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Summary record of the 2394th meeting

Topic:
State responsibility

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2394th MEETING

Friday, 2 June 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, 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. Szekely, 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. Mr. BENNOUNA, setting out his general impressions on the seventh report on State responsibility (A/CN.4/469 and Add.1 and 2), said it dealt with great intellectual honesty with a number of thorny issues and would certainly stimulate a productive debate.

2. The first difficult issue taken up in the report was the "special" or "supplementary" consequences of crimes committed by States. The Commission had already wrestled with a similar problem in its work on the draft Code of Crimes against the Peace and Security of Mankind. The Special Rapporteur believed that, when an international crime was committed, all States were injured—even those which, once the future convention on State responsibility had been adopted, were not parties to it. Consequently, any State, even one not bound by the convention, could—and probably would—react to such injury, even by the use of countermeasures. The question was whether the classical approach whereby States signed and ratified a treaty was best suited to the adoption of a legal instrument on crimes. With that classical approach, a treaty came into effect when a predetermined number of States had signed it. Yet in the case of State responsibility for international crimes, the treaty would function for the entire community of nations, not just the States parties. The treaty would confer certain powers upon the General Assembly, and decisions taken in exercise of those powers would be adopted by a two-thirds majority of the members. It was entirely possible, therefore, that decisions on matters covered by the treaty would be made by a majority of States not parties.

3. He had drawn attention to that issue and to the need for further reflection on its implications in an article on the international criminal court and State sovereignty, published in 1989.[2] Mr. Tomuschat, too, had just published a paper on the same theme.[3] They had both suggested that a new way should be found of adopting a legal text on crimes other than by incorporating it in a treaty. Perhaps the text could be adopted by consensus, or by a simple or two-thirds majority, within the General Assembly, it being understood that all Member States would subsequently be bound by it. To that end, it might be expedient to remove the articles on crime from the draft on State responsibility and put them in a separate instrument.

4. One of the Special Rapporteur's essential postulates—that all States were injured by an international crime—must be modified, as it simply was not true. Injury was relative, depending on a number of factors such as the State's physical location and whether any of its interests, property or nationals were directly affected. More consideration needed to be given to the question.

5. In the scheme proposed by the Special Rapporteur, a very large role was assigned to ICJ. But if each and every State Member of the United Nations was entitled to bring a case before the Court, the case-load would quickly become unmanageable. ICJ should indeed play a role, but not the one of primary importance. After all, it had many other areas of responsibility already. Perhaps the international criminal court, on which work was proceeding apace, could be given jurisdiction in matters of State responsibility, or, as Mr. Bowett had suggested (2392nd meeting), an independent commission of jurists could be set up.

6. With reference to what the Special Rapporteur termed the "substantive" consequences of international crimes, he could not agree with the reasoning given in the report to justify the waiver of the safeguards of political independence and economic stability. The distinction drawn between political independence and freedom of organization was by no means convincing. Freedom of organization was defined as the choice of political, economic and social regime—yet if that was not the very meaning of political independence, then what was? The examples cited to illustrate demands for restitution in kind were not all apt. For instance, the demand addressed to South Africa for an end to racial discrimination was really a demand for future action, not for restitution. In practice restitution in kind was rarely demanded in international affairs: it was much more common to demand compensation.

7. In the discussion on satisfaction and guarantees of non-repetition, the Special Rapporteur suggested that it was necessary to review the restriction on demands that would "impair the dignity" of the wrongdoing State. He did not agree with that assessment, particularly as it was

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

[2] M. Bennouna, "La création d'une juridiction pénale internationale et la souveraineté des États", *Annuaire français de droit international*, vol. XXXVI (1990), pp. 299-306.

[3] C. Tomuschat, "Ein internationaler Strafgerichtshof als Element einer Weltfriedensordnung", *Europa-Archiv, Zeitschrift für internationale Politik*, vol. 49, No. 3 (1994), pp. 61-70.

usually the dignity of innocent people, and not of the guilty parties, that was impaired. The dignity of a wrongdoing State would be impaired only when it was dragged before an international criminal court and made to account for its crimes—something that had never happened yet, even for the crimes committed in the former Yugoslavia. In short, he had serious doubts about the modifications proposed in regard to the substantive consequences and thought they must be looked at very carefully.

8. The issue of countermeasures came to the fore in the context of instrumental consequences. The wording in the report appeared to indicate that any injured State, whether or not it was a party to the future convention, could apply countermeasures. Was that the Special Rapporteur's intention? Under Article 41 of the Charter of the United Nations, the Security Council had responsibilities for peace-keeping and collective security that enabled it to adopt certain measures. Yet States themselves could take virtually the same actions in the form of countermeasures under the regime for State responsibility. Hence there was a potential for conflict between the actions of the Council and of States. A conflict could also arise between the Council and ICJ. That problem, of relations between judicial and political organs at the international level, was among the most pressing now facing international institutions.

9. Another question relating to countermeasures was whether they came into play upon the adoption of a resolution by the General Assembly or the Security Council, or once ICJ had branded an act a crime? It would appear from the report that countermeasures were contingent on a finding by ICJ, though urgent measures could be adopted pending such a finding. There, too, problems could arise in relations between the Council and ICJ: the slow pace of legal proceedings could create difficulties. Mr. Bowett had once proposed a system whereby the Council, when dealing with matters that required a legal assessment of responsibility, would refer the matter to an independent institution for a legal opinion before adopting its own decision.

10. He fully endorsed the Special Rapporteur's remarks on the close link between the normative and institutional consequences of international crimes. The Commission, in its future work on the topic, should bear that interrelationship in mind.

11. The report also referred to the institutional interaction between the General Assembly and the Security Council. Politics would ultimately dominate such relations, being the central aspect—some might say the bane—of the existence of the United Nations. Even if the veto of a permanent member of the Council could be averted by the procedure under Article 27 of the Charter, whereby such a member would not participate in a vote, the member's allies among the permanent members could act in its stead.

12. The Special Rapporteur mentioned instances in which the General Assembly had taken decisions in response to an international crime—but there were many cases where it had passed over glaring violations in silence, often for political reasons. The system proposed by the Special Rapporteur would give the Assembly and the Security Council powers that were not set out in the Charter, inasmuch as a case could not be brought before ICJ without first being submitted to one of those organs. The Special Rapporteur cited the procedures under the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid as creating relevant precedents. Those instruments did accord certain powers, but they were not at all comparable to the ones that would be conferred by the text on State responsibility. Article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide merely authorized contracting parties to ask the competent United Nations organs to perform the functions given to them under the Charter—it did not in any way expand the powers given to those organs. The International Convention on the Suppression and Punishment of the Crime of Apartheid merely mentioned information that was to be transmitted to the Commission on Human Rights and accorded no special powers to any United Nations body.

13. The fact that it was impossible to go to ICJ without passing through the General Assembly or the Security Council meant that the mandatory jurisdiction of the Court with respect to a number of countries would be established by the Assembly or the Council—a power not provided for in the Charter. Such an arrangement would be innovative and give rise to political problems because it provided a power of decision and not just a power of recommendation. It would have to be embodied in a convention adopted by all States.

14. Was there any other solution to the problem, assuming that the Commission agreed that an institutional arrangement was needed? He would have no difficulty if the future instrument was adopted by the General Assembly or by a procedure binding on all States but not if it was to take the form of a traditional treaty. In the latter case it might be better for the powers in question to be assigned to meetings of the States parties rather than to the Assembly or the Security Council. It was, after all, normal for the States parties to be responsible for managing a treaty. In any event, such an instrument would have to deal with the overlapping political and legal problems, and he agreed with Mr. Bowett's comments in that connection. If the Council accused a State of a crime without sufficient proof and if the Court did not sustain the charge, then the responsibility of the United Nations would be incurred because a decision of the Council would have been delegitimated by the Court. The same was true of countermeasures adopted by the Council when the Court did not subsequently confirm that a crime had been committed.

15. It was disturbing that the draft should contain a part on the mandatory jurisdiction of the Court and, in particular, that everything resulting from a decision of the Court would fall within the Court's competence. That would impose a great burden with which the Court might not be able to cope. The Commission might therefore consider something other than ICJ, some system combining flexibility with guarantees of proper functioning.

16. Lastly, he would stress that the report was a model of legal argument. It had engaged the Commission in a fundamental debate which must not be shirked. Whatever the outcome of that discussion, it would be enriching for the international community.

17. Mr. de SARAM said that the Special Rapporteur's seventh report and his recommendations reflected the sincerity of his convictions. Whatever the fate of the draft articles, the report would stand as a brilliant contribution to the doctrine on the topic.

18. He said he wished to comment on three broad groups of issues: first, the general difficulties that arose when the concept of "State crime" was introduced into the law governing inter-State relations, and the serious difficulties some members of the Commission had with the expression "crime"; second, the difficulties that arose when that same concept was introduced into the draft articles; and third, the necessity, if a concept of crimes was ever introduced into the draft, of making provision for an "adjudicatory" form of dispute settlement.

19. The problem regarding the first group of issues was not merely a matter of terminology. The argument that the term "crime" should be used because the Commission could not find a better one did not do sufficient justice to the concerns of those who regarded the use of "crime" in the present context as fundamentally incorrect and confusing. It was incorrect because in many national legal systems the concept of crime marked the great divide between two entire areas of national law: on the one hand, a legal system intended to compensate for harm caused, and on the other, a legal system intended not to compensate for harm but to punish acts deemed to be against the good order and well-being of the State. Criminal law had a number of unique characteristics: great precision of substantive law, very formal, even rigid, procedures concerning process and evidence; and special courts and systems of administration and enforcement. It was in that special sense that the word "crime" was used in the law of many regions of the world and that the public of those regions understood it, looking askance at those found guilty and even those who were only accused of a crime. Thus, to use the term in public international law in a sense other than the one used in national systems of law would be confusing.

20. It had been suggested with good reason that, for its present purposes, the Commission should forget about "crime" and consider the draft as if the expression did not occur therein. He had himself crossed out "crime" in his copy of the draft articles so that he could read them free of that term's connotations, yet the difficulties did not go away, largely because the present purpose of the draft remained not to compensate but to punish. It was hard to see what other term could be used. The "peremptory-norm" language of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, for example, did not have the necessary precision. Nor must it be forgotten that the purpose of introducing a system of punishment into inter-State relations was to punish States. However, crimes were committed not by States but by individuals. To use the legal fiction of "attribution"—to make a State liable to compensate for damage caused by its officials—was one thing; to cast the shadow of crime over the entire population of a State was quite another matter, and one not sustainable either in fact or in reason.

21. Accordingly, the Commission should stick by the basic decision taken many years ago when it had adopted article 3, in particular subparagraph (*b*), that is to say that the basis of the obligation to compensate in the whole field of State responsibility must rest exclusively on a State's breach of an international obligation;[4] or as the Commission had stated later in less precise language, it was only on a breach by a State of a primary obligation that the secondary rules of State responsibility would come into play. Of course, breaches of international obligations came in a wide variety of forms and magnitudes. But if the Commission proceeded on the premise that the purpose of the draft articles was to compensate for harm caused, then the solution to breaches of great magnitude was to ensure that the draft allowed for the imposition of compensation of equal magnitude.

22. Difficulties also arose when an attempt was made to group breaches of international obligations, according to the severity of the harm, into the categories of "crimes" and "delicts". Such a grouping could never be precise. Moreover, as others had commented, in article 19 of part one[5] the Commission seemed to be entering the field of primary obligations in a set of rules which it had always maintained should be setting out secondary obligations arising from a breach of a primary obligation.

23. If the concept of State crime was introduced into the draft, a clear need arose for an adjudicatory system to determine that a crime had been committed. As Mr. Bowett and Mr. Bennouna had pointed out, such a system would have to cover all the stages of the adjudicatory process. Obviously, the diplomatic procedures available for dispute settlement were inadequate, since they depended on the agreement of the parties. Furthermore, judicial determinations would have to be made by a judicial body, and therefore neither the Security Council or the General Assembly could serve as satisfactory substitutes. On the other hand, ICJ might offer an appropriate forum and should be considered in that respect, but the Court's jurisdiction was essentially consensual and it might not have the necessary capacity in its present form. It was also hard to escape the conclusion that Governments would be most unlikely to agree that any tribunal should be vested with the authority to determine that a State might be guilty of a crime. Nor was there much hope that the institutional arrangements for giving effect to article 19 would be in place for many years to come.

24. The question of the substantive consequences of a crime ought to be relatively easy to resolve: cessation, restitution in kind without limitation, and trial of the individuals responsible, as well as non-recognition as legal

[4] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[5] See 2391st meeting, footnote 8.

of the results of a crime. The draft articles adopted by the Commission earlier would have to be reviewed in the light of the Special Rapporteur's new proposals, but it must always be borne in mind that the purpose of the draft articles was not to punish but to compensate for damage caused.

25. There were occasions in the Commission's work when matters of fundamental importance to the relations between States under public international law surfaced for debate, without there being any clear guidance in treaties, general practice accepted as law, or authoritative judicial or arbitral decisions. The present debate was one such occasion, and it was appropriate for the Commission to remember, as Mr. Thiam had stated (2393rd meeting), that in such circumstances there were certain fundamental principles of modern international law concerning the status, independence and integrity of all States set out in Article 2 of the Charter of the United Nations which must remain the legal parameters for the Commission's work.

26. Mr. AL-KHASAWNEH said that in 1976 the Commission had drawn a distinction between the great majority of internationally wrongful acts, which it had termed "delicts", and a small number of serious breaches of international law, which it had termed "crimes".[6] That distinction could not have been meant to serve a purely descriptive function but rather to fulfil a normative role in terms of the consequences attaching to the two categories. Having dealt in earlier reports with the consequences of delicts, the Special Rapporteur now sought to delineate the special or supplementary consequences of crimes. With prudent resort to progressive development of the law, he had produced a solution that would contribute to the establishment of the rule of law at the international level by regulating the reaction to crimes. That approach would further advance the purpose and principles of the United Nations, which included the settlement of disputes in conformity with justice and international law.

27. He supported the distinction between delicts and crimes as a useful system of classification and recognized that, even in the case of delicts, a punitive element was present, although usually more subsumed by a function of reparation than in the case of crimes. He joined Mr. Mahiou in disagreeing with Mr. Pellet (ibid.) that the difference between delicts and crimes was that only crimes elicited moral indignation or contained an element of fault. However, while he agreed with Mr. Pellet that crimes threatened the very fabric of international society, there again, widespread delicts could have the same effect. It was ultimately justifiable to distinguish delicts from crimes in order to delineate clearly the consequences of each category, thus helping to ascertain the applicable law. The arrangement also struck a happy compromise between those who advocated a number of differentiated regimes, which would lead to fragmentation—the antithesis of codification—and those who wished to encompass many breaches of obligations within a single regime.

28. As far as terminology was concerned, "crime" had long been current in legal parlance and its use would not gravely offend States. More important was the fact that some States had been subjected to criminal consequences, sometimes exceeding those normally attached to crimes, without their actions being designated as crimes. It was preferable to designate some conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship, rather than to leave that whole area of international relations unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition.

29. He was in general agreement with the Special Rapporteur's approach to the consequences of crimes. The severity of those consequences had been achieved by modifying the rules that regulated the operation of the substantive consequences of delicts, which had already been adopted on first reading. Thus, it was fair, for example, that the factor of excessive onerousness, as a mitigating circumstance precluding insistence on restitution in kind instead of compensation, should not apply. The only cases in which the Special Rapporteur would not apply that more severe rule were where such an insistence on restitution in kind would jeopardize the vital needs of the population of the State concerned, on the one hand, and the very existence of the State or its territorial integrity, on the other. While he agreed with the Special Rapporteur as to the vital needs of the population and the continued existence of the State—for the death penalty could not be imposed on a criminal State—he had doubts similar to Mr. Mahiou's (ibid.) regarding the territorial integrity of a State which, for example, practised genocide. Obviously, that was an extremely sensitive issue and one that could wreak havoc on the inter-State system unless carefully regulated by the expression of the unambiguous will of the international community, as judicially assessed. It was no longer possible to pretend, in an age of post-modern tribalism in many parts of the world, that the territorial integrity of States should automatically override concern for a people subjected to genocide. In general, the substantive consequences of crimes presented few problems.

30. In dealing with the instrumental consequences of crimes, the Special Rapporteur started from the premise that crimes were by definition *erga omnes* breaches of international law. The complex relationship arising out of the multiplicity of injured States in itself called for a coordinated and reasonably speedy coherent reaction. A case in point was that of the Bosnian Muslims, which Mr. Pellet had cited (ibid.). Hence there was an inherent tension between the delay which was characteristic of the reactions of the "international community", especially having regard to the requirement that the reaction must be judicially assessable, and the need for an effective response to provide the remedies and to compel compliance and, indeed, to inflict punishment as a matter of retributive justice on the criminal State. Mr. Pellet had sought to deal with that response a posteriori, as it were, by subsequently legitimizing the incoherent reaction of a State or group of States. But such a scheme would allow States too much freedom to resort to force or to take the law into their own hands in an extremely sensitive

[6] Ibid.

area—for to be accused of a crime was no light matter. An institutionalized response to crimes which sought to eliminate the delay inherent in coordinating that kind of response would therefore be preferable. That was particularly true since Mr. Pellet's concern could be taken care of, partly at least, by providing for such urgent interim measures as were required to protect the rights of an injured State or to limit the damage caused by the international crime. The Special Rapporteur had, of course, endeavoured so to provide in draft article 17, paragraph 2.

31. Mr. Bowett, in introducing his suggestion, had described the Special Rapporteur's proposal as having some attractive and some problematic features. He said that, with respect, however, the same comment could be made of Mr. Bowett's proposal. The main difficulty with that proposal was that a juridical body, appointed directly by a political organ on a case-by-case basis, would not perhaps be perceived as being as conducive to due process as would resort to an established and permanent court. Another consideration was the proliferation of dispute settlement procedures. Moreover, the problem of the compulsory jurisdiction of ICJ and of fact-finding could be taken care of if the political organs empowered the Court accordingly. At all events, if it were agreed that the reaction to international crimes should be both institutionalized and speedy, the proposals of the Special Rapporteur, Mr. Pellet and Mr. Bowett were not mutually exclusive.

32. With reference to paragraph 1 (*a*) of draft article 18, perhaps the Special Rapporteur could explain why non-recognition of the situation created by the international crime and also nullity should be confined to international crimes. Nullity was, of course, an appropriate remedy under municipal law in delictual situations and would seem to apply to cases in which the internationally wrongful act took the form of legislation even if there was no allegation of criminal conduct. International practice was replete with examples of cases in which non-recognition was called for even though there had been no determination that a given line of conduct, though illegal, was criminal. It was doubtful that ICJ, in calling upon States not to recognize South Africa's illegal presence in Namibia, had based its opinion on considerations relating to reactions to crimes.

33. Lastly, he wished to pay tribute to the Special Rapporteur's commitment to strengthening the rule of law in international relations.

34. Mr. VILLAGRÁN KRAMER said that the Special Rapporteur's seventh report, which would afford an opportunity to review the articles on reprisals, had two major qualities—clarity and the fact that it raised a series of substantive issues. It was, however, marked by a degree of idealism and even by faulty perception. Unfortunately, therefore, he was unable to agree entirely with all its propositions.

35. The Special Rapporteur had chosen a valid premise for his articles, as reflected in draft article 15, which was both positive and constructive. It was none the less essential, above all, to be clear about the terminology used. In that respect, Spanish-speaking lawyers had certain problems. Unlike certain common law systems, the systems of law in which Spanish-speaking lawyers were trained did not make a distinction between felonies and misdemeanours but treated every offence (*delito*) as a crime. A distinction was, however, drawn between a culpable wrong (*delito culposo*) and a wilful wrong (*delito doloso*). Thus, if a person fired a gun by accident and killed someone without intent, that person would have committed culpable homicide—a *delito culposo*—whereas murder (*asesinato*) was a crime committed with the classic element of premeditation. It was a *delito doloso*. No doubt, similar problems could arise under other systems of law and at a recent United Nations conference he had noted the emphasis placed by some lawyers from Islamic countries on the importance of mutual understanding in regard to legal terminology. For the purposes of the topic under consideration, the distinction drawn was between delicts and the most serious crimes, but it was clear that there were in fact three categories: wrongful acts, also known as delicts; international crimes that were not serious; and serious international crimes.

36. It had for the time being been decided that, for a wrongful act to be characterized as a crime, it must have an element of gravity. But gravity was a subjective element and lawyers also looked to the objective elements. The decisions of the Nürnberg Tribunal provided useful indicators in that connection, as did the provisions of municipal law establishing penalties for crimes against the *jus gentium*. It was interesting to note that, in the late eighteenth century, a law had been enacted in the United States of America which had conferred jurisdiction upon its domestic courts to deal with crimes against international law. Pursuant to the law in question, United States courts had on three occasions assumed jurisdiction to try cases of torture committed outside its territory. Another objective source for characterizing a wrongful act as a crime was, of course, international treaties under which crimes such as genocide and apartheid were treated as international crimes. Such objective elements would enable the Commission to identify certain acts and omissions as being sufficiently serious for the international community as a whole to treat them as international crimes and, because of their seriousness, to establish a separate category of wrongful acts, thus increasing the international responsibility of the State concerned and broadening the range of reaction, both centralized and decentralized, accordingly.

37. The Commission had been attempting to classify certain acts as crimes against the peace and security of mankind, whose perpetrators would be punished as individuals. The original list of 21 such crimes had been cut down to 10, then again to 6, and there was now a feeling that it might be further reduced to 4. He wondered whether an attempt was being made to use that list to determine the aggravated international responsibility of the State or whether other crimes could also be used for the purpose. The Special Rapporteur could perhaps provide some illustrations of possible indicators that he used for classifying certain acts as crimes and thus aggravating responsibility. It was clear that, if the Commission approached the question from the angle of *lex lata*, the scope of crimes would be more reduced than if it did so from the angle *de lege ferenda*.

38. Gravity could usually be better appreciated a posteriori, and in that respect it was akin to another subjective element, intent. There again, Spanish-speaking lawyers, who distinguished between *culpa* and *dolo*, were faced with a problem. It seemed to him that the Special Rapporteur, in dealing with international crimes, was thinking more in terms of *dolo* than *culpa*.

39. In the Commission's view, there were three components to the substantive and instrumental consequences of State responsibility in the field of crime: the normative, the procedural and the institutional. As to the first of those components, he was inclined to accept the idea of aggravated responsibility of the State for crimes and to consider that the result would be to produce *erga omnes* effects. Accordingly, the emphasis should be on the elements of aggravation. However, the Special Rapporteur offered a revealing spectrum in regard to the effects of responsibility. In the case of cessation of the act, whether a wrongful act or a crime, the same rules would apply. That was also true of compensation. On the other hand, in the case of restitution in kind, and also satisfaction and guarantees of non-repetition, a significant aggravating factor had been introduced. The Special Rapporteur stated in his report that the limitation of the obligations would not apply in the case of a crime, except where full compliance with the obligation would put in jeopardy the existence of the wrongdoing State as a sovereign and independent member of the international community or its territorial integrity, or the vital needs of the population. The differences established by the Special Rapporteur were, for all that, both valid and well-founded.

40. He had two reservations with regard to procedure. First, it was apparent from the report that an injured State, in the event of an international crime, was required to obtain authorization before resorting to countermeasures. In other words, the responsibility of the State would be aggravated and the initial resort to countermeasures would be made subject to certain conditions. As he understood it, therefore, in the case of a wrongful act, the State did not have to seek authorization before resorting to countermeasures.

41. He also had doubts about the *raison d'être* of the suggested pronouncement by one or more international bodies, referred to in the report. Such a pronouncement would be tantamount to imposing a condition for the exercise of countermeasures which, again, was not required in the case of wrongful acts. He would seek clarification on that point later. There was, however, one other point on which he was in complete agreement, namely, that when the wrongdoing State submitted to a peaceful settlement procedure all sanctions should cease apart from obligatory interim measures.

42. The Special Rapporteur had raised various doubts on proportionality, and his proposal that the Commission should review article 13 was worthy of consideration. However, perhaps it would not be wise to review a provision that had been adopted by the Drafting Committee and by the Commission.[7] Indeed, it might be better to establish separately on what bases proportionality could be applied with respect to crimes, for he did not think that the Commission could encompass both wrongful acts and crimes, which constituted different situations, within one and the same legal formula.

43. With regard to the institutional aspects, which he would discuss more fully at a later meeting, he considered that the Security Council had the necessary powers to investigate any act or situation that posed a threat to world peace, and that an inspection regime of the sort envisaged by the Special Rapporteur thus already existed. He saw no reason to change that system, although it could of course be expanded.

44. The question was, did international crimes exist, or did they not exist? If they did, then they must result in aggravated responsibility. If the Commission decided that they did not exist, then that would be a valid conclusion. However, all the evidence seemed to suggest that they did, in which case the criminal responsibility was of course individual, but international responsibility lay with the State.

45. Mr. FOMBA said that the draft articles could be assessed on the basis of various criteria, including the degree of harm to the present foundation of international society and its law; their legitimacy, logic, and teleology; the acceptability and political feasibility of the mechanisms proposed; and the complexity, rapidity and effectiveness of those mechanisms. Reference to those criteria would ensure that the conclusions reached were as well grounded and judicious as possible. He none the less had no intention of embarking on such a risky venture and would be more modest in his objectives.

46. Draft article 15 was important since it set forth the principle that a particular category of offences entailed a special regime of legal consequences. That was indeed the basic assumption, and that article thus called for no particular comment. He had, however, taken note of the extremely interesting discussion between Mr. Pellet and Mr. Mahiou on the subtleties of the distinction between crimes and delicts, particularly with regard to the notion of fault (*faute*) and its place in that distinction. On a drafting matter, the words "*Sans préjudice*" should, as Mr. Pellet had pointed out, be replaced by "*En sus*".

47. Draft article 16, paragraph 1, concerned the right to react *ratione personae*. The commission of a crime by a State conferred on any State the right to demand cessation and full reparation, on condition that ICJ had already found that a crime had been committed. The paragraph raised two problems. The first concerned recognition of the right of every State to react. The solution adopted was the absolute objectivization of the injury. As Mr. Mahiou and others had pointed out, it was a logical but abstract solution, and it would be better to be realistic, and to draw a distinction between those States directly injured and those indirectly injured. The question was one that clearly merited further reflection. The second problem concerned the requirement for a prior finding by ICJ. The procedure had been criticized as cumbersome and slow, when in fact the need was for a flexible and rapid response. That criticism was pertinent, and it was gratifying to note that the Special Rapporteur did not take issue with it.

[7] Ibid., footnote 11.

48. He supported the substance of draft article 16, paragraph 2, concerning restitution in kind and his only reservation concerned the limitation about jeopardizing the wrongdoing State's territorial integrity. Mr. Mahiou's comments had been very relevant and the Special Rapporteur had described them as not incompatible with his own position.

49. Paragraph 3 proposed two rules. The first stipulated that the State which had committed an international crime could not invoke failure to respect its dignity as grounds for limiting its obligation to provide satisfaction and guarantees of non-repetition. The second rule stipulated that that State was not entitled to benefit from any principles or rules of international law relating to the protection of its sovereignty and liberty. Both rules were logical and legitimate in letter and in spirit.

50. Draft article 17, paragraph 1, set out a rule whereby any State whose demands under article 16 had not been satisfied was entitled, subject to a prior finding by ICJ, to resort to countermeasures under the conditions and restrictions set forth in paragraphs 2 and 3 of the article. The criticisms already voiced about the scope *ratione personae* of the right to react and the ineffectiveness of an intervention by the Court were also applicable to paragraph 1 of article 17.

51. Draft article 17, paragraph 2, proposed that the obligation concerning a prior finding by the Court did not apply to urgent, interim measures. That was only right, given the very nature and the potentially devastating effect of the crime. Under paragraph 3, the principle of proportionality was to apply to countermeasures taken by any State. The analogy between crimes and delicts was applicable in that context, for it was always dangerous to seek to stem the evil at its root. Clearly, those comments would have to be reviewed in the light of the proposals to be made by the Drafting Committee concerning articles 11, 12 and 13 of part two.

52. Draft article 18, paragraph 1, concerned the attitude to be observed by all States in the case of a crime. They must do or refrain from doing a number of things. However, the fact that those obligations came into effect only subject to a prior decision of ICJ would certainly impair the effectiveness and urgency of the reaction. There was thus a case for reviewing that provision so as to make it more efficacious.

53. He endorsed paragraph 2, under which the "criminal" State must not oppose fact-finding operations or observer missions in its territory for the verification of compliance with its obligations of cessation or reparation. Nevertheless, clarification was needed of its scope *ratione temporis*. Did that obligation come into effect from the moment when a crime was alleged by any State, or only after the finding by ICJ that a crime had been committed? Plainly, the measures would not be equally effective in either case.

54. As to draft article 19, paragraphs 2 and 3, he shared Mr. Pellet's reservations about the link between international law on responsibility and the constitutional law of the United Nations. Were those two legal regimes compatible, particularly in respect of the majority rule? He also shared the views expressed by Mr. Pellet with regard to paragraph 4. Paragraph 5 had been repeatedly criticized, and rightly so.

55. Article 7 of part three, concerning the settlement of disputes relating to the legal consequences of an international crime, as proposed in the seventh report, could be considered as a positive step towards a mandatory international system of justice. However, the letter of that rule could be improved without betraying its spirit. He thus supported Mr. Pellet's proposal to reproduce in that article, *mutatis mutandis*, the wording of article 66 of the Vienna Convention on the Law of Treaties. In conclusion, he broadly supported the views expressed by Mr. Mahiou and Mr. Pellet on the various other questions raised.

56. Mr. MAHIOU said that he was not sure whether the question put by Mr. Thiam (2393rd meeting) had been addressed to the Special Rapporteur, to Mr. Bowett, or to himself. In the latter event, he should perhaps clarify his own position. Mr. Thiam's question had concerned, first, the relationship between territorial integrity and the right to self-determination; and secondly, what organ or authority might be empowered to decide to dismember a State. His own remarks had not addressed the latter issue. He had simply wished to point out that, when invoking a number of fundamental principles in the implementation of sanctions against a State, it was indeed legitimate to invoke the principle of territorial integrity, but that in some circumstances it could be equally legitimate to invoke the principle of the right to self-determination. In the event of a threat of genocide, for example, implementation of the right to self-determination might be one solution advocated.

57. Mr. ROSENSTOCK said that Mr. Mahiou's remarks were yet another illustration of the lack of any need for a notion of international crimes. The existence of a right of self-determination—which, if meaningful, included the right to independence—could not be conditional on the existence of some scheme of crimes and some complex mechanism based thereon.

58. Mr. VILLAGRÁN KRAMER said that, in the case of Kuwait and Iraq, the Security Council had determined the frontier between those States and had given Iraq a mandate to respect that demarcation of frontiers. If Iraq considered that its territory had been dismembered, then that was the view of one State; the fact remained that the Council had performed the function of demarcating a territory.[8]

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the question of territorial integrity reminded him that, when Mr. Thiam had asked what organ might be empowered to make a decision to dismember a State in the event of a threat of genocide, he had not been clear enough when he had stated that it would be for the Court to decide the issue. That had been an over-hasty response, which he now wished to qualify. His position was, in fact, that any matter pertaining to a dispute over territory would have to be settled within the framework of Chapter VI of the Charter of the United Nations, namely, of Articles 33 to 38, with particular attention

[8] Security Council resolution 687 (1991) of 3 April 1991.

paid by the Security Council to Article 36, paragraph 3, as well as to the advisory function of ICJ.

60. Mr. de SARAM said that many controversial questions of doctrine and State practice were being raised concerning interpretation of the Charter—an exchange of views that was very peripheral to the subject under consideration. The provisions of the Charter must be preserved. Difficult questions of interpretation did arise, on which there were differences of views. Since the Commission often referred to particular cases concerning which very few members had the fullest possible information, he intended in his own statements to follow the custom of referring to "State A", "B" and "C", and to purely hypothetical situations.

61. Mr. BOWETT said that to describe the issue as "peripheral" was unduly charitable. In his view, it was a red herring. The existence of a right to self-determination and the manner of exercising it were matters of political judgement, and not matters for a court to decide.

62. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, on the contrary, political bodies and the Court could both do a good deal within the framework of Chapter VI of the Charter. The Court could act for example, in given circumstances, in an advisory capacity and, if the Security Council recommended that the parties refer to it under Article 36, paragraph 3, of the Charter, and the parties did so, the Court could operate in a contentious capacity. But it all depended so much upon the nature of the dispute or situation, that it was difficult to express a general opinion. At any rate, to say that the decision was a political one did not mean that it must be put into the hands of a political body and that that was an end to the matter; nor did it mean that the political body could make a binding decision concerning a hypothetical situation such as the one to which Mr. Mahiou had referred.

63. Mr. MAHIOU said that Mr. Bowett's reply had been elliptical. The problem of the right to self-determination was indeed essentially a political problem. Nevertheless, there were circumstances in which a court could pronounce on such matters. For example, ICJ had been seized of the question of the right to self-determination of the Sahraoui people.

64. The CHAIRMAN said it would be a good thing if, rather than use plenary meetings purely as a forum in which to deliver formal statements, members occasionally also engaged in informal interaction of the sort that had just taken place. As the Chairman, however, he appealed to members to follow the usual practice and avoid making reference to specific countries in their illustrative submissions. While there was obviously no intention to pass judgement on any case when all the relevant facts were not available and the advocates for all parties were not present, exercise of some restraint in that regard would none the less help the Commission to consider issues amicably and harmoniously.

The meeting rose at 1 p.m.

2395th MEETING

Tuesday, 6 June 1995, at 10.05 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, 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. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to submit to the Commission a few considerations which might, in his view, help to clarify some of the questions raised during the debate. It seemed to him that certain issues, all of which relate to the institutional aspects, had perhaps not been sufficiently clarified either in his seventh report (A/CN.4/469 and Add.1 and 2) or in the articles he proposed.

2. The first issue was how to shorten the judicial phase of the proposed procedure. Concern had been expressed by a number of speakers with regard to the proposed role of ICJ in the existence/attribution determination procedure. As rightly pointed out, the Court was too slow in its pronouncements. In addition, to involve the Court would be to imply the attribution to it of a compulsory jurisdiction. Both drawbacks could be avoided, it had been suggested, if the legal phase were entrusted to an ad hoc commission of jurists appointed by the political body (the General Assembly or the Security Council). The League of Nations practice had been cited as an example.

3. While he agreed that a more expeditious procedure should be envisaged, he seriously doubted that a commission of jurists appointed ad hoc by the political body would really be a better choice. Admittedly, any politically appointed panel of jurists would be more likely to do the job more expeditiously, but it would inevitably be tainted with partiality. Those concerns could perhaps be met by using the suggested ad hoc idea in a different way. First of all, the General Assembly or the Security Council could appoint an ad hoc prosecuting body which

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