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Summary record of the 2395th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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).

would perform the functions of investigation/fact-finding and would also promote expeditious proceedings. Secondly, the President of ICJ could appoint—directly or following a vote by the members of the Court—an ad hoc Chamber of five judges that would be assigned exclusively to the case in question as soon as one or more States had seized the Court following the political body's "concern resolution". Given that such monstrous wrongful acts were a relatively infrequent occurrence, such an arrangement might suffice. If not, an increase in the number of judges of the Court—for example, by five additional judges—could be envisaged at some future stage so that the appointment of an ad hoc Chamber would not interfere with the performance of the Court's ordinary functions.

4. With regard to the problem of compulsory jurisdiction, a compulsion would be equally inherent in the judicial phase, whether the Court solution or the solution of an ad hoc commission of jurists was adopted. That phase would have to be accepted in the project as compulsory, whatever the nature—permanent or ad hoc—of the technical organ called upon to pronounce. Such compulsory jurisdiction would, however, be limited; and the limitation of its scope would be achieved, in both cases, by the requirement of a preliminary "screening" of accusations effected by the General Assembly or the Security Council in order to prevent possible abuse of the compulsory procedure to which he referred in his seventh report. It was to prevent the extension of the Court's competence beyond the area of crimes, and notably to delicts, that the possibility States had of seizing the Court was made subject to the condition, as provided for in paragraph 2 of draft article 19, of a prior vote of the General Assembly or the Security Council resolving, by a qualified majority, that the allegation justified "grave concern".

5. The second issue concerned the "constitutionality" of paragraphs 2 and 3 of draft article 19, about which some members had expressed concern. In particular, one member had pointed out that the voting and majority rules, in both the General Assembly and the Security Council, were laid down under the Charter of the United Nations or the rules of procedure of each organ. Although he did not think that the two paragraphs in question really raised constitutional issues, an express reference to those requirements in the draft article might not be indispensable.

6. The third issue concerned the participation of "third" States in the proceedings under paragraph 4 of draft article 19. Concern had been expressed by one speaker with regard to the title of "third" States' participation in proceedings before ICJ in the hypothesis contemplated in that paragraph. According to that speaker, third States should intervene under Article 62 or 63 of the Statute of ICJ. He (the Special Rapporteur) had, however, deliberately excluded the possibility of intervention under Articles 62 and 63 of the Statute of the Court because, in such a case, the intervening State was not a principal party to the proceedings. In the hypothesis he envisaged, "third" States should participate as "principal" parties alongside the original applicants under Article 36, paragraph 1, of the Statute of the Court.

7. The fourth issue related to the delicate problem of "differently injured States". A number of speakers had rightly referred to the importance of the question whether and how account should be taken, in setting forth the legal consequences of crimes, of the fact that not all States were necessarily injured in the same way and to the same extent. Although the issue was not exclusively relevant to the consequences of crimes, special concern was justified. The difficulty of the problem did not, however, exclude the need to deal in the draft with the consequences of crimes.

8. Before attempting to define a solution, the real dimensions of the problem of differently injured States must first be more clearly assessed. First, the differentiation did not exist in every case. As he had noted in his fourth report,[2] marked differences existed in a case of aggression or of massive environmental pollution. Between the plight of the direct victim of aggression or the plight of the State whose coasts were affected by the consequences of massive sea pollution, on the one hand, and the injuries suffered by States that were, geopolitically or geographically, very distant, on the other, there would be decreasing degrees of material injury. But if the environmental crime reached the "global commons", all States would be equally affected and equally injured.

9. At all events, no unequal injury could derive, as between States, from violations—whether "criminal" or "delictual"—of international obligations relating to human rights, self-determination or racial discrimination. In such cases, the nationals or the population of the wrongdoing State, or a minority inhabiting the wrongdoing State's territory, were directly affected, but not other States. However, all States were legally injured by the internationally wrongful act, whether it was a delict or a crime. To deny that point would be tantamount to throwing overboard not merely a problem relating to the consequences of crimes, but also the problem of the consequences of any *erga omnes* breach, whether it was a delict or a crime. The concept of *erga omnes* breaches had, rightly or wrongly, been universally accepted, at least since ICJ had for the first time laid down the concept of an *erga omnes* obligation, notwithstanding the obvious difficulties of its application.

10. The problem was therefore to determine in what sense injured States were equal and in what sense they differed from the standpoint of the legal consequences (substantive and instrumental) of an *erga omnes* breach, whether criminal or delictual. In what sense were they equal or different, from the standpoint of demanding cessation/reparation and eventually applying countermeasures? Draft article 5 *bis*, which he had proposed in his fourth report[3] and which had been before the Drafting Committee since 1992, answered those questions only in part. It answered the basic question whether all States were equally entitled in law to demand cessation/reparation and eventually to react with countermeasures. The question "in what sense do the injured States differ when they differ" remained, of course, unan-

[2] *Yearbook ... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3, see especially pp. 45-46, paras. 135 to 139.

[3] Ibid., p. 49, para. 152.

swered. His tentative answer to that question was that, while all injured States were equally entitled to demand cessation/reparation and eventually to take countermeasures, they were not necessarily entitled to demand for themselves or to take measures for their own material benefit. Specifically, they were entitled to demand cessation/reparation for the benefit of each injured State in so far as it was injured and to resort, if necessary, to sanctions. In his view, it was by a rule of that kind that article 5 *bis* should be completed by the Drafting Committee and placed in the initial section of part two of the draft, where it belonged. The reason why he had not himself completed article 5 *bis* was that he had been waiting for a collective reaction to that first attempt which, he trusted, would soon be forthcoming. He was inclined to believe, subject to correction, that an article 5 *bis* so completed should apply *mutatis mutandis* in the case of crimes. A provision to that effect, once article 5 *bis* had been worked out by the Drafting Committee, could be inserted in the draft articles on the consequences of crimes as set forth in his seventh report.

11. Some of the subparagraphs of paragraph 1 of draft article 18 could prove useful, subject to further reflection on them in the Drafting Committee, in dealing with the issues raised by the multiplicity of injured States. Subparagraphs (*c*), (*f*) and (*g*) could, in particular, be useful in securing, in the case of crimes, forms of cooperation and coordination among the injured States that might less easily be made the object of obligation in the case of delicts.

12. The fifth and last issue was whether States should not be entitled to implement the legal consequences of a crime prior to the judicial determination of existence/attribution. He had taken good note of the suggestion made by one member of the Commission that the judicial determination envisaged in draft article 19 should follow and not precede the implementation by States of the legal consequences of crimes defined in draft articles 15 to 18. In view of the importance of that issue, he believed that it should be carefully explored by the members of the Commission, in which connection he thought it necessary to make three essential points that were perhaps overlooked by the objectors.

13. First, he trusted that, in considering the said suggestion, as compared to his proposed solution, due account would be taken of the provisions of draft article 17, paragraph 2, relating to interim measures, as well as of draft article 18, paragraph 1, subparagraphs (*f*) and (*g*). Those provisions should help to reduce the concern to ensure as early an implementation as possible of the legal consequences of the crime, especially in certain cases. Secondly, in his view, the abbreviation of the judicial determination he had proposed might speed up the procedure, and thus also help to minimize the concern in question. Lastly, he trusted it would not be forgotten that, in all cases of crime, and although the injured States had to wait, following the decision of a political organ, for a judicial determination before implementing the legal consequences of crimes, namely, the special or supplementary consequences under draft articles 15 to 18, as proposed in the seventh report, they were of course entitled, without waiting for compliance with the condition laid down in draft article 19, to implement the legal consequences which derived from articles 6 to 14 of part two as applicable to delicts, since in most cases a crime also included a delict.

14. In conclusion, he urged the members of the Commission to reflect on all those questions and, if necessary, to help amend draft article 19, in particular, so as to make it clearer that the regime of special consequences of crimes had no dramatic, negative effect on the capacity to react to delicts in a timely fashion.

15. Mr. PAMBOU-TCHIVOUNDA said that the statements during the discussion that had taken place at the Commission's forty-sixth session on the sixth report on State responsibility had crystallized into two opposing views. The pessimist view, which denied that the division of an internationally wrongful act into the two categories of delicts and crimes had any relevance, had endeavoured to dissuade the Special Rapporteur from embarking on a special regime for State crimes. The optimist view, which he espoused, considered that the material differentiation of wrongdoing was a creation and an achievement of the Commission and that it was for the Commission to deal with it by means of a normative projection that would take account of the specific nature of State crimes. At the current session, the Commission had before it the Special Rapporteur's seventh report and, notwithstanding all the different views, should express its appreciation to its author. The report should be given a favourable reception despite the imperfections from which it suffered throughout. Some speakers had referred to those imperfections, but without sufficiently emphasizing the intrinsic difficulties of the topic, which were mainly of three kinds.

16. The first difficulty, which was methodological, arose out of the order adopted by the Commission itself for dealing with the consequences of an internationally wrongful act, considered from the standpoint of its dual—delictual and criminal—component. That order did not however correspond to that adopted for the wording of the definition of crimes and delicts in article 19 of part one[4] and, if anything, went in the opposite direction. The Commission had conceivably, for reasons of convenience and pragmatism, adopted an approach consistent with that of Descartes in the Discourse on Method, according to which a given subject was considered by proceeding from the simplest to the most complicated considerations. But it was conceivable to a certain extent only and common sense tended to recommend to the contrary. The adaptation of a pre-existing regime for crimes would certainly have made the Special Rapporteur's task easier, had that task consisted of the elaboration of a regime for delicts.

17. The second difficulty, which was technical, made the Commission, so far as the consequences of crimes were concerned, a prisoner of its legacy, namely, of part one of the draft articles,[5] which had in turn been affected by the legacy of the law of treaties. The methodological opening created by the generic term "internationally wrongful act" probably formed part of the progressive development movement that the Commission had

[4] See 2391st meeting, footnote 8.

[5] See 2394th meeting, footnote 4.

wished to stamp on the international law of State responsibility that was being codified. None the less, by making it multilateral, in keeping with that dual legacy, it had altered the fundamental bases of machinery which, in its spirit and essence, remained bipolar. That obviously created problems. In particular "the universalization of the status of injured State", as referred to in the seventh report, had politicized the matters.

18. The third difficulty was precisely of a political nature. The subject matter of paragraphs 2 and 3 of article 19 of part one, whether it was the essential obligation that was the subject of the breach or the result of such breach, was of a political nature. The interests that motivated the actors, gave rise to the reactions or determined the conduct were only the reflection of the political nature of State crime. State crimes were internationally wrongful acts of a political nature. It was inconceivable to him that, both before and after 1976, the Commission had had a different perception of the matter, for that was what explained the split that divided it as to the principle and relevance of a specific regime for State crimes. He could not accept that that split derived from the distinction between substantial consequences and instrumental consequences, which rather called to mind the very close relations between law and politics in international relations. Given those relations, how could a system of arbitration be devised and rebalancing machinery found that would restore law to its place without politics being undervalued or disregarded? That was the object of the task with which the Special Rapporteur had been entrusted.

19. The schema proposed by the Special Rapporteur was acceptable, even if it needed to be rewritten, improved or corrected by the Commission. He wished to make a contribution to the debate by formulating a number of comments relating, first, to the argumentation and, secondly, to elements of the proposed mechanism.

20. The argumentation which formed the substance of the seventh report related to both the normative and the institutional aspects—which of course were closely linked—of the consequences of international crimes. He would begin by commenting on a question that had given rise to a discussion for which the Special Rapporteur perhaps bore part of the responsibility, namely, the question of terminology. The Special Rapporteur had certainly wanted to impart a meaning to the concept of fault and of the wrongdoing State which recurred like a refrain in almost every paragraph of the seventh report. What were the reasons for that resurgence of the concept of fault, which some had seized on to make it the criterion for characterizing an act as a crime and, consequently, for distinguishing between the two categories of internationally wrongful acts covered by article 19 of part one? He could not agree with such an interpretation, for article 19 was clear. An internationally wrongful act was considered to be a generic category. A crime was an internationally wrongful act and so was a delict. What mattered in both cases was the breach of an international obligation. The intent supposedly underlying the breach was of little importance. Accordingly, a crime could not be characterized as such on the basis of the perpetrator's wrongful intent, for that intent was not known. The discussion on that point therefore appeared to be redundant.

21. Another perplexing aspect of the seventh report was its author's decision not to refer until a fairly late stage, under the heading of "The indispensable role of international institutions", to the list of crimes appearing in paragraph 3 of article 19 of part one. He wondered whether a recapitulation of that list placed much earlier on in the report, straight after the introduction, would not have helped the Special Rapporteur to shed light on the ambiguities of wording and substance contained in paragraphs 2 and 3 of article 19 or, at the least, on a doubt the Special Rapporteur had raised in the sixth report[6] that the question was very likely to arise whether the list ever had been and currently was the most satisfactory. In his opinion, that question was one of those that robbed the topic of scope and perspective and created the impression of going around in circles.

22. The reference to "rules of international law in force" in article 19, paragraph 3, was relevant to the characterization of crimes and to going further than the list, which, as the words "*inter alia*" clearly indicated, was not intended to be exhaustive. It was relevant because the identification of the rules in question—whether they originated in customary law or in treaty law or whether, for example, they related to the new law of the sea or the law governing international communications on the basis of case law (*Oscar Chinn* case,[7] *Corfu Channel* case[8])—would reveal which among them set forth obligations that were essential to the protection of fundamental interests of the international community; and such an identification could perfectly well be made by the Commission, if not in plenary, then, at least in the Drafting Committee.

23. Moreover, the seventh report gave rise to some questions relating to certain specific modalities of the general obligation of restitution and the method consisting in transposing to the regime applicable to crimes all the elements of the regime applicable to delicts. Two factors were essential in that regard, namely, the object of the breach, or in other words the type of crime committed, and the preliminary determination of the beneficiary of reparation. The former of those two factors would reveal the limits of restitution in kind, or even of compensation, in the case of a crime, and the second would weigh fully in the justification of entitlement to act within the framework of a judicial body for the purposes of reparation. But did not the distinction between directly injured States and others which supposedly were only indirectly injured make the very concepts of international community and crime relative, and have the same effect on the basic elements of the definition of a crime in that questions of substance were going to arise, first, a priori at the level of the bodies entrusted with the characterization of a crime, and, secondly, a posteriori because of the specific implications of such a characterization. The principle of prior determination of the crime and of its attribution to a State was the keystone of the regime of crimes being elaborated, and the Special Rapporteur proposed not only the theory of that principle, but also a system for its technical application which, as

[6] See 2393rd meeting, footnote 3.

[7] *Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65.

[8] See 2381st meeting, footnote 9.

the Special Rapporteur conceded, could and should be amended and corrected by the Commission.

24. The assumption which formed the basis of the Special Rapporteur's reasoning and which the Commission ought to endorse was that, if the concept of crime constituted a legal category, it was logical that the determination of correspondence between de facto situations, or in other words the alleged crimes, and the definition of crimes in article 19 could and should be entrusted to a judicial rather than a political body. The required determination was, in fact, a legal one on the basis of an already existing standard, the definition contained in article 19. Within the framework of the United Nations system, the Special Rapporteur preferred recourse to ICJ rather than to the General Assembly or the Security Council. Several speakers had drawn attention to the shortcomings of ICJ, but they had done so in order to justify some alternative solution rather than to express a general and categorical opposition to that proposed by the Special Rapporteur. For his part, he had no preconceived ideas about the matter, but felt that there were three important points to be made. First, the Commission should beware of the risk of slipping from the universe of reparations into that of sanctions, from a system of "compensation" into one of "security". The possible overlapping of the jurisdictions of different bodies was connected with that risk. Secondly, the slowness of the Court's workings was not a convincing argument, in the sense that the judicial settlement of any dispute arising from the violation of a legally protected interest was likely to be slow rather than swift, as proved by the examples of Bosnia and Rwanda, or the *Corfu Channel* case, in which the ideas the Commission was exploring now had already been taking shape. Lastly, from the viewpoint of going further than the list in article 19, it might perhaps be of interest to envisage recourse to existing international courts, either at the regional level (for example, in the human rights area) or within the framework of specific regimes (in particular, that of the new law of the sea) establishing some *erga omnes* obligations—in other words, obligations whose breach constituted a crime within the meaning of article 19, paragraph 2.

25. As to the draft articles of part two proposed by the Special Rapporteur in his seventh report, draft article 15 did not seem to give rise to any particular problem. Article 16, on the other hand, and particularly its paragraph 2, made him wonder at what point the designation of the injured State was to take place and whether restitution in kind was conceivable in every case. The question was basically that of the scope of the jurisdiction of the body entrusted with the determination of the crime. In other words, did the attribution of a crime to a State include, in an implicit and incidental manner, the determination of the "circle of injured States"? If so, did such dualism apply to all crimes? In any event, it would be preferable to insert the words "where necessary" after the word "obtain" in paragraph 2 of draft article 16. Draft article 17 gave rise to two sets of problems, one of connection with other articles and the other of clarification. In its connection with draft article 16, it bore the stamp of uncertainty as to who had the right to resort to countermeasures. In particular, the Special Rapporteur might explain in the Drafting Committee the various uses of the terms "every State", "every injured State" and "all States". Similarly, were interim measures requested by all States or only by certain particular States and on what basis? The right to resort to countermeasures also created a connection between draft articles 17 and 18. The implementation of the provisions of both articles was subject to the same condition of prior determination of the crime, which gave rise to the question whether the implementation of the obligations embodied in article 18 did not form part of resort to countermeasures. If not, was the implementation of those obligations left to the discretion of States or did it take place under the supervision of the international community? But, if so, who would be the arbiter? Lastly, draft article 19, which was the keystone of the edifice, and in particular its paragraphs 2, 3 and 4, could and should be altered, again for the sake of clarity. The Commission should, in any event, receive the seventh report favourably and, with the assistance of the Special Rapporteur—that open-minded and least doctrinaire of men—clarify all the elements that would enable him to draw up a well-ventilated and rationally acceptable text in the interests of the international community as a whole.

26. Mr. ROSENSTOCK, referring to the statement made by the Special Rapporteur at the beginning of the meeting, said he thought that the Commission was on the wrong track in wanting to build the second part of the draft on a text, that of article 19 of part one, that was full of infelicities if not absurdities, such as the definition of an international delict as any internationally wrongful act which was not an international crime in accordance with paragraph 2 of the same article, thus making it impossible to respond to a crime in the same way as to a delict. As to the "constitutional" problems raised by other speakers, everything would depend on what the Special Rapporteur meant to cut out of his proposals, but the problems in question were not confined to Articles 18 and 27 of the Charter of the United Nations; they also related to Articles 12, 24 and 39. The ballot proposed by the Special Rapporteur combined the negative aspects of both systems to create a potential monster. So far as the commission of jurists that was supposed to act as prosecutor was concerned, if that meant the General Assembly or the Security Council having to set up a subsidiary organ to conduct the prosecution of a State in ICJ, that was a highly inadvisable route to follow. Nothing in the Special Rapporteur's new proposals therefore cured the fatal problem of all his imaginative constructs, namely, that the compulsory jurisdiction of the Court would not be acceptable to States. He appreciated the Special Rapporteur's undeniable creativity, but thought that it reflected a desire to attain a castle in the sky and to put off the recognition that nothing remotely similar to the proposed system was going to work. The experience of the Council, all the way back to the case of Southern Rhodesia,[9] clearly showed that dealing with problems which involved threats to international peace and security did not need the imaginative construct of crimes of States. The real question continued to be that of the purpose of the proposed edifice: were there any acts which the international community might plausibly consider to be crimes of States and which did not represent threats to

[9] Security Council resolution 277 (1970) of 18 March 1970.

international peace and security? Obviously, such cases could only be peripheral ones that could be dealt with as *erga omnes* violations, combined with some refinements of the concepts relating to directly or indirectly injured States. The question that needed answering was why the Commission should construct the whole edifice for peripheral cases and, by so doing, jeopardize meeting the time-limits it had set itself for the first reading, especially as the text it would eventually produce would not be likely to contribute to the progress of international law or the promotion of international peace and security.

27. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Rosenstock's statement was out of order inasmuch as the Commission was in the process of considering the way in which he had acquitted himself of the task it had entrusted to him at the preceding session. He had worked very hard on the preparation of his report, which, like all reports, was certainly not perfect and needed to be improved by the Commission. That Mr. Rosenstock was against article 19 of part one was his own business, but he had no right to demand that the Commission should consider whether or not it should maintain article 19 or deal with the problem of the consequences of internationally wrongful acts characterized as crimes under that article.

28. Mr. MAHIOU said that there were differences of opinion within the Commission on the concept of crime and on article 19 of part one. From a logical point of view, it could be asked whether the Commission was right to deal with the consequences of crimes first and revert to article 19 afterwards, but the fact was that, at the present stage of its work, the Commission was in the process of considering those consequences. Therefore it must, without prejudging the reactions of States, acquaint them with the consequences it drew from crimes, leaving it to them to express their views on that subject and, consequently, on article 19. Since consensus seemed difficult to reach, the Commission might on completing the first reading, submit not a single proposal to the General Assembly and to States, but a proposal containing two alternatives or even two separate proposals, one based on the determination of the crime being made by States and the other on that determination being made by a mechanism which, in addition to determining the existence (or non-existence) of a crime, would decide on the lawfulness of the consequences to be drawn therefrom by States or any other institution.

29. Mr. HE thanked the Special Rapporteur for his erudite and elaborate report accompanied by recommendations reflecting his deep conviction about the course he believed the Commission should follow.

30. After due reflection he had to admit, with great reluctance, that despite the ingeniousness, boldness and imagination of the Special Rapporteur's ideas, approaches and reasoning, the envisaged system might be far from practicable. He feared that the gap between the ideal and the reality remained serious and great and that, for that reason, the Commission's work might lead nowhere because the resulting draft articles, even if they could be accepted by some States in the form of a convention, still could not affect the competence of United Nations organs as defined by the Charter.

31. The fundamental issue continued to be the use of the term "State crime" in the field of international law in a sense other than the meaning it had in internal law, such usage was bound to cause concern to most sectors of international public opinion.

32. It was widely accepted that States did not commit crimes, but individuals did. Under international law, the State was composed of certain basic elements, namely, territory, population and administrative organs. If a State were to be established as a subject of crime, the question might be asked whether the main elements constituting it should be considered as committing a crime. For territory or population in an integral sense, the answer was no. For juridical persons, including administrative organs, the question whether or not they could be considered as subjects of crime was disputable. That problem had been dealt with by States in a variety of ways. But, in any case, the State itself had been exempted from criminal responsibility, since it alone was entitled to punish and since it could not punish itself.

33. By extension, it was difficult to see who, in an international community of some 184 sovereign States on an equal footing with one another, all with the power to punish, could exercise such power over other sovereign States. True, the Charter of the United Nations endowed the Security Council with the power to maintain international peace, but it gave the Council no legal or criminal function with regard to States. ICJ was the only permanent judicial organ for the settlement of disputes, but its jurisdiction was founded on voluntary acceptance by States. That being so, it would be difficult to imagine how the United Nations machinery could operate in the way envisaged by the Special Rapporteur.

34. Reverting to the argument that only individuals, but not States could commit crimes, he said that, in a sense, the State could be considered as an instrument which individuals could use in order to commit crimes. Thus, criminal responsibility would fall on the individuals and the crimes committed would constitute crimes of individuals. Persons in the leadership of a State might use its territory, resources, people and administrative organs to engage in internationally wrongful acts for criminal purposes. Furthermore, as Mr. de Saram had pointed out (2394th meeting), to use the term "attribution" to mean that a State was liable to compensate for harm caused by its officials or agents was one thing, but to impose the vicious label of "criminal" on the entire population of a State because of the conduct of some of its leaders was another. That was not fair to the population of the offending State and could not be justified.

35. That was why it had been suggested that, if the main objective was deterrence, the best way of achieving that objective was to attribute criminal responsibility to the individuals from the offending State who had decided to commit the wrongful act. Imposing criminal responsibility on the State—an abstract entity—would dilute the deterrent effect on the individuals who were criminally responsible.

36. As to international practice, the Nürnberg and Tokyo Tribunals had tried and punished individuals as government leaders who had committed crimes against peace and humanity. The International Tribunal for the

former Yugoslavia[10] and the International Tribunal for Rwanda[11] had jurisdiction to try not State "crimes", but crimes of aggression and genocide committed by individuals. Moreover, the draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind also applied to individuals. The proposal that "crimes" should be attributed to States therefore did not reflect contemporary State practice.

37. The concept of "crime" as provided for in article 19 of part one encroached on the field of primary rules and went beyond the Commission's role, which should be to set forth the secondary obligations that would arise in the event of any breach of primary rules. Consequently, to persist in addressing the legal consequences of a questionable notion—State "crime"—would only prolong the debate and divert the Commission from the important task of elaborating a set of rules on State responsibility.

38. If the concept of "crime" were to be introduced into the draft articles on State responsibility, clear provision must be made for the judicial system that would determine that a crime had been committed. In that connection, the Special Rapporteur had proposed, in draft article 19 now before the Commission, that the main organs of the United Nations—the General Assembly, the Security Council and ICJ—should, in playing their respective roles, together take the important decision to implement the special provisions on the legal consequences of crimes. That proposal, which was bold and imaginative, seemed attractive. It should, however, be remembered that the Council and Assembly were political bodies whose mandates were defined in the Charter of the United Nations: the function of the Council in maintaining international peace and security was purely political and had nothing to do with legal judgements and the role of the Assembly was also political and limited to deliberations and recommendations. The suggestion that the Council or the Assembly should consider whether an "international crime" would justify the grave concern of the international community would mean that the Council or the Assembly would become involved in the legal field in that they would be enabled to exercise a *de facto* judicial function which should be exercised *ipso facto* by an international judicial body. The question whether such a proposal was in conformity with the Charter therefore merited further study. It was also a matter that concerned the interpretation of the Charter, which was outside the Commission's mandate.

39. Reference to ICJ was a good idea, but, as Mr. Bowett had pointed out (2392nd meeting), the problem was that, as a rule, the Court took a long time, sometimes several years, before arriving at a decision. It was because of that problem that the Special Rapporteur had suggested the number of judges should be increased. That, however, would not speed up the work of the Court, but would involve an amendment to the Charter and to the Statute of the Court, which was outside the Commission's field of competence.

40. At the preceding session, he had been among those who had advocated that the legal consequences of an internationally wrongful act should be addressed on the basis of the distinction, not necessarily between crimes and delicts, but between quantitatively less serious and more serious internationally wrongful acts. That might provide a way out of the Commission's dilemma. The Special Rapporteur, however, insisted on dealing with the legal consequences of "State crimes" separately, thus placing the new draft articles on a questionable basis. In the circumstances, he would reserve his position on draft articles 15 to 20, as proposed in the seventh report, but he wished in passing to make a few comments in that connection.

41. The draft articles on State responsibility should be based on the principle of the sovereign equality of States and should exclude any unduly excessive demands that encroached on the rules and principles of international law relating to the protection of the sovereignty, independence and stability of the offending State. Yet such limitations had deliberately been omitted from draft article 16. That article also provided that every State was entitled to demand full reparation. Given that, in the case of "crime", all States were injured States, did that mean all States had the right to demand full reparation regardless of the limited resources of the offending State? Should a distinction be drawn between injured States and States entitled to demand reparation, as had been done between directly injured States and indirectly injured States? The underlying logic of the article seemed questionable.

42. The provisions on restitution in kind, satisfaction and guarantees of non-repetition also raised certain difficulties.

43. It was important to strike a certain balance between the progressive development of international law and its codification. While the Commission should look beyond the stark realities, so as to promote the progressive development of international law, it should be wary of pursuing an ideal that was too far removed from reality lest the outcome of its work should prove unacceptable to States and, hence, futile. It was also necessary to ensure consistency between international law and State practice. The approach contemplated, whereby the system of international responsibility would be made into a system parallel or supplementary to the system under the Charter, seemed too ambitious to succeed. It would be better if, with a view to carrying out its mandate, the Commission confined itself to setting up a system of secondary obligations on State responsibility, which was already a difficult and complex task. On practical grounds, he would agree with the suggestion made by some delegations in the Sixth Committee, at the forty-ninth session of the General Assembly, that consideration of the question of the legal consequences of international crimes should be deferred until second reading.[12] Although that suggestion would leave an undesirable gap in the draft articles, it would provide a solution to the current dilemma.

[10] See 2379th meeting, footnote 5.

[11] Ibid., footnote 11.

[12] See *Official Records of the General Assembly, Forty-ninth Session, Sixth Committee*, 25th meeting, para. 4.

44. Mr. ROSENSTOCK said that the Special Rapporteur was free to think as he saw fit of his suggestions, comments, questions or analyses, but he would appreciate it if he did not engage in *ad hominem* argumentation.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had engaged not in an *ad hominem* argument but in an argument in reply to what he considered to be out of order proposals. Mr. Rosenstock was out of order in raising the question whether article 19 of part one, or any other article in the draft, should deal with crimes. At the present stage, the issue was to find solutions for the implementation of the consequences of crimes, and not to discuss whether article 19 of part one, as adopted on first reading, should stand.

46. The time argument was not valid. If the draft articles under consideration were sent back to the Drafting Committee with all the comments and proposals made in plenary in that connection, the Drafting Committee could start to consider them at the current, or next, session. He did not see why the Commission should come back all the time to the use of the word "crime", which had been adopted in article 19 of part one: it was not his invention and he did not insist on it. Nor did he intend to propose that a given consequence should or should not have a punitive character. He had simply indicated the supplementary or special consequences of crimes and ways and means of implementing them. It was up to the Commission to discuss those questions at the current and next sessions and at least to try to produce draft articles on the subject. The waste of time was caused by the improper attempts, by some members, to remove article 19 of part one beforehand.

47. Mr. SZEKELY said that he was grateful to the Special Rapporteur for his courage in placing the strengthening of the rule of law in international relations before the cold, calculating and selfish realism of the individual interests of States.

48. In his excellent seventh report, the Special Rapporteur mentioned two interdependent problems to which the distinction between an international delict and an international crime gave rise. The first problem concerned the rules governing the determination of the special or supplementary consequences of crimes as compared to the consequences of delicts, while the second concerned the institutional question of the appointment of the entity or entities that would determine and/or implement such special or supplementary consequences. As one who was resolutely in favour of the distinction between an international delict and an international crime, he was also in favour of the aggravation of the consequences of crimes as compared to the consequences of delicts. For the same reason, he was, moreover, in favour of the intervention of international institutions to determine who had committed an international crime and to implement the special or supplementary consequences of that crime so as to make it possible to prevent, or at least minimize, the possibilities of arbitrary action that were more likely if States, taken individually, had to do the same without any control.

49. Clearly, therefore, the Special Rapporteur had had to meet the enormous challenge of devising a credible scheme whereby the existence of a crime could be determined and its attribution decided in a legally objective manner.

50. He started to construct that scheme in draft article 15 of part two, in which he proposed the regime of supplementary substantive and instrumental consequences. His own view was that that regime should be in addition to the regime of the legal consequences entailed by a delict, " not "without prejudice" to it. In draft article 16, the Special Rapporteur introduced the first adjustment by aggravating the consequences of a delict in the case of crime: the State which committed a crime would not enjoy the benefit of the exceptions provided for in article 7, subparagraphs (*c*) and (*d*),which provided that restitution in kind was due provided, and to the extent, that it

> would not involve [for the State which committed the wrongful act] a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation

or that it

> would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.[13]

51. In the first case, he agreed the criterion should be that the wrongdoing State must, in so far as possible, reestablish a situation whose maintenance was essential for the international community even if that would mean a very heavy burden for it. In the second case, it would be reasonable, in his view, to provide that the restitution in kind imposed on the wrongdoing State would be confined to safeguarding the vital interests of its population. In that connection, he wondered whether it was possible for the State to suffer serious economic consequences without the vital interests of its population being endangered. In practice, it was probable that those vital interests would be seriously affected by the State crime and that it would be the population, always the weaker and more vulnerable party, who would pay for the crime or be punished for it, and not so directly the natural persons or groups of natural persons who ran the Government or took decisions. Similarly, because of the disproportionate burden restitution in kind represented by comparison to compensation, the exception to the limitations set forth in article 7, subparagraph (*c*), to which reference was made in article 16, could, in practice, affect the vital interests of the population more than those of officials who, through the acts they had committed under cover of the Government's prerogatives, had caused the State to commit an international crime. That was an added reason for aggravating the penalties laid down in the draft Code of Crimes against the Peace and Security of Mankind, particularly in the case of crimes committed by an official in the performance of his official duties. Even so, he did not see how States could be deterred from committing an international crime except by providing for extreme consequences. In the interest of balance, however, it would then be advisable to define the meaning and scope of the expression "vital needs of the population" so that restitution in kind did not result in a massive violation of the fundamental political, social and economic rights of the population—which was what article 14

[13] See 2391st meeting, footnote 9.

(Prohibited countermeasures)[14] was designed to prevent. Perhaps it should also be stipulated that the restitution must be materially feasible, as the Special Rapporteur pointed out in his report, and also morally tolerable, as the Special Rapporteur stated in his report in regard to "satisfaction". He had dwelt on that point because, in his view, the sacrifice of the vital needs of the population was far more to be feared in the case of a developing wrongdoing State than in that of a prosperous wrongdoing State, which had more resources for making reparation.

52. As to the exception concerning the safeguarding of political independence, he agreed with the Special Rapporteur's conclusion in his report, which was reflected in draft article 16, paragraphs 2 and 3, but not with the reasoning set forth in the report. Basically, he did not believe it was possible to say in particular that aggression was a wrongful act frequently perpetrated by dictators or otherwise despotic Governments, for contemporary history made it sufficiently clear that aggression was often, and perhaps even more often, also committed by industrialized democracies because they had a far greater chance of going unpunished because of their power and, above all, because, under the international legal system, there was no completed regime of international responsibility with defined consequences and international machinery to determine that the wrongful act had occurred and to apply the consequences it entailed, like the one the Special Rapporteur proposed.

53. The distinction the Special Rapporteur made between "political independence" and "political regime" seemed at first sight to be risky, to say the least. "Political regime" according to the meaning given to it in the report, seemed rather to be linked to, and to have an affinity with, the concept of "self-determination" in political matters; if that self-determination were affected, the inevitable result would also be an infringement of political independence. It would perhaps be better to link the concept of restitution in kind less to the "regime" and more to the group of persons who controlled it and who were covered, in the context of reparation through "satisfaction", by article 10, paragraph 2 (*a*),[15] and draft article 16, paragraph 3. Despite that dubious distinction, however, the concept of "political regime" and its consequences in the event of an international State crime were admirably well explained in the report. To his mind, there was nothing incongruous in the wrongdoing State being required to make restitution in kind in the event of an international crime even if that presupposed that the group of persons intellectually and materially responsible for the crime must be punished, chastised and, above all, removed from power (or from the political regime). Such a measure was certainly less extreme than depriving the wrongdoing State of the benefit of the rules and principles of international law concerning the protection of its sovereignty and freedom, to which reference was made at the end of draft article 16, paragraph 3, of and which would irreversibly undermine the reservation or safeguard set forth at the beginning of that paragraph, in other words, the preservation of its existence as a genuinely independent member of the international community.

54. If, as he trusted, a close connection was ultimately established between the regime of consequences laid down in article 19 of part one of the draft articles on State responsibility and the regime provided for in the draft Code of Crimes against the Peace and Security of Mankind, the persons covered would be more or less the same. Consequently, it was inconceivable that, under the terms of the draft Code, they would end up paying for their acts with loss of their liberty, while, under the draft on State responsibility, they could remain free and even continue to exercise power. That would be manifestly unacceptable and absurd.

55. As to the instrumental consequences, it was a positive step to provide that "all States" could resort to countermeasures, something which constituted a very important aggravation of the consequences of committing a crime and could act as a deterrent or bring pressure to bear on the wrongdoer. In that regard, draft articles 17 and 18 were not only particularly well structured, but showed that articles 11 to 13, concerning delicts, were along the right lines.

56. He also fully endorsed draft articles 19 and 20 and pointed out that it was inconceivable that the Commission should take nearly a quarter of a century to elaborate a draft convention on State responsibility without including an institutional system for the progressive development of international law like the one devised by the Special Rapporteur. Personally, he would prefer a judicial mechanism to a political mechanism. Furthermore, while the slowness of ICJ was to be deplored, that of a body like the General Assembly should not be underestimated, for it was still considering at its regular sessions items that had been on the agenda for more than 20 years. The procedure for establishing the existence/attribution of a crime was very important, since it could either weaken or strengthen international law.

57. Again, a system under which States were obliged to submit to a settlement mechanism would be nothing new. For several decades, States had agreed to such mechanisms, more particularly under the Hague Conventions and the Charter of the United Nations. Accordingly, it was not unreasonable to expect all States to agree to be judged by the same yardstick and so expect to impart some reality to the principle of the equality of States in law.

58. The mechanism proposed by the Special Rapporteur was in fact modest. Indeed, under a perfect legal system, that institutional scheme should be applied not only to crimes, but also to all international delicts; confining the application of the mechanism to crimes was already a concession to the sacrosanct sovereignty of States, a concept which States often invoked improperly in order to evade the consequences of their breaches of international law. The provisions of draft articles 19 and 20 seemed to be regarded by some members as removed from reality, but it should be borne in mind that, as far as the crucial question of State responsibility was concerned, being realistic meant bowing to the lack of political will on the part of some States which did not want legal obstacles that would in any way hinder their free-

[14] Ibid., footnote 11.

[15] Ibid., footnote 9.

dom to promote their interests, in disregard of the rights of others or the interests of the international community as a whole. The price of that realism was being paid by men and women, children and old people, victims of wars of aggression, colonial domination, slavery, genocide, apartheid and ecocide, because States did not want their acts to be judged by the competent international bodies, not only to avoid bearing the consequences, but also to remain free to carry on perpetrating their misdeeds. Realism should not turn the members of the Commission into their accomplices. It had been asserted that States did not commit crimes; unfortunately, every day millions of victims gave the lie to that assertion. Those considerations had to be borne in mind in answering the question raised by Mr. Rosenstock, namely, whether an arrangement such as the one proposed by the Special Rapporteur was necessary. For his own part, he was convinced that it was.

59. He would also like to make a few comments on the informal addendum to the seventh report. To begin with, the idea of an ad hoc commission of jurists appointed by a political body was quite disturbing, for it was difficult to believe that such a system would afford some degree of impartiality. He would prefer the other solution suggested in the informal addendum, which emphasized the judicial rather than the political aspect of the mechanism by setting up an ad hoc Chamber of judges to make the requisite finding. Nevertheless, if the judicial phase was assigned to an ad hoc commission of jurists appointed by a political body, the members of that Commission should at least be expected to act in keeping with the interests of the international community and not the particular interests of the States of which they were nationals.

60. One paragraph of the informal addendum was rather troubling in that it spoke of "third" States. As the Special Rapporteur himself admitted, such States should participate as principal parties at the side of the original applicants, since all States were in fact injured by the commission of an international crime.

61. Otherwise, he endorsed the conclusions the Special Rapporteur set out in the informal addendum to take account of diverging opinions which had been expressed in the course of the discussion. In particular, the proposals concerning the adoption of countermeasures even before a judicial determination of the existence of an internationally wrongful act were entirely acceptable.

62. Lastly, it was regrettable that the debate on the topic of State responsibility, which was of crucial importance to international law, gave rise to such sharp controversy, precisely in the year of the fiftieth anniversary of the United Nations, as if no lesson had been drawn from the past, as if the guarantees of respect for international law had been greater after the Second World War than they were at the present time, a time of other conflicts and of other serious breaches of international law. It was none the less to be hoped that the Commission, faithful to its task, would do everything to move ahead in its work on the topic under consideration, even moving into the progressive development of international law.

63. Mr. THIAM said that he wished to emphasize the generosity and humanism behind the Special Rapporteur's seventh report. While a number of points in the report were open to dispute, by and large the cause did not lie with the Special Rapporteur, who was one of the most competent members to whom the Commission had entrusted the consideration of a particularly delicate topic, but with the Commission's particular method. The Commission was moving ahead in considering the draft articles when a number of concepts and terms were still not clearly defined. For example, the concept of crimes had been the subject of debate since the time of Mr. Ago. It was unfortunate and dangerous that the report and the draft articles used terms on which not everybody was agreed and the meaning of which was constantly being questioned. It was also regrettable that vague and ambiguous expressions should be used when a more straightforward formulation would be more readily understandable. In that regard, for example, under the terms of draft article 18, paragraph 1 (*e*), all States would

> "fully implement the *aut dedere aut judicare* principle, with respect to any individuals accused of crimes against the peace and security of mankind the commission of which has brought about the international crime of the State or contributed thereto."

Would it not be better to speak simply of individuals whose crimes entailed the international responsibility of States?

64. The Commission was also considering part two of the draft when part one had not been endorsed by the international community and the very terminology used had not been accepted. Consequently, part two of the draft was built on quicksand. To avoid talking pointlessly and going around in circles, the Commission should have submitted part one of the draft to States after completing the first reading, obtained the comments of States on part one, considered part one on second reading and only then have taken up part two. The Commission should never lose sight of the fact that it was working for the international community and that, for example, when it was drafting articles on crimes, it must know whether the international community endorsed the meaning that it attached to that term. Moreover, the woolliness of certain words or concepts was a constant source of controversy.

65. In his opinion, the Commission also had a tendency to indulge excessively in theory, to the point where it sometimes lost the resulting conclusions from sight. For example, it had enunciated the principle whereby crimes had an *erga omnes* effect, while envisaging a convention on crimes. However, if crimes had an *erga omnes* effect, why would a convention between States be needed? He would be grateful to the Special Rapporteur for some clarification on that point.

66. Over and above problems of consistency and method, the Commission should also weigh up the effectiveness of the Special Rapporteur's proposals. For instance, the Special Rapporteur had considered that, if an allegation was to be regarded as sufficiently serious and well founded to require the attention of the international community, a political body—the General Assembly or the Security Council—should so decide. Such reasoning seemed acceptable, for the seriousness of an act was a

subjective notion and a political authority was needed to take a decision in that regard. Nevertheless, such a mechanism posed a problem in that the decision to refer a matter to ICJ, the judicial body competent to determine the responsibilities and assess the consequences of crimes, was left to a political body. Furthermore, the Assembly procedure would not prove very easy, since the Assembly, which took its decisions by a two-thirds majority, held a regular session only once a year. Convening a special session would require consulting all States and a certain majority would need to meet, something which was neither easy nor rapid. As far as the Council was concerned, things were still more complicated because account would have to be taken of the veto power of its permanent members. If the members directly concerned were to abstain in the voting, as proposed by the Special Rapporteur, the Charter of the United Nations would need to be amended. Indeed, all of the solutions proposed by the Special Rapporteur would entail amending the Charter, not with regard to the Charter's principles or purposes, but with regard to the procedures that it established.

67. In the field of State responsibility, which involved international peace and security and in which States could be very seriously wronged, it was essential for the procedures to allow prompt action. Yet the mechanisms proposed by the Special Rapporteur would be slow and complex and it was doubtful how effective they would be in responding to an emergency situation. The proposals contained in the informal addendum were not, at first glance, any more satisfactory than those contained in the report.

68. In the discharge of its mandate, which was to ensure the progressive development of international law, and to respond to the needs of the international community, the Commission should be in closer touch with reality and work more methodically, step by step. The progressive development of the law did not call for revolutionary solutions, even if they were generous solutions. While the Special Rapporteur was skilfully carrying out his difficult task, the members of the Commission were duty-bound to tell him of their concerns. It was his hope that the Commission would move back a little and work on the progressive development of international law in order to meet the needs of the international community.

69. Mr. PELLET said that he had already spoken on a part of the Special Rapporteur's report (2393rd meeting), a part which was perhaps the most spectacular and also certainly the most debatable in that it sought to subordinate the implementation of the consequences of the commission of a crime to a prior finding, in a wieldy and complicated arrangement. But, regardless of how spectacular it was, the procedural side of the report was not the most important; it was important only because, if the mechanism devised by the Special Rapporteur was adopted, the proposals for a response to heinous wrongful acts that were set out in draft articles 16 to 18 would be largely drained of substance. That would be a great pity, for they could be criticized on points of detail, but they were in the main entirely appropriate.

70. He had already indicated his complete agreement with draft article 15, which was very important in that it provided that the consequences of crimes added to, and did not replace, the consequences of delicts. Crimes and delicts were internationally wrongful acts and it was therefore natural that they should produce shared consequences. Similarly, since, under article 19 of part one, a crime was a serious breach of an international obligation of essential importance for the protection of fundamental interests of the international community, it was natural that the consequences of such a breach should be more radical and more "penalizing" than those of a mere delict. In that regard, he would point out to Mr. Thiam that, since the Commission had adopted part one of the draft, it was natural that it should continue under its impetus and that it would not now be natural for it to adopt an entirely different strategy.

71. He wished to engage only briefly in the discussion of the draft articles, for the discussion fell within the purview of the Drafting Committee, but he would none the less like to dwell at some length on two fundamental problems of a general nature which had been taken up by a number of members and were again discussed in the informal addendum. One pertained to the relationship between the draft and the system for the maintenance of international peace and security organized under the Charter of the United Nations and the other pertained to the definition of the injured State.

72. For lack of time, however, he would continue his statement at a later meeting.

73. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was appreciative of some of the comments by Mr. Thiam, but wondered what Mr. Thiam meant when he called for the Commission to move step by step. According to that suggestion, the Commission should have broken off its work for two years after adopting part one of the articles, on first reading, including article 19, in order to submit them to States and only thereafter deal with the consequences of the wrongful acts singled out as crimes under article 19. However, on the one hand, it was usual for States to comment on a draft only when the whole of the draft had been considered by the Commission and, on the other, it seemed obvious that States would not be in a position to discuss article 19 and part one of the draft properly without having a draft as a whole including of articles covering the consequences of crimes. In addition, it might well be asked why article 19 should have been, so to speak, suspended, whereas the rest of the articles of part one were being used by the Commission as the premise for the elaboration of parts two and three. Accordingly, he did not understand the reasons for Mr. Thiam's suggestion, but could not believe that it was simply a pretext.

74. Mr. THIAM said it seemed that he had not been properly understood. His remarks had been intended more particularly to highlight the fact that, if the General Assembly rejected the concept of State crimes and article 19, the whole edifice built by the Commission would collapse. The idea behind his suggestions had been to make sure that the international community endorsed the new foundations proposed by the Commission; if the

Commission did not do so, it would be continuing its work at its own risk.

The meeting rose at 1 p.m.

2396th MEETING

Wednesday, 7 June 1995, at 10.10 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. 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. YAMADA said that, with the submission by the Special Rapporteur of his scholarly seventh report (A/CN.4/469 and Add.1 and 2) containing draft articles 15 to 20 of part two, the Commission now had before it the complete structure of a draft convention on State responsibility. He had perused the whole set of draft articles several times, and could not help but entertain some fundamental doubts about the responsibility regime to be set up in the future convention. He recognized, however, that the Special Rapporteur's purpose was faithfully to abide by the past decisions of the Commission and the prevailing views of members. Hence his doubts related not to the Special Rapporteur's own proposals but to the decision of the Commission on the "structure of the draft" taken in 1975,[2] and, in particular, the decision that the purpose of part two of the draft would be to determine what consequences an internationally wrongful act of a State might have under international law in different hypothetical cases. It would first be necessary to establish in what cases a State which had committed an internationally wrongful act might be held to have incurred an obligation to make reparation, and in what cases such a State should be considered as becoming liable to a penalty. He was concerned at that coexistence in part two of the two entirely different legal concepts of reparation and penalty.

2. He was not, at the present stage, questioning part one of the draft, which included article 19, on international crimes and delicts.[3] His doubts related to part two, and to the kind of responsibility regime the Commission should formulate for internationally wrongful acts. The problem might be similar in substance to the one Mr. de Saram had so eloquently explained (2394th meeting). In explaining his own thinking, he wished, albeit with some diffidence, to draw an analogy between international and national legal systems. Although such an analogy might not necessarily be valid, it could perhaps shed some light on the topic under consideration.

3. In the Japanese legal system, civil responsibility was totally different, distinct in quality, separate and independent from criminal responsibility. The regimes of civil and criminal responsibility were never mingled. When individual A failed to fulfil a contractual obligation entered into with individual B, civil responsibility alone was incurred. The State provided a set of rules governing civil responsibility and it was left entirely to parties A and B to solve the problem, either out of court or through recourse to judicial proceedings. No agency of the State, other than the judiciary, intervened in the case. That system of civil responsibility was the one which prevailed in the modern-day world: most States had now eliminated intervention by State agencies in matters of civil responsibility, and such Dickensian institutions as debtors' prisons were prohibited under article 11 of the International Covenant on Civil and Political Rights.

4. When individual A inflicted bodily injury on individual B, that act entailed civil responsibility for individual A *vis-à-vis* individual B and, at the same time, criminal responsibility for individual A *vis-à-vis* the State. The civil responsibility aspect of that wrongful act was dealt with in exactly the same way as in the case of a breach of contract. The civil proceedings were wholly independent of the criminal proceedings, and whether individual A was convicted or not was irrelevant. Concurrently, criminal proceedings might be held. The criminal responsibility aspect of that same wrongful act, the crime of bodily injury, was handled only by the State agencies responsible for suppressing crimes, such as the police and the prosecution department. Neither individual B, the direct victim, nor other individuals who might theoretically be regarded as victims if a crime was thought to be against the public interest, were involved.

5. In the draft articles of part two submitted by the Special Rapporteur in accordance with the Commission's decision of 1975, the civil responsibility and criminal responsibility of a wrongdoing State were lumped together under one regime, something that posed a problem. As he had said earlier, the analogy with a national regime might not be valid: the international community had not yet developed to a stage at which it could accommodate a criminal responsibility regime similar to

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

[2] *Yearbook... 1975*, vol. II, pp. 55 *et seq.*

[3] See 2391st meeting, footnote 8.