Document:-
A/CN.4/SR.2396

Summary record of the 2396th meeting

Topic:
State responsibility

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

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

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.

a national regime. The Special Rapporteur clearly explained the situation in the seventh report, in which he stated that in the predominantly inorganic condition of the inter-State system, even the implementation of the consequences of internationally wrongful acts recognized as a crime by the international community as a whole seemed to remain in principle, under general international law, in the hands of States. He asked whether, in such circumstances where the actors were States and not the international community as a whole, a viable regime of criminal responsibility of States could be expected? He also asked whether the substantive and instrumental consequences currently envisaged in the draft articles of part two were effective punitive measures? He raised the question whether it would not be better to deal solely with the civil responsibility of States for all categories of internationally wrongful acts?

6. The Special Rapporteur was to be commended on his ingenious proposal for a two-phased procedure, in which the General Assembly or the Security Council would make a preliminary political evaluation and ICJ would make a decisive pronouncement on the existence/attribution of an international crime. That was one way to meet the requirement that an objective determination as to the existence/attribution of a crime should be a prerequisite for the implementation of any special regime. He also appreciated the Special Rapporteur's point that that procedure was likely to reduce the arbitrariness of the *omnes* injured State's or States' unilateral or collective reaction.

7. He asked how that scheme would function in reality. He had drawn up a comparative chart of the consequences of international delicts and international crimes. In the case of crimes, the injured State would be relieved of some restrictions on countermeasures as envisaged in article 17, paragraph 3. But that State must await the decision of the two-phased procedure before it could resort to countermeasures. The injured State could, admittedly, resort to the countermeasures stipulated in the case of an international delict. But what incentive did the injured State have to trigger that rather cumbersome procedure? It would not obtain a decision on the merits and a solution to the crime by resorting to that procedure. The Special Rapporteur pointed out that the wrongdoing State could also invoke that procedure. Indeed, by doing so, it might delay resort to countermeasures directed against it. Should the wrongdoing State be allowed to do that? Would it not conflict with the maxim *ex turpi causa non oritur actio* (no action arises out of a disgraceful matter)?

8. Draft article 19, paragraph 2, stated that the decision of the General Assembly and the Security Council on the matter should be made by a qualified majority. He, too, thought that it was the prerogative of those two organs to decide by the required majority in accordance with the provisions of the Charter of the United Nations. In the same article, the Special Rapporteur proposed an *actio popularis* system in bringing the matter before ICJ. It was the corollary to article 5, paragraph 3.[4] However, ICJ had been reluctant to accept an *actio popularis*. In its judgment in the *South West Africa* cases (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*), the Court had ruled that

> the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (*c*), of its Statute.[5]

9. The Special Rapporteur advocated a contentious procedure of ICJ rather than an advisory opinion with regard to the existence/attribution of a crime. He recognized the rationale of that argument, yet fully-fledged contentious proceedings between States were complicated and time-consuming. He said that what was sought from the Court was not a decision on the merits of the dispute and a final solution to the problem, but simply a decision on the existence/attribution of a crime. He asked whether it would not prejudice the authority of the Court to utilize the contentious procedure and to require it to stop short of a final judgment of the case. He also asked whether the Court was to be told to leave the matter in the hands of the parties until they brought the post-countermeasures dispute before it. He thought it might be more expedient to seek an advisory opinion of the Court. Such an advisory opinion could be made binding by placing a provision to that effect in the current draft. A precedent existed in article 37, paragraph 2, of the Constitution of the International Labour Organisation[6] as well as in article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations.

10. Mr. BARBOZA, referring first to the notion of "crimes" committed by States, said that the acts had to be called by some name. They were committed very often, they looked like crimes, they were crimes. Was it necessary to worry about the dignity of a State which engaged in such conduct? Of course, one must bear in mind the disadvantage of the fact that responsibility for such crimes in international law was a form of collective responsibility, and that innocent people would thus have to suffer the consequences of a State action, in circumstances such as an embargo. There was no way around it, but collective responsibility was a fact of international life, and to confine international action to punishing individuals for State crimes might not be sufficient to stop the consequences of such crimes. In any case, the draft articles contained important safeguards concerning protection of the vital needs of the wrongdoing State's population, the country's continued existence as an independent State, and its territorial integrity.

11. On the other hand, acceptance of the notion that there were international obligations which protected essential interests of the international community meant that conduct by States in breach of such obligations, however characterized, had to be attributed to States according to the same rules as applied to any other State conduct in part one of the draft. And that conduct would

[4] See 2392nd meeting, footnote 13.

[5] *Second Phase, Judgment, I.C.J. Reports, 1966*, p. 47.

[6] International Labour Office, *Constitution of the International Labour Organisation and Standing Order of the International Labour Conference* (Geneva, May 1989).

undoubtedly have to carry some aggravated consequences besides those attributed to wrongful acts.

12. After some reflection, the Special Rapporteur seemed finally to have accepted the original idea by the previous Special Rapporteur, Mr. Riphagen, that crimes had all the consequences of a delict plus some other consequences which the international community as a whole would impose on them. That also seemed logical. As a final general remark, he concluded by reaffirming that he was one of those who accepted the notion of an aggravated responsibility in cases of certain offences called "crimes".

13. As to the normative aspects of the seventh report, the Special Rapporteur had done a thorough job of analysing the substantive consequences of an international crime of State, by going through the substantive consequences of a delict—cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition—and making the necessary adjustments in the field of crimes. He had no important objections on that score. The report then went on to analyse the instrumental consequences. There was a fundamental difference between the precondition for lawful resort to countermeasures in the field of crimes and in the field of delicts: in the case of crimes, a pronouncement by one or more international organs was necessary, at least regarding the existence/attribution of a crime. Once that pronouncement had been obtained by the complainant State, there was nothing to oppose the adoption of countermeasures if an adequate response from the wrongdoing State was not forthcoming.

14. Regarding proportionality, apparently any *omnes* State might take countermeasures, even if the effects of the act on itself were solely the legal damage originating in the breach of an international obligation. It sufficed that the countermeasure was in proportion to the gravity of the international crime.

15. The other consequences of crimes as set out in draft article 18 were important in that they provided the basis for concerted action by States for certain purposes. They imposed obligations on every State party to the future convention to refrain from recognizing as legal or valid the situation created by the international crime, and to abstain from any act or omission which might assist the wrongdoing State in maintaining the said situation. States were also required to assist each other and coordinate their reactions in carrying out the two aforementioned obligations. Those countermeasures were imposed by any State party, not by the Court. He asked whether that meant that all other States had to follow suit and cooperate in whatever countermeasure was decided by any one State, as long as it was not a prohibited countermeasure.

16. The point was not just an academic one, for guarantees of non-repetition might be very onerous for the wrongdoing State, as was noted in the report, because the *omnes* injured States were entitled to address to the wrongdoing State demands of disarmament, demilitarization, dismantling of war industry, destruction of weapons, acceptance of observation teams, adoption of laws affording adequate protection for minorities and establishment of a form of government not incompatible with fundamental freedoms, civil and political rights and self-determination. He asked who decided on those measures and whether there was an obligation on every State party to the future convention to assist the State taking the countermeasure, even if it deemed the countermeasure inadequate or excessive. He said that point was not very clear.

17. None the less, the part of the report on the normative aspect created a system of countermeasures of some weight, provided a sufficient number of States allowed themselves to be persuaded to join the convention on those terms. It was on institutional matters, that the report presented real difficulties. In that field, two different subjects should be distinguished: one pertaining to centralized reactions to a crime, usually known as sanctions; the other to decentralized reactions, namely, countermeasures. The draft articles proposed by the Special Rapporteur did not appear to introduce any innovations with regard to centralized sanctions. Draft article 20 very neatly separated measures under the draft articles from those the Security Council might take under the provisions of the Charter of the United Nations. Collective security, then, had nothing to do with the criminal responsibility of States in the draft, which was all to the good. It thus seemed that the system created in the report consisted of a number of decentralized countermeasures taken by States, triggered, except in the case of urgent measures, only by a decision of ICJ on the existence/attribution of a crime. Injured States also had access to the Court via a decision taken by the General Assembly or the Council by a qualified majority. The Special Rapporteur did not insist on the need for a qualified majority, to judge from the recently-circulated informal addendum to his report. Before the Court's decision, no countermeasures could be taken in regard to crimes, except for urgent, interim measures under draft article 17, paragraph 2. It was doubtful whether that system was likely to work in reality, unless the draft articles commanded exceptionally wide acceptance. He failed to see how, for instance, ICJ could be seized of a case where the wrongdoing State was not a party to the convention. Certainly, he was not aware that the Assembly had any legal power to seize the Court of a case in such circumstances. In view of the extreme reluctance of States to accept the compulsory jurisdiction of the Court, particularly with regard to articles of so vast a scope as those under consideration, making the system dependent on the acceptance of such compulsory jurisdiction might only add to the difficulties of the subject. It was a sad but realistic conclusion.

18. Mr. Pellet (2393rd meeting) had complained that the draft was too timid, that the articles proposed imposed too many conditions on the adoption of countermeasures, and that the Court's procedure was too slow to cope expeditiously with the consequences of a crime. In his informal addendum the Special Rapporteur had made some suggestions on ways of abbreviating the Court's procedure, such as the appointment of an ad hoc Chamber. If resort to the Court was to be retained in the draft articles, that was perhaps a good suggestion. The Special Rapporteur also pointed out that, in addition to the measures under draft article 18, paragraphs 1 (*f*) and 1 (*g*), interim measures could also be taken pending the Court's decision. But those measures might not be sufficient: it

might take some time for the effects of even a full range of countermeasures to make themselves felt. The initial problem thus remained.

19. Mr. Pellet apparently proposed that States should be given more freedom to take countermeasures, with an a posteriori legal revision. That was an interesting solution. It seemed that Mr. Pellet accepted either the Court or an arbitration procedure, perhaps along the lines of the one proposed in article 12 for ordinary countermeasures[7]. He would welcome some clarification in that regard. An arbitration procedure—a solution considered inappropriate by the Special Rapporteur—would deprive the process of the "Hue and Cry" effect[8] that would be provoked by the intervention of an international organization, but on the other hand, it would render the situation less dramatic, providing some consolation to those who did not accept the criminal responsibility of States. It was not a State, but a set of countermeasures, that should be subjected to legal revision.

20. At all events, if the first solution was deemed unsuitable, he would favour one along the lines suggested by Mr. Bowett (2392nd meeting), namely, the appointment by the General Assembly of a special prosecutor and of a commission of jurists to assist the Assembly in its pronouncement. The Commission was faced with a number of possibilities, among which it should be able to find an acceptable solution.

21. Finally, one paragraph of the Special Rapporteur's informal addendum clarified the problem of the "differently injured States", suggesting that those States were entitled to demand cessation/reparation and even to take countermeasures, but not for themselves or to their respective physical benefit, although incidentally, what was meant by the word "physical"? The Special Rapporteur might very well be correct: after all, in the case of a crime, the interests of the international community were at stake, as crimes were breaches of *erga omnes* obligations of fundamental interest to that community and *omnes* States acted as decentralized organs of that community. He suggested that the draft articles proposed in the seventh report should be placed before the Drafting Committee for examination.

22. Mr. VILLAGRÁN KRAMER said he would confine his comments to the institutional issues raised by the Special Rapporteur in connection with State responsibility for international crimes.

23. The road the Commission had been travelling in its study of wrongful acts was now branching off—on the one hand, into the byway of delicts, and on the other, into a path marked crimes. The road of wrongful acts had had only one exit: a place where States, either individually or as a group, were the victims of such acts. The situation was very clearly one of an *erga omnes* breach, a breach of commitments that affected the entire international community. If States were affected individually, the action was direct, as was the reaction; if States were affected as a group, it was an *actio popularis*, as Mr. Yamada had just pointed out.

24. Now, on the path marked international crimes, the Special Rapporteur had set out a number of very clear signposts concerning the relevant institutional regime. In the case of acts entailing the right to take reprisals, a mechanism was suggested for dispute settlement based on consensus, or in other words, conciliation and arbitration, including mandatory third-party arbitration. The picture drawn of dispute settlement was attractive, audacious and juridically sound. It was grounded in ideas, not in institutions, and that was precisely why it was so useful.

25. The organs of the United Nations were evolving. The Security Council was taking on new functions in cases of breaches of the peace and was adopting significant measures such as the imposition of major sanctions. The Special Rapporteur had acknowledged that the United Nations as presently structured had limitations, but that new avenues for action by the Council had opened up, and they deserved to be explored.

26. The Special Rapporteur's suggestion that the role of the General Assembly should likewise be explored was a valid one. Yet the General Assembly was empowered only to adopt recommendations, even in the case of crimes. It could, of course, "pillory" the wrongdoing State and the sanction of adverse publicity would then become one of its prerogatives. For Namibia, however, it had taken 27 years of public opprobrium before the tragic situation there had been resolved.

27. Another interesting option for the General Assembly would be that of requesting advisory opinions from ICJ on matters relating to a crime. If the Court found there was cause for a dispute among States, it would naturally refrain from ruling on the merits of the case. The advisory opinion mechanism was, of course, a political tool that could be borrowed by any Member State, but the Assembly, too, could make use of it. Indeed, by using it, the Assembly would be breaking new ground, effecting a de facto revision of the Charter of the United Nations and fostering a consensus in favour of an official revision of it. Requesting an opinion of the Court would, of course, imply accepting its jurisdiction. The Special Rapporteur made it abundantly clear in his report that the text on State responsibility would become a treaty to be signed and ratified by States. A State that ratified it would simultaneously be accepting the compulsory jurisdiction of the Court, and that might jeopardize the chances for broad ratification of the instrument.

28. A number of new developments had occurred in connection with the Security Council, owing to the new international climate created once the confrontations of the cold war had subsided. The Council's functioning had become more efficient, as demonstrated by the sharp decline in the number of vetoes in recent years: the figures showed a radical reduction during the period 1988 to 1995, compared with 1975 to 1988. States that were not permanent members of the Council were gaining more and more responsibilities and a consensus configuration was emerging.

[7] For the text of article 12 of part two as adopted by the Drafting Committee at the forty-fifth session, see *Yearbook... 1993*, vol. I, 2318th meeting, para. 3.

[8] A. Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (London, Macmillan and Co., 1936), p. 451.

29. The Security Council had applied sanctions, very severe ones, against Iraq, not because Iraq had simply violated a norm of international law, but because its action could be characterized as a crime under international law. If the Council had adopted sanctions in what was essentially a breach of the peace, that meant there was room for it to exercise its competence in respect of international crimes. The sanctions imposed by the Council had involved compensation by Iraq to private citizens, not to States. The Council's action had simultaneously benefited individuals and punished a wrongdoing State.

30. In the whole range of options available, the best was probably recourse to the Security Council. Admittedly, it did pose a problem and it had been outlined by Mr. Bowett in 1994;[9] Mr. Jiménez de Aréchaga, too, had raised a similar point: there was nobody able to monitor the legality of actions taken by the Council.[10] Yet the expedient of requesting advisory opinions from ICJ had not yet been properly scrutinized.

31. The formulas offered by the Special Rapporteur for dispute settlement were different for crimes and for delicts. There might well be a reason for that disparity, yet it presented an obstacle to in-depth consideration of the dispute settlement scheme. Because the scheme was extremely sophisticated, it might prevent the Commission from finding a comprehensive solution for crimes and force it to lower its sights.

32. Mr. YANKOV said that the seventh report not only afforded an opportunity to pursue and perhaps complete the discussion on the concept of a "crime" committed by a State, but also offered further ideas in the form of new draft articles and proposals. It was a commendable intellectual effort to raise controversial questions and to try to offer some solutions. The informal addendum attested yet again to the Special Rapporteur's earnest efforts to provide common grounds for compromise.

33. The Commission's consideration of the legal consequences of internationally wrongful acts in general and of exceptionally grave breaches of international obligations in particular had focused on the concept of crime in international law and the definition contained in article 19 of part one.[11] The difficulties encountered in fleshing out that concept should not force the Commission to abandon its endeavour: it must make strenuous efforts to the bitter end in order to find a solution. Even if it deleted article 19 altogether, the problem of differentiating between ordinary delicts and serious breaches of international obligations would remain. He did not hold with the view that the only problem involved was one of terminology. Replacing the word "crime" by expressions such as "violation of extreme gravity", "internationally wrongful act of particular gravity" or "very serious international delict" would not solve the problem.

34. He agreed with the Special Rapporteur and some members that article 19 of part one in its present form gave rise to serious reservations and had to be reconsidered on second reading in the light of the Commission's work on parts two and three. The article's deficiencies, in both substance and form, had now become clearly evident. Mr. Rosenstock (2395th meeting) had detailed some of the reasons why the article did not measure up as a true legal definition of a crime as opposed to an ordinary delict.

35. During the Commission's review of article 19 of part one, a number of essential elements must be borne in mind. A crime was a breach involving the fundamental interests of the international community: it did not exist merely in the context of a bilateral relationship, but had broad international ramifications as well. Secondly, a crime was a breach that was exceptionally serious in both qualitative and quantitative terms. Finally, the international community had to recognize, on the basis of experience and practice, that a particular breach constituted a crime.

36. The concept of "crime" under international law had evolved, particularly during the Second World War, to crystallize in international public opinion as something which had political and moral, as well as legal, connotations. Therein lay the problem facing the Commission. He agreed with the Special Rapporteur that the regime to be proposed for crimes could not be seen as involving strict codification *de lege lata*. Particularly serious violations of international obligations such as aggression, genocide, human rights violations and serious war crimes had become generally recognized as "crimes" when they were committed, not only by individuals, but also by entities such as States. The higher degree of gravity was the inherent characteristic of such acts.

37. What kind of legal regime should be established for State responsibility? Was it absolutely necessary to retain the distinction between civil and criminal responsibility? Perhaps the time had come to move away from the standard approach based on municipal law. Protection of the marine environment was an area of concern that had prompted radical changes in traditional concepts of State sovereignty and State responsibility. Perhaps the golden age of legislation solely on the basis of customary law was now a thing of the past. The Commission was not a legislative body, but a group of legal experts whose function was to serve the international community by putting forward new proposals. It must take the actual and potential responses of States into account, but must not lose sight of its mission to provide new options for the solution of newly emerging legal phenomena.

38. As to the legal effects of internationally wrongful acts characterized as crimes, it was only natural to look into the "special" or "supplementary" consequences. The substantive consequences of ordinary delicts and those stemming from exceptionally serious violations of international obligations identified as crimes were similar in many instances and the remedies applied had many points in common, though it was necessary to explore the special consequences specific to crimes.

[9] See 2391st meeting, footnote 17.

[10] E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sorensen, ed. (London and Basingstoke, Macmillan Press Ltd., 1968).

[11] See 2391st meeting, footnote 8.

39. The problem of claimants derived from the notion of *erga omnes* breaches. The solution should perhaps be sought in a distinction between the substantive and the instrumental consequences of an *erga omnes* breach, irrespective of whether the breach was a delict or a crime. The informal addendum to the report pointed out the significance of that problem. Clearly, States that were directly or materially affected were different from other injured States. But the Commission was still at a very early stage of its examination of the issue. In his report, the Special Rapporteur made the interesting suggestion that the active and passive aspects of the responsibility relationship could be covered in draft article 15 of part two which would be the introductory provision of the special regime governing the substantive consequences of international crimes of States. While he agreed with that general proposition, he believed that the distinction between a directly or materially injured State and other injured States in connection with an *erga omnes* breach still had to be scrutinized.

40. Article 6 of part two (Cessation of wrongful conduct),[12] should apply both to delicts and to crimes, though in the case of a crime, the injured State should be able to request urgent action or support by the appropriate international institution, whether global or regional. The text of draft article 16, paragraph 1, therefore required further examination. Perhaps it would be possible to find additional elements by which grave breaches of international obligations could be more adequately identified.

41. As to restitution in kind, he understood the provisions proposed in article 7 of part two to apply to both delicts and "crimes". By referring to "every injured State" in paragraph 2, draft article 16 failed to draw a distinction between directly and indirectly injured States, something which was a shortcoming. On the other hand, it was right that the provision oncompensation, set out in article 8, should apply to both delicts and crimes. Some differentiation between delicts and crimes should none the less be contemplated in connection with satisfaction and guarantees of non-repetition, namely, articles 10 and 10 *bis*, and further thought should generally be given to the considerations formulated in the relevant part of the seventh report.

42. On the question of instrumental consequences, or countermeasures, the distinction between delicts and crimes was undoubtedly of great significance. As rightly pointed out in the report, while only some kinds of delicts involved violations of *erga omnes* obligations, all crimes consisted of infringements of such obligations. Article 5 was based on that assumption.[13] However, as had already been pointed out in the present debate, the distinction between the directly injured State or States and other injured States was of paramount importance.

43. The dispute settlement procedure suggested by the Special Rapporteur needed closer scrutiny, especially in the matter of the possible involvement of the General Assembly or the Security Council. Despite the great political and moral value of the Assembly's recommendations, it was difficult to see how they could be incorporated in an institutionalized procedure. As for the Council, the question was whether its powers should not, in accordance with Articles 24 and 39 of the Charter of the United Nations, be confined to determining the existence of any threat to the peace, breach of the peace, or act of aggression, it being left to an international judicial body to decide on the legal consequences. In that connection, he would inform the Commission that the Drafting Committee had been engaged in working out specific provisions of the draft articles on dispute settlement and hoped that they would be completed at the present session.

44. In conclusion, the Commission should not lose sight of realities or ignore the question as to whether certain provisions were really ripe for adoption by States. It might take some years for the full impact of the Commission's work to be fully felt, but he firmly believed that the time would come when the rule of law would be applied far more broadly. The area of customary law as a background for strict codification should be explored as a move towards progressive development. He proposed that the draft articles should be transmitted to the Drafting Committee, possibly with a view to the elaboration of a revised text which could then be submitted to Governments, whose reactions needed to be known at every stage of the Commission's work.

45. Mr. KABATSI said that the Special Rapporteur's seventh report, like all the preceding ones, made a most positive and valuable contribution in a particularly thorny area of international law. The subject of State responsibility was complex enough in itself, but the concept of the so-called international crimes of States—and it should be noted that the Special Rapporteur himself resorted frequently to the expression "so-called"—was even more so.

46. There was no question that particularly serious international wrongful acts should be met by equally serious consequences. But would the application of such consequences be made easier by characterizing the wrongdoing State as a criminal State? After all, the State in question might itself be the prime victim of the so-called crime, particularly where acts of genocide or serious violations of human rights were concerned. Long after the wrongdoing State had suffered all the consequences of the breach, the label of "criminal State" would still haunt the country and its people. Such a situation was neither desirable nor just. It was very difficult to accept the notion of a crime being attributable to States as opposed to individuals, and he shared the views expressed to that effect by several speakers, especially Mr. He (2395th meeting) and Mr. de Saram (2394th meeting). The Special Rapporteur himself and other members of the Commission, for example Mr. Tomuschat, although in sympathy with the concept, had admitted to being not entirely happy with the term "crime". To use the term simply for want of a better one would be most unwise and the resulting confusion would inevitably entail grave and unjust consequences for the States concerned and their peoples.

47. For reasons of a mainly political nature, some States were increasingly being characterized as "rogue"

[12] Ibid., footnote 9.

[13] See 2392nd meeting, footnote 13.

States. It was not a trend the international legal order should encourage or endorse. States which had the means to do so would be more and more inclined to resort to interim measures, in other words to self-help, and the consequences of such arbitrariness could be horrendous. The danger was increased still further by the fact that, under the proposed regime, all States were to be considered injured States and would therefore be entitled to resort to interim measures, either directly or in the guise of assistance to the more directly affected State or States; and the suggestion was that countermeasures should be more readily applied to States branded as "criminal". Characterizing a State as "criminal" could be used as an excuse for taking countermeasures for quite other reasons.

48. The seventh report clearly showed that the Special Rapporteur himself was not happy with the attribution of the "criminal" label to States. For his own part, he considered it acceptable and indeed necessary that provision should be made for a legal regulatory regime for very serious violations, but he doubted whether "criminalizing" States would help that process and he would find it extremely difficult to accept any regime based on the concept of State crime.

49. Mr. LUKASHUK said that the debate had revealed significant differences on some of the provisions of the draft on State responsibility. The only solution would seem to lie in discussing the draft article by article, with a view to achieving the greatest possible measure of agreement.

50. The differences related basically to two points, that of the concept of State crimes and that of the mechanism for the implementation of State responsibility. With regard to the former point, the Commission had already adopted article 19 of part one,[14] which incorporated the concept of State crimes, and continually going back on past decisions was hardly advisable. That, however, was a formal argument. As for the substance of the question, he would refer to paragraph 9 of the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, which read, in part,

> Due consideration should be given by Member States to making criminally responsible not only those persons who had acted on behalf of an institution, corporation or enterprise . . . but also the institution, corporation or enterprise itself.[15]

An aggressor State bore not only criminal responsibility but also serious political responsibility, and an element of punishment was undoubtedly also involved.

51. By recognizing the possibility of the criminal responsibility of State leaders, the Commission had surely taken a step far more threatening to potential criminals in positions of power than the recognition of the criminal responsibility of States. It was not by chance that some Governments had taken the view that the criminal responsibility of States was an acceptable concept, but that the criminal responsibility of State leaders was not. The real difficulty, however, lay in the fact that the proposed provisions fell very far short of recognizing the criminal responsibility of States. Only the terms used were the same, simply because, as Mr. Yankov had convincingly shown, no other name could be found for the most serious breaches of the law.

52. No one would deny the need to listen carefully to the views of Governments. But that certainly did not mean the Commission must blindly follow the practice of States. The Commission was entrusted with encouraging the progressive development of international law, and each member was personally responsible for carrying out that task. If Governments failed to agree with the Commission's draft, the responsibility would be theirs, not the Commission's. It was the Commission's duty to work out and propose a draft which it honestly believed to be the best possible. The draft presented by the Special Rapporteur was indeed somewhat romantic in a number of particulars. Yet in the course of an article-by-article discussion it would undergo many changes, including some that would bring it more closely into line with the Charter of the United Nations. That did not mean that romanticism and idealism should be banished altogether from the Commission's work; on the contrary, they were essential to progress in all spheres.

53. Mr. ROBINSON said he paid tribute to Mr. Ago and his colleagues, who, some 20 years earlier, had charted a course for the international community in a manner which, perhaps, still represented the single most daring act of progressive development undertaken by the Commission. At that time, he had experienced a sense of powerful excitement mingled with some concern about the concepts and the political and jurisprudential underpinnings of article 19 of part one. He was still deeply moved by that article and captivated by the imagination and foresight that had inspired its formulation. The challenge before the Commission was, while remaining faithful to the spirit of article 19, to plot a course for its implementation that was grounded in reality and was fully alive to the social and political climate of the present day. The Special Rapporteur had clearly been appropriately inspired by that article and, with the exception of one instance where there was some over-reaching, the report also reflected a keen sensitivity to the real politics of the present-day world.

54. Nation States exhibited a degree of organization not to be found in the international community, which was generally characterized by a low level of organization. States had a persona and a personality, and there was nothing unreal in the notion that States had the capacity to commit crimes. Neither the acknowledgement of the existence of individual criminal responsibility nor the fact that the Commission had, in its work on the draft Code of Crimes against the Peace and Security of Mankind, adopted the approach of dealing with individual criminal responsibility, detracted from the validity of the concept of State responsibility for crimes.

55. He endorsed the Special Rapporteur's approach, which sought first to identify the normative, supplementary consequences of international crimes and then acknowledged that implementation of those consequences

[14] See 2391st meeting, footnote 8.

[15] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. B, annex.

required the intervention of some third-party system in order to avoid arbitrariness.

56. The report accepted the proposition laid down in article 5 of part two, namely, that all States were injured States and, as such, were entitled to obtain cessation and reparation from the State that committed the crime. It was true that that proposition was a logical consequence of the fact that only some kinds of delicts involved violations of *erga omnes* obligations, whereas all crimes consisted of infringements of such obligations. Nevertheless, the concept of *erga omnes*, as he understood it, did not mean that every State, no matter how remote from the crime in physical or legal terms, had the same entitlement as the State directly affected by the crime, nor did it mean that each and every State was entitled to reparation and cessation from the wrongdoing State. Otherwise, the result would be an unacceptable multiplicity of claims. Despite the Special Rapporteur's suggestion that every State should be entitled to demand cessation and reparation to the extent that it had been injured, his own view was that article 5 would have to be reconsidered so as to find an acceptable solution.

57. As to the special or supplementary consequences of international crimes of States, although the comparison the Special Rapporteur had made with delicts was useful from the standpoint of methodology, it would be better to devote discrete articles to such consequences. In many instances, the extraction of certain aspects of the provisions on delicts—for example, in regard to some of the exceptional cases in which there was no right to restitution and satisfaction—was confusing.

58. The Special Rapporteur had made the bold proposal that a State which claimed that an international crime had been committed could refer the matter to the General Assembly or the Security Council. If it was decided that the matter was such as to justify the grave concern of the international community, any Member State could then bring the case before ICJ. While he agreed in general with the Special Rapporteur's move towards third-party settlement, the proposed use of the Assembly and the Council was perhaps going too far. In the current global environment, there were good grounds, many of which had already been cited, for rejecting such a proposal, though it might become more acceptable in the context of a revision of the Charter of the United Nations. His concern, however, was that claims might be brought simultaneously before the Assembly and the Council—which could give rise to concurrent jurisdiction, it had been said, although that would be to ignore the confining features of Article 12 of the Charter. Again, he did not agree with the proposal by one member, that a commission of jurists should be appointed by the Assembly or the Council, for that would not overcome the political objections to the involvement of those two organs.

59. On the other hand, he fully concurred with the Special Rapporteur that an element of compulsion was inevitable. If arbitrariness was to be avoided, some binding machinery must be established to determine whether an international crime had been committed by a State prior and as a precondition to the implementation of the legal consequences of a crime.

60. His own suggestion would be to take from the Special Rapporteur's proposal the excellent idea of a court—in which connection he endorsed certain paragraphs of the report—to which aggrieved States could have direct access for the purpose of determining whether an international crime had been committed by a State. The jurisdiction of such a court would be compulsory in that any aggrieved State could unilaterally invoke its jurisdiction. Problems of cost, frequency of sessions and the screening of claims to avoid abuse of process could be resolved in the pragmatic manner which had characterized the Commission's work on the draft statute for an international criminal court. The court proposed by the Special Rapporteur would be preferable to ICJ, which was not a criminal court and whose procedures were not geared to criminal trials. Admittedly, the Statute of ICJ could be amended, but a special court would better achieve the desired objective.

61. He urged the Commission to follow the Special Rapporteur's lead in dealing with a very difficult area of the law, though that did not mean it was bound to accept all of his proposals.

62. The CHAIRMAN, speaking as a member of the Commission, said that the issues raised in the Special Rapporteur's seventh report were of fundamental importance for the reorganization of the world public order and called for detailed analysis. They were, however, too broad to be realistic and did not make for a readily comprehensible picture.

63. His own approach to the issues raised was conditioned by the practice of countermeasures and his recognition of their arbitrary and unjust nature. Too often, such measures legitimized power play and coercive measures rather than promoting the equity and justice essential for a new world order. The practice whereby the claimant State acquired the status of a judge in its own cause was particularly suspect. Consequently, a careful structuring of the restraints was essential in the interests of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice.

64. In his energetic pursuit of those restraints, the Special Rapporteur had made a number of suggestions, which could only command admiration and support. None the less, it was important to guard against reopening the system under the Charter and not to allow States to take the law into their own hands and subject the international community to a virulent form of vigilantism, which would have grave consequences for the world public order. Many of the Special Rapporteur's suggestions and proposed draft articles did not provide a conclusive answer to the issues involved. Those issues included the concept of crime and whether it could be transported to the international plane; the distinctions to be drawn between delicts and crimes for the purpose of the consequences generated by the concept of differently injured States; the need to make the responses of the community proportional to the overall injury involved and the factors that should govern such responses; the need to ensure an objective determination of the alleged crime before any action was taken; the role of the General Assembly, the Security Council or any other interna-

tional forum in determining whether there was a *prime facie* case before a response was initiated by States; the difficulty of distinguishing a purely legal determination from a political assessment in the highly complex international society in which both intermingled; the role of interim measures and how they would differ from the ensuing consequences; and the respective roles of ICJ and of the political organs of the United Nations.

65. The basic difficulty for him lay not so much in what the report proposed in terms of the progressive development of the law or *de lege ferenda* or in the fact that some of the proposals would inevitably clash with, or even result in an unnecessary duplication of, the system under the Charter. Rather, it lay with the very concept of State crimes and the rigorously precise response system provided. In that regard, the Special Rapporteur's world was a brave new world of States, law-abiding and ready and willing to subordinate the element of sovereignty that allowed them a measure of freedom, as well as the equality to choose when and when not to act. It was that freedom which the Special Rapporteur's proposal sought to deny, particularly when it was a matter of responding to criminal acts that could affect their very survival and when, as so often proved to be the case, discretion was the better part of valour. But, while there was no consensus on the ground rules for determining violations, while the institutions for making such determinations had yet to be established, while the world order was still based on unequal strengths and uneven development and while equity and justice for millions of wretched human beings was ill-defined and elusive, the Special Rapporteur's brave new world order must for the immediate future remain beyond the realm of acceptability.

66. Modern systems of national law were based more on techniques of reform than on a purely punitive approach. Accordingly, on the basis of the concept that a crime once committed was a crime against the entire community, a prosecutor was given responsibility for the prosecution, which, however, took place only if he deemed it appropriate. Yet the Special Rapporteur did not recognize such an approach and resorted to the concept of differently-injured States, allowing such States a measure of freedom or the initiative to react to the "crime" in question. That could pose a severe threat to world peace and security, and could cause the proposed legal order to wilt under the pressure from differently motivated States—for when States acted, they did so mostly out of self-interest. Unfortunately, the Special Rapporteur's new proposal did not remedy the basic flaws in his earlier proposals. Furthermore, any proposal drafted in terms that were too rigorous was likely to be honoured more in the breach than in the observance and could thereby further undermine respect for the existing world order. The Special Rapporteur's proposed scheme, which required further examination, should therefore be completely recast.

67. Time was not on the Commission's side. If it wished to finalize the draft articles on State responsibility on first reading, it must not bite off more than it could chew. Rather, it should place before the world community of States the kind of menu that community was likely to find edible.

68. Like the subject of countermeasures, the treatment of "crimes" must await a world of greater political and economic integration, one where the participants were respected for their power not of coercion but of persuasion and where the national interest was in communion with the common interest.

69. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would be grateful for clarification on one point: was the Chairman suggesting that the work on countermeasures should be suspended?

70. The CHAIRMAN said he had simply wished to stress that the subject of "crimes" was as difficult and elusive as that of countermeasures. He was certainly not suggesting that the Commission should not proceed to deal with the latter. Both questions would require further examination.

The meeting rose at 1.05 p.m.

2397th MEETING

Thursday, 8 June 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET said that, as he had indicated (2395th meeting), he would first discuss two general basic issues before commenting on draft articles 16 to 18. One basic issue was the relationship between the draft articles and the system for the maintenance of peace and security established under the Charter of the United Nations. The other concerned the definition of an injured State.

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