Document:-
A/CN.4/SR.2392

Summary record of the 2392nd meeting

Topic:
State responsibility

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

2392nd MEETING

Wednesday, 31 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. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,[1] 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 (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the seventh report on State responsibility (A/CN.4/469 and Add.1 and 2) and asked whether members required any clarification of the introduction of the report by the Special Rapporteur at the previous meeting.

2. Mr. IDRIS said that, since the Special Rapporteur clearly attached importance to the obligation of the State which has committed a crime not to oppose fact-finding operations, perhaps the issue should have been included under "Substantive consequences" rather than under "Other consequences of crimes".

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that under "Other consequences of crimes" he had meant to assemble all those consequences which did not belong definitely to one of the other two categories. In fact, the obligation in question straddled the demarcation line between substantive and instrumental consequences and he had therefore included it under "Other consequences".

4. Mr. ROSENSTOCK said that the Special Rapporteur was a friend and mentor and had been for many years. It was therefore with regret that he had to record his basic disagreement with what was proposed in the seventh report. In his view, the entire scheme set forth in the report was based on a false premise as reflected in article 19 of part one[2] and on the neologism "crimes of States". The scheme was, even if not based on a false premise, flawed and unnecessary and likely to be "virtually unacceptable to the 185 members of the General Assembly. It was one thing to be forward-looking, but another to be unrealistic. The Special Rapporteur had ignored the warning signs of the divisive debate on article 19 of part one which had taken place in 1994[3] and had included in his report a defence of article 19. Personally, he was not convinced by that defence. The notion embodied in article 19 of part one was not supported by State practice. One could perhaps find a basis for a continuum, ranging from minor breaches to very serious breaches affecting the international community as a whole, or even conceive of some qualitative distinction based on the effect on that community—but not if the term "crime", resonant as it was of domestic law, was used.

5. Furthermore, it was no answer to the relevance of the maxim *societas delinquere non potest* to cite the case of private companies found guilty of crimes under domestic law. Quite apart from the problem of punishing a people rather than its leaders, the analogy between private corporations and States was extremely tenuous. What was more, the existence of a domestic criminal law system of prosecution and enforcement merely served to underline the distance that would have to be travelled before the "criminal" responsibility of States, in any formal sense of the term, were to be viable—assuming that it was a good idea, which, in his view, it was not.

6. The suggestion that article 5 of the draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of States",[4] implied the criminal responsibility of States was not only unconvincing but little short of disingenuous. If anything, article 5 pointed to a distinction between the criminal responsibility of individuals and the civil responsibility of the State. The Special Rapporteur also failed to say why he had ignored Mr. Vereshchetin's wise advice in 1994 that the matter of article 19 of part one and its possible consequences should be deferred until the second reading, when both could be evaluated together. As Mr. Vereshchetin had further noted, that would have the advantage of enabling the Commission to complete the first reading of the draft in the current quinquennium.[5] It was clear that since article 19 proclaimed, for no apparent reason, that States could not treat crimes as delicts even if they wished to, an express decision would be required if Mr. Vereshchetin's suggestion was to be followed.

7. The report made no mention of the adverse effect on *erga omnes* obligations in general of the creation of a class of *erga omnes* violations which merited special treatment. In that connection, the energy and scholarship which had gone into the seventh report could perhaps have been more productively used to address the problem of directly and indirectly affected States—an approach that might have provided a better response to the problem of *erga omnes* situations in general, without creating insurmountable problems of the kind created by

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

[2] See 2391st meeting, footnote 8.

[3] *Yearbook... 1994*, vol. II (Part Two), paras. 230-346.

[4] For the text of the draft articles provisionally adopted on first reading by the Commission at its forty-third session, see *Yearbook... 1991*, vol. II (Part Two), pp. 94-97.

[5] See *Yearbook... 1994*, vol. I, 2348th meeting.

the scheme set forth in the seventh report. If there was some basis for retaining provisions that responded to the curious notion of "crimes" by States, some of the provisions of article 18 of part two, as proposed by the Special Rapporteur in his seventh report, could perhaps be added.

8. One question that repeatedly came to mind was whether, notwithstanding the terms of article 19, there really were sufficient extremely grave *erga omnes* situations or "crimes" that did not involve a threat to the peace. Having regard to precedents such as those provided by Security Council action with respect to South Africa, Rhodesia, Somalia and Rwanda, and by some of the resolutions relating to human rights aspects of the Iraqi and Yugoslav situations, he for one believed that virtually all of what could conceivably be accepted as extremely grave *erga omnes* violations—or "crimes"—involved threats to the peace, if not acts of aggression. To the extent that that was true, there was already a system in existence and it was beginning to work. There might, in fact, be no need for a grandiose new scheme even if an acceptable form for such a scheme could be designed. The Special Rapporteur's proposed scheme would not, however, be acceptable even if its defects were remedied, for the problems were systemic.

9. As to specific aspects of the report, the Special Rapporteur's proposed adjustments to articles 7 and 10 of part two[6] would not be inappropriate if it was decided to have a category of "crimes", but they certainly did not justify the existence of such a category. A somewhat more creative reading of article 10 (Satisfaction), paragraph 2 (*c*), and bearing in mind that article 13 (Proportionality)[7] would operate as a limitation, might be a simpler way of meeting the needs. It might even have been worth exploring the possibility of exemplary damages in the context of the conduct that some would designate as "crimes". The *S.S. "I'm Alone"* case[8] could be regarded as a platform for any such approach. Some progressive development along those lines would seem to be more promising than the quantum leap proposed.

10. Whether or not the notion of "crimes" was retained, consideration could, for example, be given to introducing a phrase such as "subject to the gravity and breadth of the effect of the wrongful act" in order to lessen the constraint imposed by article 10, paragraph 3.

11. The examples of past action by the Security Council cited in the report were interesting in that they established that, in the case of truly serious situations of wrongful conduct by States, there was an existing and effective mechanism. They were not, however, as the Special Rapporteur stated, theoretically conceivable measures but real life examples of action which negated the need to invent a new system.

12. The Special Rapporteur stated that one of the main characteristics of the instrumental consequences of "crimes" was that the option of resort to countermeasures extended to all States. Did that not, however, apply to all *erga omnes* violations and were not all States injured States in the case of an *erga omnes* violation? That, together with the availability of means to deal with situations that constituted threats to the peace, seemed to strip the Special Rapporteur's conclusion—that the factors he cited justified the creation of a special category of wrongful acts and the designation of that category as "crimes"—of its compelling force.

13. The Special Rapporteur's reference to article 11 as having been "tentatively" adopted was misleading, since it had in fact been provisionally adopted in plenary, like all the other articles.[9] His reference to a version of article 12 that had been twice rejected by the Drafting Committee was also curious. His suggestion that the words "the effects ... on the injured State" should be deleted from article 13 seemed inadvisable, since it was essential to include that concept in calculating the acceptable level of countermeasures. There were also precedents which supported the existence of that concept, such as the case concerning the *Air Service Agreement*.[10] There were, of course, no precedents concerning "crimes" because there was no State practice in that respect, the neologism having been invented only relatively recently. Quite apart from the lack of precedent, which in itself indicated a dearth of interest on the part of States, the Special Rapporteur's arguments were unconvincing. At one point, he stated that to single out the effects on the injured State was to denigrate the many other factors. At another point, he seemed to suggest that the effect on the injured State was an invalid criterion. At all events, if a category of "crimes" was accepted, article 13 as drafted and provisionally adopted remained necessary so far as delicts were concerned.

14. The Special Rapporteur's apparent failure to deal with article 14, subparagraph (*b*),[11] in the context of "crimes" seemed odd. To allow that provision to stand was tantamount to suggesting that State A could apply extreme economic or political coercion on State B but that, in addition to the valid requirement of proportionality under article 13, State B was barred from responding proportionally. That was strange in the case of delicts but even stranger in the case of "crimes", if indeed such a category was retained.

15. Draft articles 17 and 18, as proposed by the Special Rapporteur in his seventh report, contained various additional consequences, some of which also seemed distinctly odd. Article 18, paragraph 1 (*e*) for example, imposed an obligation on the part of the victim State as well as on the wrongdoing State to extradite or prosecute. No reason was given for the inclusion of such a notion. It seemed to be a fugitive from the draft Code of Crimes against the Peace and Security of Mankind.

[6] See 2391st meeting, footnote 9.

[7] Ibid., footnote 11.

[8] Decisions of 30 June 1933 and 5 January 1935 (Canada *v.* United States of America) (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1609 *et seq.*, in particular, p. 1611).

[9] See 2391st meeting, footnote 11.

[10] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 417 *et seq.*).

[11] See 2391st meeting, footnote 11.

16. The provisions proposed for article 18, paragraph 1, subparagraphs (*a*), (*b*) and possibly (*c*), raised the question why they should not apply to delicts as well. The effect of including a reference to them in the opening clause of the article was to rule out even the most serious delicts. That, at least, seemed to call for an explanation.

17. The Special Rapporteur, who was to be commended on the imaginative sweep and personal commitment behind his grand scheme, had recognized that empowering States to accuse one another of crimes and to take drastic action was a dangerous game. Very understandably, he had sought to invent a system to contain what he had created. The question, however, was whether it made sense to empower all States equally or whether there should be a differentiation between those directly affected and others. In that connection, it might be worth considering whether such a scheme was necessary if it were recognized that any wrongful acts worth categorizing as the most serious breaches were those that constituted threats to the peace. After all, a functioning mechanism did exist to deal with such problems.

18. The Special Rapporteur's proposed scheme raised numerous problems and, in particular, seemed to be inconsistent with, *inter alia*, Articles 12, 24, 27 and 39 of the Charter of the United Nations. However, to point out possible defects in the scheme was in no way to suggest that curing those defects would make the scheme acceptable.

19. The inconsistency with Article 12 of the Charter, already apparent from the wording of draft articles 18 and 19, was brought out unmistakably by the statement in the report that accusing States under paragraph 1 of draft article 19, as proposed, may seize either the General Assembly or the Security Council or both at the same time. That would create precisely the situation that Article 12 of the Charter was designed to prevent, namely, a potential conflict between the Assembly and the Council. The somewhat glib comment that "any divergence between the Assembly and the Council would be settled by the Court's judgement" hardly resolved the constitutional crises so blithely facilitated. The casual reference to ICJ seemed to ignore at least the spirit of the decision taken at San Francisco not to provide for some form of de facto judicial review of actions taken by the political organs of the United Nations. There were some who seemed committed, no matter what, to seeing the Court as the answer to all problems: they had been referred to as "judicial romantics".

20. Article 24 of the Charter, whereby Members were required to "confer on the Security Council primary responsibility for the maintenance of international peace and security" was also ignored by the Special Rapporteur.

21. Draft article 19 provided that the members should bring a claim to the attention of the Security Council under Chapter VI of the Charter, whereas it could reasonably be assumed that most, if not all, "crimes" by States would involve threats to the peace, and therefore be a matter for Chapter VII of the Charter. It was intriguing to imagine a convention on State responsibility that, by some alchemy, would transport Article 39 of the Charter from Chapter VII to Chapter VI; if the alchemy was not effective, the last phrase of draft article 19, paragraph 3, would be contrary to Article 27, paragraph 3, of the Charter.

22. The complexities of the role of ICJ in the Special Rapporteur's grand scheme were described to some extent in the report, though not all of the problems were addressed or resolved. Draft article 19, paragraph 4, provided that "any other Member State of the United Nations which is party to the present Convention shall be entitled to join, by unilateral application, the proceedings of the Court". Quite apart from the fact that there was no guidance as to how such a system would be managed, there was the question why the right to join the queue of States should be limited to States Members of the United Nations. For that matter, why was paragraph 1 of draft article 19 limited to States Members?

23. There was also the issue of the concept of "interim measures" as set forth in draft article 17, paragraph 2. The problems of applying that concept, one which had been borrowed from Article 41 of the Statute of ICJ, had been considered and the concept twice rejected by the Drafting Committee in the context of delicts. Were the problems any less in the context of crimes? A more detailed analysis of the nature of the jurisdictional link created by General Assembly or Security Council action, and of whether such a link solved all potential *locus standi* issues, might be informative. The present report also failed to suggest any basis for believing that States which had so far shown reluctance to accept the jurisdiction of ICJ under Article 36, paragraph 2, of the Statute, would suddenly embrace such a role for the Court. In his view, far more crucial issues were at stake than those involved in the original ICJ/*jus cogens* package which had formed a package deal for many States in 1969.

24. As the Special Rapporteur had rightly said, the whole approach to the consequences of a "crime" depended on a scheme such as the one he had developed being accepted in its entirety. Quite apart from its defects and from the fact that it was an unnecessary response to a self-induced problem, that scheme could not conceivably command wide acceptance by States. The work of the Commission over the past three decades on the topic might well come to naught if the Commission allowed its reach to exceed its grasp, and it included anything like such a fascinating scheme in its recommendations to the General Assembly.

25. Mr. LUKASHUK said that the Special Rapporteur's reports had already become part of a "golden fund" of research on the topic of State responsibility. In recent times he had not found a single work on the topic which did not refer to or quote the Special Rapporteur. The reports were based on past experience and sought to respond to contemporary requirements, but they were essentially forward-looking, perhaps to the twenty-first or even the twenty-second century. They were full of optimism and amounted to a jurist's dream. Nevertheless, he himself would like to see, within his lifetime, the Special Rapporteur's proposals become part of doctrine and of positive law itself. He therefore asked the Special Rapporteur to consider preparing a short text, covering perhaps only part of the topic, which the Commission could

quickly put before the General Assembly. The Commission could then continue its work on the other parts.

26. The proposed articles were revolutionary and far from consistent with States' sense of international law. He had no basic objection to the seventh report but wished to note an important general point. The report, like other reports of the Commission, was based almost entirely on European doctrine and practice. However, the Commission must always try to ensure the representation of the main forms of civilization and the world's principal legal systems. Of course, one special rapporteur could not know all languages, but many countries issued international law publications in English or French which would be fully accessible to any special rapporteur. He did not wish to overstate the importance of the question. European doctrine, and to some extent practice, were not so different from that of Asian and other countries. It was, nevertheless, wrong to disregard entirely the doctrine and practice of regions other than Europe. For example, it would be impossible to solve problems such as State succession and citizenship without taking account of the doctrine and practice of the countries of central and eastern Europe. One solution might be for the members of the Commission to serve as channels for information about doctrine and practice in their countries and regions.

27. With respect to the progressive development of the law of State responsibility, the Commission must certainly take account of the views of world society. The statement just made by Mr. Rosenstock showed that the draft articles would encounter serious difficulties. There had been no great difficulty while the topic dealt mainly with diplomatic and consular law, but the recognition in the draft articles of *jus cogens* treaties had generated a storm, even though *jus cogens* could not be compared with some of the revolutionary texts prepared by the Commission. For example, if the draft statute for an international criminal court, the draft Code of Crimes against the Peace and Security of Mankind, and the draft articles on State responsibility were all adopted in the near future, they would fundamentally change the nature of international law, especially in its weakest area—the machinery for implementing it.

28. State responsibility was a new concept, unknown to traditional international law. Even as late as the early twentieth century, State responsibility had been regarded as incompatible with sovereignty and alien to international law. In the past, special rapporteurs had written about State responsibility in a very special context: responsibility for damage caused to foreigners in a State's territory as a result of exceptional events such as uprisings. In other words, it was a question not so much of the public as of the civil legal responsibility of States. When the League of Nations had taken up the topic of State responsibility it had done so in the context of civil law. Yet even in that limited context, nothing had been achieved.

29. Accordingly, the complexity of the Commission's task was obvious. Just as in the past there had been reluctance to accept State responsibility as compatible with sovereignty, now there was equal reluctance to accept the concept of crimes of States in international law. The facts showed that States were not ready for more effective international law, especially a more effective implementation machinery. The destiny of the draft articles would not be an easy one. Interestingly enough, the Special Rapporteur had taken account of the situation in all his reports and had convincingly demonstrated the lack of justification of most of the criticisms offered in the Commission and the Sixth Committee. But what convinced the Commission would not convince everyone. States had their own logic, a logic not of international law but of political interests.

30. Commenting more specifically on the seventh report, he would point out that many legal systems did not recognize the concept of criminal responsibility of legal persons. Other systems did, and indeed the Nürnberg Tribunal had recognized a number of legal persons as criminals. The action taken by the United Nations against Iraq was a typical action to deal with the criminal responsibility of a State guilty of the crime of aggression. All the previous special rapporteurs had also advocated acceptance of the concept of international crimes of States, thus reflecting the prevailing opinion in world doctrine. At the present stage, the recognition of that concept still did not mean the "criminalization" of international law. It was instead a question of identifying in a special category the most heinous wrongful acts inflicted on the whole international community. The point was well illustrated in the decision of ICJ in the *Barcelona Traction* case.[12] In fact, one of the most important marks of an international crime was its *erga omnes* nature. With regard to the consequences of international crimes of States, he noted that unlike many national legal systems international law did not make a strict distinction between the criminal and civil consequences of a wrongful act.

31. "Restitution in kind" seemed to mean essentially restitution in full, but experience had shown that such a degree of restitution was often impossible and even undesirable. The Second World War peace settlement had taken account of the sad experience of the Versailles settlement which had become one of the causes of the later war. A system of partial restitution had been established, and the level of compensation linked to considerations of democratic development. Accordingly, the Special Rapporteur's idea of attributing special significance to democratization as a guarantee of non-repetition of a crime was extremely important.

32. He had some doubts about draft article 16, paragraph 3, as proposed by the Special Rapporteur in his seventh report. It was perhaps too severe to specify that a State which had committed an international crime was not entitled to benefit from any rules or principles of international law relating to the protection of its sovereignty and liberty; it was certainly too severe with respect to liberty. The provision gave the impression that such a State was being placed outside the law, but even criminals had their rights.

33. He did not agree with the widely held view, shared by the Special Rapporteur, that under general international law the implementation of the consequences of

[12] See 2388th meeting, footnote 14.

crimes remained in the hands of States. The reaction to violations of international law was already a joint reaction by States and the United Nations. He fully agreed with the Special Rapporteur on the need to use existing international organs, but the proposed arrangement was not fully consistent with the Charter of the United Nations. He would simply suggest that, acting on a declaration by a State or on its own initiative, the General Assembly should determine that a crime had been committed and recommend appropriate action. It had already acted in that way in connection with a number of international crimes. Admittedly, Assembly resolutions were only recommendations, but the role of such recommendations in legitimizing the behaviour of States and organizations was already recognized and it would be quite sufficient in the present case. Of course, the Security Council could adopt emergency measures under Chapters VI and VII of the Charter in order to resolve disputes about countermeasures. As far as ICJ was concerned, at the request of a State the Assembly would refer the issue for an advisory opinion. It was already the case that, in disputes between organizations, the Court's advisory opinions were legally binding.

34. Mr. TOMUSCHAT said that he concurred with many of the suggestions made by the Special Rapporteur in the seventh report and, in particular, that it was necessary to have an institutional framework to deal with specific legal consequences of the commission of crimes. It was not enough to draft substantive rules. He was not in fundamental disagreement with the Special Rapporteur concerning the word "crime", which he took to mean a particularly serious violation of international law; for him, the word "crime" in that context had no criminal connotation whatsoever.

35. He agreed with the basic proposition set forth in draft article 16, according to which an internationally wrongful act of a State had all of the consequences which were also entailed in the commission of an ordinary delict of a State. It was clear that reparation was a general obligation, although he did not agree with some of the language used in the report in that connection. For example, the Special Rapporteur stated that any State should be entitled to obtain reparation, whereas draft article 16, paragraph 1, which was correctly worded, stated that every State was entitled to demand that the State cease its wrongful conduct. It was important to ensure that all States had a right to demand that the law-breaker behave in a correct manner and in accordance with the rules of international law. In that regard, it was right to say that one of the main difficulties lay in article 5,[13] which had created a general category of injured States and was fundamentally wrong. What was needed was a distinction between States that had suffered tangible injury and other States that had been injured only in the legal sense, their right to demand compliance with treaty obligations having been breached. Two different categories were involved and should not have the same rights.

36. Plainly, a State which had committed a particularly serious internationally wrongful act was required to make restitution in kind. But it was difficult to understand why, in that connection, the Special Rapporteur had discussed restrictions on the independence of a State as a member of the international community. In his view, if a State was required to make restitution in kind, it must certainly not lose its status as an independent member of the international community or its territorial integrity. He would also stress the vital needs of the people, an important precedent which was to be found in Security Council resolutions on Iraq, under which Iraq was required to pay only 30 per cent of its oil revenues to the International Compensation Fund.[14] That was a very wise decision and a beacon for the work of the Commission.

37. As to compensation, as Mr. Lukashuk had rightly pointed out, after major disasters like the Second World War and even the aggression by Iraq, it was generally impossible for full compensation to be paid for all of the harm done. Mr. Lukashuk had also mentioned the peace settlement following the First World War in which the vanquished were burdened with heavy obligations that had led to financial disaster. Compensation, therefore, was a highly relevant factor, and provision for it should be included under article 16. Strangely enough, the Special Rapporteur had suggested no rule in that regard.

38. Again, it was obvious that satisfaction and guarantees of non-repetition should be a normal consequence of the commission of a crime. While he supported the Special Rapporteur's very interesting ideas on the question, it had to be stressed that the Special Rapporteur's suggestions as a whole could not be dealt with in the context of a bilateral relationship between States of the sort to which his suggested rules were essentially confined. Of course, he did suggest that institutions of the international community should also play a role: there might be a decision by the General Assembly or the Security Council, followed by a decision of ICJ. Thereafter, however, implementation was left to States acting individually (art. 19, para. 5). In his opinion, that was wrong: States acting individually could not handle the imposition of far-reaching measures such as demilitarization or the acceptance of fact-finding missions on the territory. What would happen, for example, if States made conflicting demands on the wrongdoing State? In such cases, a decision of the Council acting on behalf of the entire international community was clearly needed.

39. With reference to the relationship between the substantive and the procedural provisions, he favoured a clear distinction between, on the one hand, measures States were authorized to take individually, acting in the interests of the international community (as *defensores legis*), and, on the other hand, measures appropriate solely for action by the international community. Admittedly, there were few international institutions with jurisdiction or competence in that field. It was one of the flaws of the present-day structure of the international community. Reverting to draft article 16 in that connection, he did not see the need to require that a State wishing to make demands, as mentioned in paragraph 1 of that article, should obtain a prior determination by ICJ

[13] For the text of article 5 of part two, and commentary thereto, provisionally adopted by the Commission at its thirty-seventh session, see *Yearbook... 1985*, vol. II (Part Two), pp. 25-27.

[14] See, in particular, Security Council resolution 705 (1991) of 15 August 1991, para. 2.

under draft article 19, paragraph 5. When an international crime had been committed, should not each and every State call for corrective measures to be taken? Further, third States not directly injured should also have the right to make demands for reparation and compensation. In such cases, a determination by ICJ would be far too cumbersome. If, however, one were to go further and to burden wrongdoing States with obligations to give far-reaching guarantees of non-repetition, those demands did not automatically derive, *ipso facto*, from the internationally wrongful act or the commission of the crime. Such demands must be specific, and tailored to the situation. There again, to leave it to 185 individual States to make specific demands for guarantees of non-repetition would lead to a chaotic situation. Clearly, a decision by an appropriate organ of the international community was required. In addition, he failed to see why the requirements listed in draft article 18, paragraphs 1 (*a*) and 1 (*b*), should be subject to a decision of ICJ. Those matters should be an automatic consequence of the commission of an international crime. Nor was paragraph 1 (*c*) very helpful: why did States need assistance in fulfilling their obligations under paragraphs 1 (*a*) and 1 (*b*)? There was no such necessity. On the other hand, draft article 18, paragraph 1 (*f*), went much too far. By way of an example, he would point out that, for a long time, there had been disagreement in the United Nations about the best way to abolish apartheid. The great majority of third world States had wanted to isolate South Africa, while other States had preferred to pursue a policy of active involvement. Eventually, the pursuit of those two policies in parallel had led to the desired outcome. No group should be able to impose its political views on any other group. Accordingly, he could not endorse paragraph 1 (*f*).

40. Draft article 18, paragraph 2, signified a specific determination to be made by the Security Council. Again, according to the logic of the draft system submitted by the Special Rapporteur, that would be left to the discretion of individual States. Here, too, there should be a single determination by the international community, not a large number of demands addressed to the alleged wrongdoer by individual States.

41. Draft article 19 raised difficult issues regarding constitutionality under the Charter of the United Nations and the Special Rapporteur was well aware of them. It was incorrect to state that the General Assembly was a more democratic organ than the Security Council. Under the current system whereby every State had the same voting power, one very large State could be out-voted by two or three diminutive States. Of course, if a system of weighted voting were to be introduced, then matters would be different.

42. As for draft article 19, paragraph 3, a decision according to which a State was subjected to the jurisdiction of ICJ did not come within the scope of Chapter VI of the Charter: such a determination necessarily fell within the scope of Chapter VII. Consequently, the permanent members of the Security Council would be able to exercise their power of veto. The question was, could a State bind itself, with regard to future determinations, not to use its power of veto? Personally, he very much doubted it.

43. Draft article 19, paragraph 5, was not satisfactory because, although an institution of the international community was involved, it provided only for a bilateral procedure. There was, however, another problem. Quite simply, ICJ could not handle such a full docket. Too much reliance was placed on the Court, which could not be expected to deal with all the conflicts arising around the world.

44. Article 5 might lie at the heart of many misperceptions and must be reviewed, for it was not possible to lump together States directly injured and those acting as *defensores legis*. Moreover, he would be grateful if the Special Rapporteur would clarify whether the special consequences were punitive consequences. If that was so, he fundamentally disagreed with the proposal. The system to be established should not entail punitive consequences. The Commission should also recall that under article 5, third States had many rights. They were injured States. In the case of human rights treaties, the Commission had defined any other third State party to such treaties as an injured State. Would those specific rules on crimes also apply to those other injured States? Would they be free to act under the general provisions? The rules suggested by the Special Rapporteur were perhaps well suited to cases of aggression, but as far as serious human rights violations—also one of the categories listed in article 19 of part one[15]—were concerned, the rules were not at all appropriate. The third State should have the right to demand that the author State should desist from its unlawful course of action, but it should not be able to make specific demands for restitution, compensation and so forth. Such matters must be settled by those directly concerned. In the case of South Africa, for example, a solution to the consequences of the apartheid regime must be hammered out by South Africans themselves. Third States had no role to play in that regard. Chile was another example of a country still dealing with the consequences of its past. That was a matter the Chilean people itself must address.

45. For his own part, he could envisage a somewhat different system. The Special Rapporteur, as seen from draft article 20 proposed in the seventh report, wished to keep the system under the future convention on State responsibility and the system for the maintenance of international peace and security separate from one another. However, particularly with regard to crime, that was hardly possible. In instances where international peace and security were at stake, any decision must be left to the Security Council. Outside that area, however, some simpler system could be envisioned. A third State wishing to take action against an alleged wrongdoer could be required to notify its intention to the States parties to the Convention, which, by a majority or by a two-thirds vote, could enjoin the vigilante to desist from its plans. Afterwards, if the vigilante insisted on its right, one could give it the right to seize ICJ. The advantage would be to make the first stages of the procedure swift and easy, and avoid imposing too weighty a burden on the Court.

[15] See 2391st meeting, footnote 8.

46. Historical disasters could not be settled in the way accountants settled a claim. There must be a lot of political discretion, which could only be entrusted to responsible international institutions. Essentially, the Special Rapporteur was still on the path of bilateralism. In his view, such a system was not workable.

47. Mr. FOMBA said that the Special Rapporteur had been faced with the difficult task of envisaging a legal system of State responsibility which was broadly compatible with the global legal or institutional balance secured under the system of the Charter of the United Nations, and which preserved the international political and legal status quo while introducing a legitimate dose of adaptability and innovation, so as to reconcile the desirable with the possible. In his view, the Special Rapporteur had achieved that difficult and finely balanced objective. For the rest, he broadly supported the logic behind the theoretical arguments developed by the Special Rapporteur in his seventh report, which, furthermore, tended to be backed up by the practice of the main United Nations organs. In the report, the Special Rapporteur tried to take account of the specific nature of international crimes as compared to delicts, so as to draw the substantive and instrumental consequences in terms of legal logic and, especially, of political reason. He supported that commendable effort, and reserved the right to make further specific comments on the report at a later stage.

48. Mr. BOWETT said that, at the previous session, he had tried to persuade the Commission not to deal with crimes under the present topic, and to exclude article 19 of part one from the draft articles. He had produced a paper designed to persuade the Commission that that was the right course. He had failed in that attempt and had had to accept the Commission's view, although his own remained unchanged, namely, that international society was not currently structured to deal with crimes.

49. That being said, in the light of the Commission's opinion that it must now deal with crimes, he welcomed the Special Rapporteur's seventh report as a bold attempt to deal with the consequences of such crimes. The report contained many features which were very attractive, and a number which were distinctly problematical. Among the attractive features, he had liked the requirement that a resolution expressing the "concern" of the international community should be adopted, either by the Security Council or by the General Assembly, as a precondition or trigger to any further sanctions or consequences which might flow from a crime. Secondly, he had liked the notion that a finding that a crime had been committed, as opposed to a mere expression of concern, should be a finding of guilt by a judicial body—that the crime of State should be found to be such by ICJ. Thirdly, he liked the notion that, although the precondition or trigger operated with regard to sanctions which all States could take on their own authority, that did not affect the powers of the Council, acting under Chapter VII of the Charter, to authorize sanctions by States, and for States to apply them without waiting for a judicial finding of guilt. Lastly, generally speaking he had liked the way in which the Special Rapporteur had dealt with the additional consequences attaching to crimes—the way in which he envisaged amendments or alterations to the articles dealing with consequences. He did, however, accept the need for care in that regard and had considerable sympathy with some of the points raised by Mr. Tomuschat.

50. The problematical features arose primarily from selecting ICJ as the traditional organ that would find that a crime of State had been committed. There were profound difficulties about that assumption. First, there was the difficulty that the whole scheme presupposed an acceptance of compulsory jurisdiction for ICJ with regard to crimes. Frankly, he saw no possible chance of such a scheme being accepted.

51. Secondly, there was a difficulty over timing. It was common knowledge that the Court currently took about four years to give its judgment in a case. He could not see that the Court would want to take less care, or less time, over a matter as serious as an allegation of a crime of State. If the States of the international community were to be required to wait four years before applying sanctions other than those already authorized by the Security Council and any interim measures taken, they would inevitably lose interest in applying sanctions. Four years was simply too long a period, and a much more expeditious process was needed.

52. Thirdly, there was the difficulty that, in an allegation of a crime of State, fact-finding would play a vital role. Yet ICJ had no adequate techniques for independent fact-finding. That was one of the difficulties it had experienced in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).[16] Reliance by the Court on such facts as the parties might choose to bring before it would be aggravated by the fact that the accused State might not be willing to participate. Consequently, the presentation of facts before the Court might very well be one-sided. Lastly, there was the disadvantage that, under the present scheme, the Special Rapporteur envisaged the institution of proceedings as depending upon a complainant State. Consequently, some State would have to complain, and to shoulder the burden of prosecution. It seemed to be a chancy process and he was by no means sure that a complainant State, which, by definition, was far from unbiased, would be the right prosecutor in a case alleging a crime of State.

53. Selecting the Court as the judicial organ could perhaps be avoided. One possibility would be that the political organ registering the initial concern—the General Assembly or the Security Council—should at the same time appoint an independent commission of jurists and a special prosecutor, who would then take charge of prosecution of the complaint on the basis of such evidence as the independent special prosecutor could procure. The use of an independent commission of jurists had not been a feature of United Nations practice. It had, however, been a prominent feature of League of Nations practice. The establishment of an independent commission of jurists and the appointment of a special prosecutor presented a number of advantages. To begin with, as the commission would be a subsidiary organ of the United Nations, the problems currently encountered with respect to compulsory jurisdiction would not arise.

[16] See 2381st meeting, footnote 9.

Again, the institution would be capable of acting rapidly, as it would be convened on a full-time basis, something that was not true of ICJ. Moreover, through the office of the special prosecutor, the institution would have better facilities for fact-finding than were currently available to ICJ. And finally, the involvement of a special prosecutor would ensure that cases were prosecuted with impartiality, professionalism and effectiveness.

54. Mr. ARANGIO-RUIZ (Special Rapporteur) said that all of the comments were of the greatest interest to him and he thanked the members of the Commission who had participated in the debate so far. He wished at present merely to take up some terminological issues raised by Mr. Tomuschat.

55. He had tried many ways of avoiding the use of the word "crimes", but they had all proved too cumbersome. He sincerely doubted that a proper euphemism for the term could ever be found. For his part, he had no difficulty with the notion that States committed crimes—his own country had certainly done so, both before, and during, the Second World War.

56. As to whether the special or supplementary consequences of crimes outlined in the report entailed any punitive connotations, that was for scholars to decide. He had made a deliberate effort, however, to avoid bringing in any punitive issues and to keep the word "punitive" out of the text, precisely because he knew that created problems for some members of the Commission.

57. Mr. Tomuschat had once again referred to the difficult problem of States being indirectly, as well as directly, harmed by wrongful acts. In the case of aggression, all States were affected because of their common interest in prevention of and opposition to that act, though some States were more directly, physically, touched by aggression than were others. Violations of human rights, crimes against humanity and obstruction of the right to self-determination could well have no ill effect on States, but they would deeply harm individuals. It was important to stress the wide repercussions of the international crimes of States, even if the direct consequences were felt by a limited contingent. In such cases, what was paramount was a collective rebuke from the international community.

58. On the question of how "democratic" the various international bodies were, he would point out that the membership of ICJ was elected by the two main political bodies of the United Nations: the General Assembly and the Security Council. The Court was made up of jurists from all over the world and, all things considered, it was a fairly representative body. The Assembly was relatively democratic, as its membership included all States Members of the United Nations, though it was regrettable that no acceptable solution had yet been found to the need for a more adequate form of representation of the Member States and their peoples. The Council, however, was aristocratic: it had a number of special powers under the Charter of the United Nations, but that did not mean it represented the inter-State system any better than did the Assembly.

59. Mr. PELLET said that the Special Rapporteur had taken up three basic issues, two of which were specifically related to the topic—the terminology used and the problem of fault in general (to which he would revert at a later meeting)—and the third, which was somewhat marginal, namely, international democracy.

60. As to international democracy, care should be taken not to confuse the concepts, for some could not be transposed to international society. In the present instance, the notion of democracy was not suited to the United Nations. Democracy, by the traditional definition, was government of the people by the people and for the people, a notion which had no bearing whatsoever on the principle of State sovereignty, since "one State, one vote" did not make for democracy. If democracy was to be properly transposed to international society, China should be given a billion votes and San Marino a few thousand, and on the understanding that States were all democratically governed, in other words, that Governments actually expressed the will of the people, something which remained to be seen. Accordingly, it was never a valid argument to contend that one body was more democratic than another. It was better to find concepts other than those suited to domestic society, but unsuited to international society, in order to express ideas grounded in the same requirements.

61. With reference to the problem posed by the use of the word "crime", many members of the Commission were troubled to find the use of a term which, in their eyes, had criminal law connotations. On that point he was, on the contrary, entirely in agreement with the Special Rapporteur, for the term seemed appropriate. It would be hypocritical and awkward to abandon it at the present stage, for one advantage was that it had the negative connotations of blame that attached to the commission of particularly serious internationally wrongful acts. Such reprobation was, naturally, primarily moral and political, but it was legitimate in that it was reflected in the law and the word "crime" was its extension at the legal level.

62. The problem of fault was one of those which had always confronted the Special Rapporteur when, in his previous reports, he had introduced the notion of fault into international responsibility. A priori, a State's international responsibility was neither civil nor criminal; it was international, since fault had nothing to do with it. Responsibility was incurred by something objective, by a breach of the law. But that was true only for delicts. For crimes, fault was entirely relevant. A crime was distinguished from a delict more particularly by intent, by the deliberate will to violate international law, a constituent element of fault in the context of a crime. (Neither genocide nor aggression happened by chance.) The link between fault and crime warranted the very word "crime", and hence the problem of a State's criminal responsibility. There too, the Special Rapporteur was right to say that Nazi Germany, Mussolini's Italy—one could add Saddam Hussein's Iraq and, nowadays, the Pale Serb regime in Bosnia and Herzegovina—were criminal regimes which had committed or were committing unpardonable intentional crimes in violation of the law of nations. The three States in question and the minority concerned in the latter instance had incurred or were incurring responsibility, which could only be regarded as criminal responsibility at the international level.

63. Accordingly, he was pleading not only for the word "crime" to be maintained but he also thought that the real problem lay in the word "delict", which also had a negative, criminal law connotation, whereas, in contrast to international crimes, delicts did not involve any kind of notion of fault and did not call for any particular moral rebuke. Paradoxically, therefore, the problem was not the word "crime", but rather the word "delict", which, paired with crime, created the impression that the Commission had an entirely criminal law concept of international responsibility, something which would be quite wrong.

64. Were there grounds for finding a term other than "delict" to designate internationally wrongful acts that were not crimes? In all honesty, he thought that it was too late and that the distinction between crime and delict had taken an established place in international law, that the two words were commonly used by internationalists and that care should be taken to avoid systematically bearing in mind the analogy with internal law. In both cases, notions with specific meanings in international law were involved and the time had come to put an end to that terminological issue.

65. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked Mr. Pellet for his penetrating remarks, but pointed out that in his report, the word "democratic" was placed in quotation marks, which indicated that he had been using the term advisedly. Words had to be understood in context, and in relative terms. He agreed that the concept of democracy could not be transposed entirely intact from the national to the international context. That did not imply, however, that it was inappropriate to stress that an organ such as the General Assembly was more "representative" than one of limited composition. That difference should not be ignored.

66. Mr. ROSENSTOCK said the problem of how the terms "democratic" and "crime" were defined could not be pushed aside by saying that words meant what one wanted them to mean in a given situation.

The meeting rose at 12.55 p.m.

2393rd MEETING

Thursday, 1 June 1995, at 10.20 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Organization of the work of the session (*continued*)*

[Agenda item 2]

1. The CHAIRMAN reported on the Enlarged Bureau's discussions of the organization of the Commission's work on the following agenda items: "International liability for injurious consequences arising out of acts not prohibited by international law" and "State succession and its impact on the nationality of natural and legal persons".

2. With regard to the first item, the Enlarged Bureau recommended that the Commission should hold only two plenary meetings so that the Drafting Committee could continue and speed up the consideration of the draft articles on the topic begun at the preceding session. In keeping with the Special Rapporteur's wishes, a working group would also be established whose composition would be announced at a later date and which would help him consolidate and systematize his proposals. The consideration of the topic would thus take place in plenary (9 and 13 June), in the Drafting Committee (for the draft articles) and in a working group.

It was so decided.

3. The CHAIRMAN, referring to the second item, said that the Enlarged Bureau recommended that a working group should be established, to be chaired by the Special Rapporteur on the topic and composed of the following members of the Commission: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. Crawford, Mr. Fomba, Mr. Idris, Mr. Lukashuk, Mr. Mikulka, Mr. Rosenstock, Mr. Szekely, Mr. Tomuschat, Mr. Vargas Carreño and Mr. Yamada, it being understood that the working group would be open to the other members of the Commission who wished to contribute to its work on an occasional basis.

It was so decided.

4. The CHAIRMAN said that the Enlarged Bureau also recommended that the working group so created, which would meet on 8 and 12 June in the afternoon, 14 and 15 June in the morning and 20 June in the afternoon, should be instructed to identify questions raised by the topic and to classify them according to their relationship with it, to advise the Commission on questions that it would do well to consider first in view of contemporary concerns and to suggest a timetable to that effect. It would then be up to the General Assembly to give the Commission instructions for its further work on the topic.

It was so decided.

State responsibility (*continued*) (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,[1] 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 (*continued*)

1. Mr. PELLET said that the successive reports of the Special Rapporteur on State responsibility had consist-

* Resumed from the 2379th meeting.

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