHIOU said that he endorsed the position taken by Mr. Tomuschat.

82. Mr. YANKOV (Chairman of the Drafting Committee) appealed to the Chairman to end the discussion. The Drafting Committee's first priority was part three. If time allowed, other articles, including article 12, could be considered. Further consultations would just waste more time. The Drafting Committee should be allowed to take its own decisions on the order of its work in the light of the recommendations contained in the Commission's report.

83. The CHAIRMAN said that Mr. Rosenstock was pressing for a vote on the issue. As Chairman, he would prefer to avoid a vote because a consensus did seem to be emerging on how to proceed. He suggested that the Drafting Committee should begin its work with part three and that he should hold informal consultations on the present difficulty.

It was so agreed.

The meeting rose at 12.50 p.m.

2391st MEETING

Tuesday, 30 May 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State succession and its impact on the nationality of natural and legal persons (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/467,[1] A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. MIKULKA (Special Rapporteur), summing up the debate, thanked the members of the Commission for

[14] Ibid., p. 86, para. 352.

[15] Ibid., para. 353.

[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

having received his first report (A/CN.4/467) favourably. Their comments and criticisms had given rise to an interesting discussion on which the future working group could draw.

2. The topic, situated as it was at the crossroads of public international law, private international law and internal law, was certainly difficult and complex. It involved not only inter-State relations, but also relations between the State and the individual. The majority of members recognized that, in the present case, the Commission, which was not required to codify and harmonize internal law, should focus its work on the consequences of changes in sovereignty on nationality under international law. That was not to deny the importance of internal law, however: that law formed the very basis of the concept of nationality, which had certain consequences at the level of international law. It was precisely those consequences to which the Commission must direct its attention. He had therefore decided that it would be useful to refer at the outset to the various concepts of nationality that existed under internal law, even though the distinction was not relevant to international law. For the purposes of the preliminary study envisaged it was rather a question of the prerogative of the State.

3. Although it was agreed that a degree of priority should be given to the question of the nationality of natural persons, the Commission apparently did not wish to omit from the preliminary study the question of the nationality of legal persons. Some members had pointed out that it was perhaps in that area that codification prospects were most promising. But at the same time it had been recognized, particularly by those who emphasized the humanitarian aspect of the exercise, that the problem was most urgent in the case of individuals.

4. It was his understanding that the majority of the members of the Commission agreed with his proposal to abide by the definition of certain basic concepts contained in the Vienna Convention on Succession of States in respect of Treaties and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. That choice, of course, stemmed solely from the need for pragmatism in that its purpose was to facilitate the Commission's work by avoiding a return to accepted formulas, particularly since the aim at present was to draft a preliminary study, not a legal instrument. It would therefore more than suffice if the existing definitions were retained.

5. It was also his understanding that the Commission endorsed his proposal that the study on categories of succession should be based on the Vienna Convention on Succession of States in respect of State Property, Archives and Debts rather than on the Vienna Convention on Succession of States in respect of Treaties, subject, of course, to some additions and clarifications to take account of the problems specific to nationality. Some members of the Commission had wondered, however, whether the category of newly independent States, namely, States that had emerged following decolonization, should not be retained. He had merely proposed that that category should not be taken into consideration for the purposes of the preliminary study, although State practice should be borne in mind, since its dimensions were more general and that could help to explain certain rules that applied to all cases of territorial change and not just to cases of decolonization. Moreover, as some members of the Commission who shared that view had pointed out, the fact that the problems of neocolonialism could not be completely ignored had little practical significance when it came to nationality because the decisive moment, for nationality, was the moment of decolonization: it was the moment when the problem of the status of individuals arose. Neocolonialism itself no longer had any effect on the personal status of individuals, which was already well defined. It was, rather, on other grounds that it was of concern to the international community. In his view, in the case of nationality, there were no pressing needs connected to that phenomenon.

6. As many members of the Commission had pointed out, the right to nationality, as set forth, *inter alia*, in article 15 of the Universal Declaration of Human Rights,[2] must be the core of the study. And the wealth of references made in that connection could suggest that it was an undisputed right, a right that was simply there. None the less, the working group should start by examining closely the concept of right to nationality with a view to defining its precise features. That was undoubtedly a difficult task: the formula used in the Universal Declaration of Human Rights was far more ambitious than those used in the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and certain other instruments, which showed that the concept of the right to nationality could not a priori be understood in its broadest sense.

7. Some members, who had made the point that every right had as its counterpart an obligation, rightly wondered what the counterpart to the right to nationality was. In Mr. Bowett's view (2387th meeting), it was the obligation on States to negotiate. His own view was that the obligation to negotiate could also flow from the instruments that had been drawn up on the question of succession. Thus, in particular, the Vienna Convention on Succession of States in respect of State Property, Archives and Debts provided that the successor States or the predecessor State and the successor State or States had to settle certain questions of succession by bilateral agreement, and set forth certain general principles to be applied in that regard. That was a further element that militated in favour of the application of the obligation to negotiate in the settlement of questions of nationality. Naturally, such an obligation should be examined both from the standpoint of the relations between the successor States, should the predecessor State disappear and should there be several successor States, and from the standpoint of the relations between the predecessor State and the successor State or States. Indeed, it was conceivable that the predecessor State might withdraw its nationality on a massive scale, while the successor State might grant its nationality on a very restrictive basis, the effect being to make part of the population stateless.

8. It would be difficult to envisage a direct obligation to grant nationality, unless it was closely circumscribed. To transpose concepts borrowed from the human rights sphere, in the event of a wholesale change of nationality,

[2] General Assembly resolution 217 A (III).

would pose a problem: to what extent could concepts that were supposed to apply to individual cases automatically apply at the international level in the event of a collective change of nationality? Conversely, would certain limitations provided for in the human rights field for individual cases apply at the international level? The only conclusion to be drawn in that particular case was that it was not possible to apply to situations involving a collective change of nationality all the principles embodied in the human rights instruments in order to resolve individual cases. Perhaps there were other principles, other rules, to be taken into consideration. Also, the working group should explain, in the study it was to make, to what extent the right to nationality applied in the same way to adults and to children.

9. The questions raised concerning the consequences that failure to observe the rules of international law in the matter could have at the level of internal law, as well as the possible nullity of acts carried out under internal law, should, in his view, be examined very closely, particularly since the judgment delivered by ICJ in the *Nottebohm* case[3] dated back nearly half a century, so that it was not possible to arrive at relevant conclusions. In that case, ICJ had relied on the principle of non-opposability, never questioning the fact that Nottebohm had been a national of Liechtenstein under that country's internal law. In other words, in raising the question of the nullity of acts carried out under internal law, the Commission would be breaking fresh ground.

10. In response to some members of the Commission who considered that he had underestimated the humanitarian factor, he would point out that he had dealt with it in virtually the same way as with the other factors and that he had devoted about the same number of paragraphs in his report to the role of human rights rules with regard to nationality and to the principle of effective nationality. Other members of the Commission had, however, pointed out that, if the Commission laid undue stress on the role of the rules relating to human rights, it might be counter-productive. He shared that view. That did not mean, however, that the role of obligations in the human rights field should be underestimated. It should not be ignored, but, in that particular case, it was not decisive. The Commission was not in fact supposed to study only the relations between the obligations of the State in the human rights field and their consequences for nationality: it was also supposed to examine the complex problems of State succession and the effects of territorial changes on nationality. It could not confine itself to considerations of a humanitarian nature, which had a place among the other considerations in the matter, but without taking precedence over them.

11. As to the way in which the transitional status of individuals should be approached at the international level—in other words, their status between the time when the old State disappeared and the new State enacted its law on nationality—the proposal to rely on presumption rather than to formulate rigid principles and rules was extremely interesting. It would be a good idea for the working group to look into that proposal.

12. Two major trends had emerged in the Commission with regard to the question of the choice of individuals and the role to be given to their wishes with respect to nationality, one of which underlined the importance of such a choice and such a role, while the other and more prudent one placed the emphasis on the element of effectiveness. It was difficult for the time being to arrive at any conclusions on that question, which the working group would have to analyse in detail.

13. The comments concerning the academic character of the report were warranted. It could not have been otherwise, for, at the time when the report had been prepared, the replies of Governments on recent practice in the matter had not been available to him. But, naturally, he agreed that the preliminary study should not be based purely on an academic analysis.

14. As to the form that the results of the work could take, for the time being, the General Assembly, in resolution 49/51, had called for a preliminary study. In any event, the form would depend on the content. If the Commission wished to lay down certain general principles for submission to States, a declaration would be entirely indicated. If, on the other hand, it wished to draw up a specific instrument, limited to a particular subject, for instance, statelessness, it could contemplate a more ambitious instrument or even an amendment or additional protocol to the Convention on the Reduction of Statelessness, which already contained an article, but couched in general terms, on the problem of statelessness in the event of territorial changes. Some members of the Commission had taken the view that other possibilities could be envisaged if the Commission decided to deal with the question of the nationality of legal persons. It was therefore premature to dwell on the question of the form the results of the work could take. It would be better instead to wait before doing so until the working group had submitted its report, in which various options could be proposed, to plenary. The Commission could then discuss it and make proposals for submission to the General Assembly so that it could take a decision in full knowledge of all the facts.

15. Mr. YANKOV said he wondered whether the Commission could not provide the working group with some guidance on the scope of the study and its main components and whether the working group could not submit an initial outline of the envisaged preliminary study to the Commission so that, at the next session, it would have a firm basis on which to work.

16. The CHAIRMAN said that, while Mr. Yankov's point was well taken, he understood that the Commission wished to allow the working group complete freedom in deciding how to proceed.

Cooperation with other bodies

[Agenda item 9]

Statement by the Observer for the Asian-African Legal Consultative Committee

17. The CHAIRMAN invited Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

[3] See 2385th meeting, footnote 15.

18. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that he was grateful for the opportunity to address the Commission. As members of the Commission were aware, the Asian-African Legal Consultative Committee attached great significance to its long-standing ties with the Commission. It had been honoured by the attendance of Mr. Villagrán Kramer at its thirty-fourth session, held in Doha in April, and had expressed its immense satisfaction at the comprehensive account Mr. Villagrán Kramer had given there of the work of the Commission at its forty-sixth session. That account, together with Mr. Villagrán Kramer's statements, had underlined the significance the Commission attached to its links with the Committee and the spirit of cooperation between the two bodies. He trusted that the existing cooperation and ties would be further strengthened.

19. The Committee had welcomed with much appreciation the completion of the Commission's work on the draft statute for an international criminal court and on the law of the non-navigational uses of international watercourses. The items currently on the Commission's agenda were all of particular interest for African and Asian States. At its thirty-third session, the Committee had concurred with the Commission's view that consideration of the two topics of the law and practice relating to reservations to treaties and State succession and its impact on the nationality of natural and legal persons responded to a need of the international community and that the international climate was propitious for their consideration.

20. The item of international rivers had been on the Committee's work programme for a long time. At its thirty-fourth session, the Committee had commended the draft articles on the law of the non-navigational uses of international watercourses together with the commentaries thereto as adopted by the Commission on second reading.[4] It had requested the General Assembly to consider adopting a framework convention on the non-navigational uses of international watercourses based on those draft articles. The international rivers item continued to be on the Committee's work programme and the secretariat proposed, *inter alia*, that inter-State water agreements in the Afro-Asian region should be studied.

21. The secretariat of the Committee, mindful of the interest shown by the legal advisers of the Committee's member States in the establishment of an international criminal court and the debate in the Sixth Committee on the draft statute prepared by the Commission, had organized a seminar on the international criminal court. Mr. Yamada and the Chairman would perhaps recall the lively discussions which had taken place during the seminar, which had been held in New Delhi in January 1995. The draft statute had also been discussed at some length at the latest session of the Committee, which had expressed appreciation of the draft articles as adopted by the Commission[5] and proposed to monitor closely the progress of the work of the Ad hoc Committee established by the General Assembly in resolution 49/53. The secretariat of the Committee would continue to prepare notes and comments on substantive items considered by the Commission so as to assist the representatives of Committee's member States in the Sixth Committee in their deliberations on the report of the Commission at its forty-seventh session. An item entitled "The report on the work of the International Law Commission at its forty-seventh session" would then be considered by the Committee at its thirty-fifth session.

22. Presenting an overview of some of the substantive items considered at the thirty-fourth session of the Committee and of the current work programme of its secretariat, he said that an item entitled "United Nations Decade of International Law" had been on the agenda of the Committee since the adoption by the General Assembly of its resolution 44/23. The secretariat of the Committee was in the process of finalizing a summary of the Committee's activities aimed at the achievement of the objectives set for the third part of the United Nations Decade of International Law. The summary would be forwarded to the Legal Counsel of the United Nations.

23. At its thirty-fourth session, the Committee had also noted with satisfaction that the United Nations Convention on the Law of the Sea had entered into force on 10 November 1994. It had welcomed the establishment of the International Sea Bed Authority and the decision relating to the establishment of the International Tribunal for the Law of the Sea. The Committee had urged its member States to participate fully in the work of the International Sea Bed Authority in order to protect and safeguard the legitimate interests of the developing countries and to promote the principle of the common heritage of mankind. It had also reminded its member States that they should give consideration to the need for the adoption of a common policy and strategy for the interim period before commercial exploitation of the deep seabed became feasible and had called on its member States to take an evolutionary approach to the initial function of the Authority. The secretariat of the Committee would continue to cooperate with relevant international organizations in the fields of ocean and marine affairs and would endeavour to assist member States.

24. One of the most complex problems facing the Asian-African region was that of refugees and displaced persons. The Committee had examined the issues relating to the status and treatment of refugees. At its latest session, it had, in particular, examined the possibility of a framework for the establishment of a safety zone for displaced persons in their country of origin so as to provide safety and security for such persons in times of armed conflict. The Committee secretariat had drafted a model legislation on the status and treatment of refugees in the light of the codified principles of international law and the practice of States in the region. The model legislation had been transmitted to all member States for their comments prior to its consideration at the next annual session of the Committee. It should be noted that the secretariat of the Committee was working closely on that matter not only with UNHCR, but also with OAU.

25. In the field of international economic and trade relations, the Committee had, at its thirty-fourth session, urged its member States to consider the UNCITRAL

[4] *Yearbook... 1994*, vol. II (Part Two), p. 89, para. 222.

[5] Ibid., p. 26, para. 91.

Model Law on Procurement of Goods and Construction[6] when reforming or enacting their legislation on procurement. It had also called on member States to consider adopting, ratifying or acceding to other texts prepared by UNCITRAL. That recommendation, formulated by the Committee at its thirty-fourth session, had followed in the wake of an international seminar on globalization and harmonization of commercial and arbitration laws which the Committee secretariat had organized on the eve of the Committee's annual session with a view to standardizing commercial law and practices in the Afro-Asian region within the context of the ongoing liberalization of national economies.

26. As the members of the Commission were aware, ICJ would celebrate its fiftieth anniversary in April 1996. The secretariat of the Committee was proud to have been invited to organize a regional seminar to promote awareness of the Court's work in the Asian region as a part of the commemoration programme. The secretariat of the Committee also proposed to organize, in conjunction with the Court and UNITAR, an international seminar on the work and role of the Court. He invited the Chairman and other members of the Commission to take part in the seminar, which was to be held in November 1995.

27. In conclusion, on behalf of the Committee and on his own behalf, he invited the Chairman of the Commission to participate in the thirty-fifth session of the Committee to be held in 1996. After thanking the Commission for allowing him to address it, he said that he looked forward to even closer collaboration between the Committee and the Commission in the future.

28. Mr. VILLAGRÁN KRAMER said that he had been most happy to take part in the thirty-fourth session of the Asian-African Legal Consultative Committee held at Doha. The interest shown by the participants in topics under study by the Commission and other matters of international law dealt with elsewhere had been most striking. The fact that regional bodies such as the Committee were dealing with important issues of international law in a constructive and positive manner, with great seriousness and from many different angles, was to be welcomed.

29. He had also been struck by the fact that participants in the Committee's session had included not only legal specialists and lawyers, but also Ministers of Justice, members of prosecutor's offices and legal staff of Ministries of Justice. It was to be welcomed that the work of the Commission and the consideration of that work by the Sixth Committee were of interest not only to officials of Ministries of Foreign Affairs, but also to those of other ministries and departments, such as those of justice. The draft statute for an international criminal court, in particular, had aroused great interest among Ministers of Justice. It should be noted that ministers and the States they represented tended to approach the draft statute for an international criminal court from the point of view of the internal impact which the establishment of such a court would have in practical terms and to think of the responsibilities they would have in such a case.

30. He also welcomed the fact that the Committee kept its member States informed of UNCITRAL activities and the model laws it drafted. There again, it was extremely encouraging that work carried out at the international level was being considered from the viewpoint of its practical application by States. The Commission could only welcome the fact that the Asian-African Legal Consultative Committee was considering the work of the Commission attentively and closely following the discussions on that work in the Sixth Committee.

31. Noting that his fellow Latin Americans and he were accustomed to thinking on a Latin American scale, just as North Americans tended to see things on the scale of the northern part of the American continent and Europeans on a European scale, he said that the Asian-African Legal Consultative Committee, composed as it was of countries from two of the world's major regions, contributed a viewpoint that was extremely original and enriching. Although it could not always be easy to deal with problems on so vast a scale, the Committee's work and activities were undeniably extremely fruitful and of excellent quality. In conclusion, he thanked Mr. Tang Chengyuan for his highly instructive statement.

32. Mr. KUSUMA-ATMADJA, speaking on behalf of the members of the Commission from Asian States, referred to the third and fourth sessions of the Asian-African Legal Consultative Committee which he had attended in Colombo in 1960 and Tokyo in 1961, respectively, and recalled that a former member of the Commission, namely, Francisco V. Garcia Amador, of Cuba, had attended the Committee's sessions even then.

33. Ever since that time, he had been impressed by the firm will of Asian and African lawyers to contribute to the progressive development and codification of international law. Well-known examples of such contributions by the Committee were to be found, in particular, in the areas of the law of the sea and the law of treaties.

34. After hearing the statement of the Secretary-General of the Committee, he was convinced that the tradition of cooperation between the two bodies would be maintained.

35. Mr. BOWETT, speaking on behalf of the members of the Commission from the Group of Western European and Other States, thanked the Secretary-General of the Asian-African Legal Consultative Committee for his statement. The Committee's activities were of considerable interest in view of the geographical importance of the region concerned and the scope of the views and practice of the countries represented. He therefore hoped that the Committee's work would continue with success and would be given the widest publicity.

36. Mr. KABATSI, speaking on behalf of the members of the Commission from African States, thanked the Secretary-General of the Asian-African Legal Consultative Committee and expressed his congratulations on his statement and his report, which had ranged over many important topics of international law, including those on the Commission's agenda.

[6] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), annex I.

37. The Committee was an intergovernmental organization which was composed of 44 African and Asian countries and maintained close relations with the Commission. Each of the two bodies followed the other's work with close attention and sent a representative to its annual sessions. Moreover, the Committee's annual report, which described the viewpoints and practice of the States of the Asian-African region, was an important source of information on many topics of interest to the Commission.

38. Mr. LUKASHUK, speaking on behalf of the members of the Commission from Eastern European States, thanked the Asian-African Legal Consultative Committee for the work it was doing.

39. For many years, as President of the Institute of International Law of Kiev State University, he had received foreign students who had come principally from Asia and Africa and most of whom had been excellent.

40. Russia, which was located astride Europe and Asia, attached great importance to international law and was convinced that the role of international law would increase steadily in the future and that non-governmental and intergovernmental organizations would be called on to contribute more and more extensively to that common cause.

41. The CHAIRMAN welcomed the distinguished Secretary-General of the Asian-African Legal Consultative Committee to the Commission. After hearing his statement on the Committee's activities, he was convinced that cooperation between that body and the Commission would not only be maintained, but deepened.

42. Having participated in the work of the Committee as a member, he had been greatly impressed by the impetus and intellectual dynamism imparted to the Committee by its Secretary-General, as well as by the active participation of its members. He wished the Committee and its Secretary-General every success in their activities with a view to the codification and progressive development of international law.

State responsibility (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,[7] A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)

[Agenda item 3]

Seventh report of the Special Rapporteur

43. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his seventh report on State responsibility (A/CN.4/469 and Add.1 and 2) and drawing attention to a correction, said that in paragraph 26 the words "contained in subparagraph (*d*)" should be amended to read "contained in subparagraphs (*c*) and (*d*)". With regard to the substance of the report, he explained that it had been his intention to distinguish between two sets of problems. The first was the determination of the special or supplementary consequences that were or would be attached to international crimes of States, a problem he roughly characterized as merely normative. The second was the determination of the entity or entities that were or should be called upon to preside, in one manner or another, over the implementation of such legal consequences. That aspect of the problem could be described as institutional.

44. Both problems had emerged from his earlier reports and from the previous year's debate, when they had both been addressed, more or less generally, by members who opposed, as well as by those who favoured, the preservation of article 19 of part one of the draft.[8] It had also been generally agreed that both sets of problems presented a relatively high degree of progressive development or, in other words, that they involved *de lege ferenda* issues.

45. So far as the normative problem was concerned, he had tried to follow the same distinction with regard to crimes as that proposed for delicts between substantive consequences and instrumental ones, the former being cessation and the various forms of reparation and the latter consisting essentially of countermeasures. In both areas, he also distinguished between "special" and "supplementary" consequences of international crimes. Indeed, on the one hand, there was the question whether any of the consequences of internationally wrongful acts referred to in articles 6 to 14 extended to crimes and, if so, whether any such consequences should be modified by aggravating the position of the wrongdoing State and strengthening the position of injured States. That was what he meant, for want of a better term, by "special" consequences of crimes. The other question was whether any further consequences should be attached to crimes over and above those dealt with in articles 6 to 14. He would describe such consequences, again for want of a better term, as "supplementary". Examples of supplementary consequences were those given in draft article 18, as proposed and commented on in the seventh report.

46. By way of introduction to the regime of the consequences of crimes, he proposed article 15 in his seventh report, which read:

> "Without prejudice [In addition] to the legal consequences entailed by an international delict under articles 6 to 14 of the present part, an international crime as defined in article 19 of part one entails the special or supplementary consequences set forth in articles 16 to 19 below."

He left it to the Drafting Committee, should the draft articles be referred to it, to choose between "Without prejudice" and "In addition" or, perhaps, to decide to say both ("Without prejudice and in addition . . .").

47. To begin with the substantive consequences, no adaptation seemed to be necessary in the case of the articles relating to the general rule of cessation and reparation in a broad sense (inclusive of restitution, compensation, satisfaction and guarantees of non-repetition). Those general obligations were incumbent in principle

[7] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[8] *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 *et seq.*

on the perpetrators of a crime, as well as on those of a delict. The difference, in the case of such general obligations of principle, was that any crime injured all States, while only some delicts, namely, *erga omnes* delicts, injured all States. Those two general points should be consigned to an introductory paragraph in the article dealing with substantive consequences.

48. Article 16, paragraph 1, as proposed in the seventh report read:

> "1. Where an internationally wrongful act of a State is an international crime, every State is entitled, subject to the condition set forth in paragraph 5 of article 19 below, to demand that the State which is committing or has committed the crime should cease its wrongful conduct and provide full reparation in conformity with articles 6 to 10 *bis*, as modified by paragraphs 2 and 3 below."

49. An adaptation should, in his view, be envisaged with regard to some aspects of restitution in kind. It should relate to the two limitations to the wrongdoing State's obligation contained in article 7, subparagraphs (*c*) and (*d*).[9] Subparagraph (*c*) dealt with the limitation of "excessive onerousness" and subparagraph (*d*) with the "political independence and economic stability" safeguard.

50. With regard to the first of those points, he recalled that article 7, subparagraph (*c*), provided that the injured State would not be entitled to claim restitution in kind where that would involve "a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation". Considering the *erga omnes* relationship resulting from a crime, most injured States would probably not derive any individual substantive benefit from compliance by the wrongdoing State with its obligation to make restitution. There would thus be little sense, if any, in comparing the situation of the wrongdoer, on the one hand, and that of one or a few injured States, on the other. The prevailing consideration should be that the wrongdoing State must restore to the fullest possible extent a situation the preservation of which was of essential interest—in conformity with the notion set forth in draft article 19 proposed in the seventh report—to the international community. That obligation could not be evaded even if a heavy burden was thus placed on the State which had jeopardized that situation by infringing fundamental rules of international law.

51. The removal of the "excessive onerousness" limitation should not, however, jeopardize the existence of the wrongdoing State as an independent member of the international community, its territorial integrity or the vital needs of its people. He nevertheless had some doubts about an absolute preservation of territorial integrity. Exceptions might have to be envisaged; and he suggested further reflection by the Commission and by himself.

52. The other provision to be reconsidered in its application to crimes was the limitation of the obligation of restitution in kind contained in article 7, subparagraph (*d*), which was intended to safeguard the wrongdoing State's "political independence and economic stability".

53. Referring to economic stability, he noted that it did not seem equitable that a State which had committed a crime should be able to deprive the direct victims of the breach and the entire international community of the right to full restitution on the ground that compliance would affect its economic stability. Such an excuse would be particularly odious where the "criminal" State had enhanced its economic prosperity by the very crime it had perpetrated. An example could be that of a State having drawn a major economic advantage, in the area of trade relations with other States, from a policy of exploitation of labour to the detriment of an ethnically, ideologically, religiously or socially differentiated part of its population in massive breach of obligations relating to fundamental human rights. Another example could be that of a colonial or quasi-colonial power enhancing its economic prosperity by pursuing a policy of ruthless exploitation of the resources and the population of a dependent territory. The wrongdoing State could not in such cases be relieved of the obligation to make restitution, that is to say to restore the original situation, by claiming that compliance with that obligation would have a substantial negative impact on its economic stability. The only appropriate excuse for limitation should be the need not to deprive the wrongdoing State's population of its vital necessities, whether physical or moral.

54. As far as "political independence" was concerned, a distinction should be drawn between political "independence" and political "regime". The independence of a State or, in other words, its existence as a distinct sovereign entity was surely one thing and the so-called "freedom of organization" which every sovereign State was entitled to enjoy in the choice of its government was another. While he could agree that independent statehood would have to be preserved, together with territorial integrity, subject to the doubts he had expressed earlier, even at the price of relieving a "criminal" State, totally or in part, from the obligation of restitution, the same might not be true for the regime of that State. Especially in the case of aggression, which was often perpetrated by despotic Governments, it was far from sure, in his view, that the obligation to provide full restitution could be limited simply because compliance with it could jeopardize the continued existence of a condemnable regime. Neither should it be overlooked that the continued existence of a condemnable regime would not be compatible with restitution or with the wrongdoing State's obligations in cases of crimes relating to self-determination, decolonization or human rights. The preservation of a regime responsible for serious breaches of essential international obligations in that respect could not constitute ground for limiting the obligation of restitution.

55. He said that in the report he had given some examples of demands of restitution in kind which States responsible for the breach of fundamental rules relating to self-determination and racial discrimination could not evade by alleging "excessive onerousness" or "prejudice to economic stability".

[9] For the text of articles 1 to 6, 6 *bis*, 7, 8, 10 and 10 *bis* of part two, provisionally adopted by the Commission at its forty-fifth session, see *Yearbook ... 1993*, vol. II (Part Two), pp. 53 *et seq.*

56. He had thus been led to conclude that the limitation of the obligation of restitution contained in article 7, subparagraphs (*c*) and (*d*), should not be applicable in the case of a crime unless full compliance with that obligation would put in jeopardy either the existence of the wrongdoing State as a sovereign and independent member of the international community, or its territorial integrity (always with the above-mentioned reservation), or the vital needs of its population. The term "needs" was used by him in a broad sense to cover essential requirements of both a physical and a moral nature. The relevant proposed provision was to be found in draft article 16, paragraph 2.

57. Unlike restitution in kind, compensation under article 8 needed no adaptation to the crime hypothesis. For a crime, as well as for a delict, the amount due from the wrongdoing State could, in principle, be neither more nor less than full compensation.

58. Special treatment seemed instead to be called for with regard to the wrongdoing State's obligation to give satisfaction and guarantees of non-repetition. A significant adaptation seemed indeed to be required in article 10, paragraph 3, which ruled out any demands of satisfaction that would impair the dignity of the wrongdoing State. Such a limitation would be utterly inappropriate in the case of a crime. Although article 10 *bis* (Assurances and guarantees of non-repetition) did not contain the same limitation, he took the view that the close interrelationship between that remedy and satisfaction would have justified a similar treatment from the viewpoint of the "dignity" limitation. Be that as it might so far as delicts were concerned, he would be inclined to treat both remedies in the same way in the case of crimes. Guarantees of non-repetition frequently appeared to be identical with certain forms of satisfaction. Thus, like demands of satisfaction in a narrow sense, demands of guarantees of non-repetition should not be subject to the "dignity" limitation. A wrongdoing State responsible for a crime could not escape its obligations by invoking respect for a dignity it had itself offended.

59. However, the "dignity" proviso seemed to be much too vague not to call for some specification with regard to the hypothesis of satisfaction and guarantees of non-repetition to be provided by the perpetrator of a crime. Although the concept of "dignity" seemed to be appropriate in the case of delicts, where the forms of satisfaction or guarantees usually claimed were of an essentially formal or symbolic nature, it appeared inappropriate in the case of crimes. The demands of satisfaction and guarantees to be addressed to the author of a crime would presumably be so substantial as to affect more sensitive areas than merely the wrongdoing State's "dignity", such as its sovereignty, independence, domestic jurisdiction and liberty. It followed that the exclusion of the mitigating effect should be extended, for the case of crimes, to any more substantial attributes or prerogatives of a State, other than mere dignity, that the wrongdoing State might be tempted to invoke in order to protect itself from demands it should not be permitted to resist. The formula to be adopted should therefore provide that the author of an international crime should be deprived not only of the benefit of any limitations deriving from articles 10 or 10 *bis*, the latter, perhaps, to be revised so as to extend the "dignity" proviso to the guarantees of non-repetition, but also of the benefit of any further limitations which might derive, in its favour, from any rules or principles of international law relating to the protection of its sovereignty, domestic jurisdiction or liberty. Such greater severity should not, however, go so far as to affect the preservation of the wrongdoing State's existence as a State, the vital needs of its people or—again, perhaps with some provisos—its territorial integrity.

60. The text of draft article 16, paragraph 3, as proposed in the seventh report read:

> "3. Subject to the preservation of its existence as an independent member of the international community and to the safeguarding of its territorial integrity and the vital needs of its people, a State which has committed an international crime is not entitled to benefit from any limitations of its obligation to provide satisfaction and guarantees of non-repetition as envisaged in articles 10 and 10 *bis*, relating to the respect of its dignity, or from any rules or principles of international law relating to the protection of its sovereignty and liberty."

61. He said that in the seventh report, he had cited certain types of demands that a "criminal" State could face, subject to the previously mentioned provisos, by way of satisfaction or guarantees of non-repetition and the report contained some tentative illustrations corresponding to the four kinds of crimes envisaged in subparagraphs 3 (*a*) to 3 (*d*) of article 19 of part one.[10]

62. Turning to the instrumental consequences of crimes, he stressed that, regardless of any specific provisions, those consequences were obviously aggravated by the fact that, in any case of a crime, all States were entitled to react by adopting countermeasures. Combined with the aggravations of substantive consequences dealt with in article 7, subparagraphs (*c*) and (*d*), and article 10, paragraph 3 (extended to article 10 *bis*), and also with the "hue and cry" effect of the condemnation which, it was hoped, would follow a crime, that numerical factor quite considerably increased the weight of the countermeasures which a "criminal" State could expect. As in the case of substantive consequences, the article dealing with countermeasures against crimes should open with a *chapeau* paragraph echoing the general provision on countermeasures laid down in article 11.[11] That *chapeau* paragraph would be paragraph 1 of draft article 17 proposed in the seventh report. The fact that it was modelled on article 11 as originally proposed was not due to any wish on his part to see his point of view prevail at any price, but, rather, to the hope that the wording of article 11, as worked out by the Drafting Committee, could be reviewed taking into account the impact of the specificity of crimes on such elements as the "response" of the wrongdoing State and, more particularly, the function of countermeasures.

[10] See footnote 8 above.

[11] For the text of articles 11, 13 and 14 of part two provisionally adopted by the Commission at its forty-sixth session, see *Yearbook ... 1994*, vol. II (Part Two), pp. 151-152, para. 352 and footnote 454.

63. The adaptation to crimes of the provisions of article 12 should not give rise to any serious difficulties. However, the gravity of crimes would justify the setting aside, in principle, of the requirements of prior summation or prior resort to available means of dispute settlement. Once the existence/attribution of a crime had been ascertained by the proposed procedure, the absence of "adequate response" should suffice to justify a recourse to countermeasures. Considering that no prior recourse to third-party settlement was to be required, there seemed to be no reason to extend to reactions to crimes a provision such as that contained in revised article 12, paragraph 2 (*a*), as proposed by the Special Rapporteur,[12] a provision which left open the possibility for the injured State to resort to urgent, temporary measures as required to protect the rights of the injured State or limit the damage caused by an internationally wrongful act even before resorting to the available dispute settlement procedure. The issue did not arise in the present context, bearing in mind that the condition of prior resort to dispute settlement procedures would not apply in the case of a crime. A problem did arise, however, with regard to the requirement of a prior pronouncement by an international body as a prerequisite for lawful reaction on the part of any one of the States injured by a crime. It seemed reasonable to say that, although, prior to such pronouncement, the *omnes* States injured by a crime were not entitled to resort to full countermeasures, they were nevertheless entitled to resort to such urgent interim measures as were required to protect their rights or limit the damage caused by the crime. He was referring in particular to measures aimed at securing immediate access to the victims for purposes of rescue and/or aid or preventing the continuation of a genocide, measures concerning humanitarian convoys, anti-pollution, passage facilities, and so on. The corresponding provision contained in draft article 17, paragraph 2, read:

"2. The condition set forth in paragraph 5 of article 19 below does not apply to such urgent, interim measures as are required to protect the rights of an injured State or to limit the damage caused by the international crime."

64. However, the option of unilaterally resorting to countermeasures should obviously be ruled out altogether in cases where the allegedly wrongdoing State submitted the matter to the binding third party adjudication procedure to be envisaged in part three. The relevant text was that proposed in the seventh report for article 7 of part three, which read:

"1. Any dispute which may arise between any States with respect to the legal consequences of a crime under articles 6 to 19 of part two shall be settled by arbitration on either party's proposal.

"2. Failing referral of the dispute to an arbitral tribunal within four months from either party's proposal, the dispute shall be referred unilaterally, by either party, to the International Court of Justice.

"3. The competence of the Court shall extend to any issues of fact or law under the present articles other than the question of existence and attribution previously decided under article 19 of part two."

65. Once an arbitral procedure or ICJ proceedings had been initiated (as provided in draft article 7 of part three) any measures would have to be subjected to the arbitral tribunal's or the Court's control. As to the article 12 requirement of timely communication, it did not seem that it should apply in the case of a crime, except perhaps in relation to particularly severe measures which might have adverse consequences for the wrongdoing State's population. Otherwise, a State which had committed or was committing a wrongful act of the degree of gravity of the crimes listed in article 19 of part one, presumably involving a measure of wilful intent, should not be entitled to a warning that might reduce the effectiveness of the countermeasures. Since any special form of reaction to a crime on the part of individual States or groups of States would in any case be preceded by open debates within one or more international bodies, it was unlikely that a wrongdoing State might be unaware of the possibility that injured States could resort to countermeasures.

66. As explained in the report, there seemed to be a problem with the requirement of proportionality as set out in article 13 because proportionality was to be measured, under that article, not only in relation to "the gravity of the internationally wrongful act", but also to "the effects thereof on the injured State". The second parameter, that of effects on the injured State, unduly emphasized—and that was also true, in his view, of delicts— only one of the aspects of the wrongful act's gravity to the detriment of other, no less important aspects listed in the report. To that general shortcoming of the existing wording of article 13, as provisionally adopted by the Commission at its forty-sixth session, should be added the even more serious difficulty of relying on the "effects ... on the injured State" in order to assess the gravity of a wrongful act which, as was the case with a crime, affected all States, possibly in a number of different ways, particularly where the crime consisted of massive violations of fundamental human rights or self-determination. That consideration should, in his view, lead to the deletion of the reference to "effects", not only for crimes, but also for delicts. In addition to the impropriety of stressing one element of gravity to the detriment of other equally relevant factors, delicts, if they were *erga omnes* breaches, could also affect all States. That was also the case with violations of human rights and self-determination, where the breach caused no direct damage to the legally injured States. Among the factors mentioned in the report, that of the element of fault, which so far had been too neglected by the Commission, acquired particular importance in the case of crimes. The relevant provision, draft article 17, paragraph 3, in which the "effects" element had been omitted, read:

"3. The requirement of proportionality set forth in article 13 shall apply to countermeasures taken by any State so that such measures shall not be out of proportion to the gravity of the international crime."

[12] *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/461 and Add.1-3, chap. I, sect. D.

67. No adaptation seemed to be necessary in connection with the prohibitions contained in article 14, subparagraphs (*a*) and (*b*), as provisionally adopted by the Commission at its forty-sixth session. It had only to be made clear, as was done by draft article 20, proposed in the seventh report, that the prohibitions on the threat or use of force and extreme economic or political measures did not apply either to forcible measures decided on by the Security Council under Chapter VII, or to self-defence under Article 51, of the Charter of the United Nations. The prohibitions set forth in article 14, subparagraphs (*c*), (*d*) and (*e*) (maintenance of diplomatic and consular relations, basic human rights and peremptory norms of general international law), were equally applicable to crimes because of the importance of the "protected objects" and despite the gravity of the crimes. That reduction in the weight of countermeasures was counterbalanced by the weight of measures such as those listed in Article 41 of the Charter, not to mention the moral weight represented by the condemnation to which the "criminal" State would be subjected by the mere fact of being accused of a crime and eventually found guilty through the institutional procedure that should be envisaged for the purpose. Lastly article 14 needed no adaptation in order to be applicable to crimes.

68. The "normative" part of the report ended with a consideration of what might be called the "supplementary" legal consequences of crimes. Those consequences included, first of all, a number of obligations additional to those relating to the reaction to delicts, which were incumbent on all injured States. Those additional obligations were laid down in draft article 18, paragraphs 1 (*a*) to 1 (*g*) as proposed in the seventh report. The other supplementary consequences included, in particular, the obligation imposed on the wrongdoing State, once it had been found to be in breach through the relevant institutional procedure, not to oppose fact-finding operations or observer missions in its territory for the verification of compliance with the obligations of cessation and reparation. That point was covered by draft article 18, paragraph 2.

69. With regard to the "institutional" aspect of the legal consequences of international crimes of States, he recalled that the question of the role of international institutions had been dealt with in his fifth report[13] and its importance had been acknowledged by almost all members of the Commission in the course of the debate at the preceding session. Clearly the question was not whether any institutions should be involved, but, rather, how deeply they should be involved, which of the existing institutions should be involved and whether any new institution should be envisaged for that indispensable task.

70. The theoretically conceivable degrees of institutional involvement were briefly identified in the report, while a number of instances of "organized" reactions by the General Assembly and the Security Council to grave breaches of international obligations were described from a more realistic point of view. In the report, it was expressly stated that, in referring to any such instances, he had deliberately left aside both the merits of the United Nations reactions in each particular case and the precise legal qualification of each case from the viewpoint of State responsibility. Apart from the fact that the only bodies involved had been political organs, the relevant resolutions had not been intended by the General Assembly or by the Security Council as specific reactions to breaches of the kind defined as crimes in article 19 of part one; in any case, he had not seen those instances in that light.

71. With regard to the extent to which institutions should be involved, it could not in theory be excluded that, as envisaged in the report, a future convention on State responsibility might entrust to international bodies the whole range of decisions and actions necessary for the implementation of the legal consequences of crimes. That option seemed, however, far less likely to materialize in the foreseeable future than the second hypothesis, according to which the role of international institutions would be confined to the crucial aspect of determining the existence of an international crime and its attribution to one or several States. There had been a high degree of consensus at the preceding session that such a determination would be the minimum that was indispensable for avoiding arbitrary or discordant determinations and consequent conflicts among all States injured by an alleged crime. Several solutions could be envisaged to achieve that end.

72. The possibility of entrusting the determination in question solely to one of the principal organs of the United Nations—ICJ, the General Assembly or the Security Council—was explored in the report.

73. Considering the eminently legal nature of the issue, ICJ was the first organ that came to mind. It was endowed with the necessary technical capacity, it was reasonably representative and it was not only duty bound, but also used to motivating its pronouncements in fact and law. Nevertheless, a pronouncement of the Court alone could not be envisaged for at least two reasons. One was the absence of a public prosecutor institution side by side with the Court. Given the fact that cases would be brought by States before the Court, there would thus be no way of "screening" or "filtering" out accusations that were not sufficiently substantiated. Secondly, once the Court had been provided *ipso facto* with compulsory jurisdiction over issues involving crimes, it would be very difficult, if not impossible, to prevent any State from bringing to the Court any other issues of State responsibility, even if they involved mere delicts.

74. The second theoretically possible choice, for the reasons indicated in the report, would be the General Assembly. Those reasons were, first, the Assembly's relatively more representative character and, secondly, the broad scope of its competence *ratione materiae*, encompassing all the areas of international relations and law within the scope of which the four kinds of breaches contemplated in article 19, paragraph 3, of part one could fall. However, that solution too had certain drawbacks and, in particular, the fact that the Assembly had no power to make binding legal determinations in the area of State responsibility.

75. A third possible choice would be the Security Council. In addition to positive features, such as the

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

Council's power to take binding decisions, although only in the area of international peace and security, such a solution would have a number of negative ones, namely, the Council's non-representative nature, its lack of competence in most of the four essential areas referred to in article 19, paragraph 3, of part one, and, above all, as was also the case with the General Assembly, the lack of power and technical capacity to deal with legal issues of State responsibility. The Council's function was to watch over the maintenance of international peace and security by making recommendations for the settlement of disputes or situations within the framework of Chapter VI of the Charter of the United Nations and by adopting recommendations or decisions in situations covered by Article 39 of the Charter and to do so while respecting all the relevant provisions therein. It was not the function of the Council to implement the law of State responsibility, whether for delicts or for crimes.

76. Apart from the specific features of the General Assembly or the Security Council, neither body could, alone, perform the function in question because of its essentially political nature.

77. The consequences of that basic fact were listed in the report, which drew attention to the difficulty of assuming that any competence in the area of State responsibility might have been acquired by the Security Council by virtue of its own practice. The same applied to the General Assembly. In either case, careful note should be taken, *inter alia*, of the comment made by the Swiss Government in connection with a well-known problem arising within the framework of the draft Code of Crimes Against the Peace and Security of Mankind. The Swiss Government pointed out that to suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they were called upon to establish individual culpability and determine the severity of the penalty did not seem to be in keeping with a sound conception of justice.[14]

78. The only way to circumvent the respective inadequacies of each of the three principal organs would be to combine their political and judicial capabilities in such a manner as to achieve a satisfactory or at least a less unsatisfactory solution. Such a composite political/judicial determination of the existence/attribution of a crime was proposed in draft article 19, paragraphs 1, 2, 3 and 5, as contained in the seventh report. The provisions in question read:

> "1. Any State Member of the United Nations Party to the present Convention claiming that an international crime has been or is being committed by one or more States shall bring the matter to the attention of the General Assembly or the Security Council of the United Nations in accordance with Chapter VI of the Charter of the United Nations.
>
> "2. If the General Assembly or the Security Council resolves by a qualified majority of the members present and voting that the allegation is sufficiently substantiated as to justify the grave concern of the international community, any State Member of the United Nations Party to the present Convention, including the State against which the claim is made, may bring the matter to the International Court of Justice by unilateral application for the Court to decide by a judgment whether the alleged international crime has been or is being committed by the accused State.
>
> "3. The qualified majority referred to in the preceding paragraph shall be, in the General Assembly, a two-thirds majority of the members present and voting, and in the Security Council, nine members present and voting including permanent members, provided that any members directly concerned shall abstain from voting.
>
> ...
>
> "5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfil the condition for the implementation, by any State Member of the United Nations Party to the present Convention, of the special or supplementary legal consequences of international crimes of States as contemplated in articles 16, 17 and 18 of the present part."

79. Some important issues arose from the crucial role of international institutions. One was whether the ICJ pronouncement ought not to be an advisory opinion rather than a judgment. The reasons for which he preferred the solution involving a judgment were explained in the report.

80. Another important question was what should be the legal answer if a case were brought before ICJ not on the basis of the jurisdictional link created by a future convention on State responsibility, but on that of the relevant provisions of such instruments as the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all of which, with the possible exception of the International Convention on the Suppression and Punishment of the Crime of Apartheid, envisaged the compulsory jurisdiction of the Court, namely, jurisdiction involving the possibility of unilateral application. The issues arising in such a case were given in the report and answers were offered. The relevant provision was draft article 19, paragraph 4, which read:

> "4. In any case where the International Court of Justice is exercising its competence in a dispute between two or more States Members of the United Nations Parties to the present Convention, on the basis of a title of jurisdiction other than paragraph 2 of the present article, with regard to the existence of an international crime of State, any other State Member of the United Nations which is a party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court for the purpose of paragraph 5 of the present article."

81. By way of conclusion, the seventh report addressed three points which he considered very important. The

[14] Ibid., document A/CN.4/448 and Add.1.

first was a brief recapitulation of the arguments for and against dealing with the consequences of the wrongful acts singled out as international crimes of States in article 19 of part one. In that respect, the examples of breaches of essential international obligations contained in the report indicated with sufficient clarity that the wrongful acts in question were generally viewed as: (*a*) infringing *erga omnes* rules of international law, possibly of *jus cogens*; (*b*) being injurious to all States; (*c*) justifying a generalized demand for cessation/reparation; and (*d*) possibly justifying a generalized reaction in one form or another on the part of States or international bodies. It would therefore seem highly appropriate that something should be done by the Commission in order to bring such reaction under some measure of specific legal control within the draft on State responsibility.

82. Article 19 of part one represented a preliminary step in that direction. A second step had been accomplished with the provisional adoption of article 5 of part two,[15] which entitled all States to demand cessation/reparation and possibly to resort to countermeasures.

83. At present, draft articles 15 to 20 as they appeared in the report laid down the rules he deemed indispensable in order to specify the conditions, modalities and limits of the said generalized reaction. Those articles were meant to provide the legal control of that reaction within the framework of the law of State responsibility to which the matter properly belonged.

84. The other points made in the concluding remarks in the seventh report concerned two of the most essential features of the "institutional" aspect of the solution he was proposing. The first essential feature was that, for the reasons given in the report, the proposed two-phased procedure did not involve any modification of the two main existing instruments of international organization, namely, the Charter of the United Nations and the Statute of ICJ.

85. The second essential feature concerned the relationship of the proposed solution with the collective security system embodied in the Charter. On the one hand, there was the political role performed under the Charter by the Security Council and the General Assembly—especially by the former—with regard to the maintenance of international peace and security. On the other hand, there would be the role entrusted by the convention to either of those political organs and, more decisively, in view of the subject-matter, to ICJ. The preliminary political evaluation by the Assembly or the Council of the seriousness of the claims brought by the accusing State or States and the judicial pronouncement by the Court—seized unilaterally by the accusers or the accused—were the condition *sine qua non* of the implementation by States of the legal consequences of an international crime.

86. As explained in the report, in the area of security, where discretionary power, although not unlimited, and urgency of action were the primary considerations, the decision would ultimately rest solely with the Security Council in its restricted membership. But in the area of State responsibility for very serious breaches of international obligations, where the judicial application of the law was primary, the decision, prior to that of the *omnes* States themselves, had to rest ultimately with ICJ. Absolute impartiality was obviously unattainable. But a relatively high degree of impartiality could be expected—in so far as a preliminary political pronouncement was concerned—from the General Assembly because of the two-thirds majority requirement and from the Council because of the mandatory abstention of the parties in the dispute. Indeed, the area pertained, of course, to Chapter VI and not to Chapter VII of the Charter. There was no need, before a gathering of lawyers, to stress the importance of that distinction.

87. The proposed regime of responsibility for international crimes of States should not, on the other hand, be any obstacle to the exercise, by the United Nations, of its functions relating to the maintenance of international peace and security. It was in view of this essential requirement that the powers of the Security Council in the maintenance of international peace and security, as well as the right of States to self-defence under Article 51 of the Charter, were preserved by the express provision of draft article 20 as contained in the seventh report.

88. He believed it was essential to stress, however, that the provision of draft article 20, as he had proposed, was not the same as article 4 of part two, as adopted by the Commission.[16] Article 4, as adopted, was so formulated as to bring about an inappropriate subordination of the articles on State responsibility to the "provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security", particularly to the decisions of a political body such as the Security Council. The maintenance of such a provision would thus strike a serious blow to the rule of law in the relations among States, any international legal rights of a State becoming subject to overriding determinations of political bodies. He stressed that his reservations on the subject of article 4, which were stronger than Mr. Bowett seemed to think in his recent article,[17] had been expressed repeatedly since 1992, as was reiterated in the seventh report.

89. The distinction between the *law of collective security* and the *law of State responsibility* was of the greatest importance for the very survival of the law of State responsibility. It was firmly established *de lege lata* and had to be preserved *de lege ferenda*. Respect for that distinction depended in no small measure not only on the validity and effectiveness of the law of State responsibility, but also on the proper functioning and the credibility of what was known, for want of a better term, as the "organized international community". The Commission would be ill advised if it failed to take due account of the distinction in its draft on State responsibility and to bring it fully to the attention of the General Assembly.

The meeting rose at 12.05 p.m.

[15] For the text of articles 1 to 5 of part two provisionally adopted by the Commission at its thirty-seventh session, see *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25.

[16] Ibid.

[17] D. Bowett, "The impact of Security Council decisions on dispute settlement procedures", *European Journal of International Law*, vol. 5, No. 1 (1994), p. 89.