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Summary record of the 2397th meeting

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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).

2. Beginning with the second issue, he noted that, in his seventh report (A/CN.4/469 and Add.1 and 2), the Special Rapporteur had stated that in the case of crimes, all States are “injured States” under the definition formulated in article 5,² adding in a footnote, “notably in paragraph 3 of that article”. Although, in strictly legal terms, the statement was correct, since paragraph 3 of article 5 provided that, “if the internationally wrongful act constitutes an international crime”, the expression “injured State” means . . . all other States”, that definition should, in his view, either be revised or a distinction should be made between different categories of injured States for the purpose of the application of articles 16 to 18 (or 19). On that point, he agreed with Mr. Tomuschat (2392nd meeting).

3. Two very different considerations were noteworthy in that regard. In the first place, a crime, by its very definition, affected the entire international community and, in that sense, all States had an interest in its cessation and, if necessary, its punishment. The Special Rapporteur drew conclusions from that definition which were, at first glance, entirely logical, such as the idea that any State could resort to countermeasures against the wrongdoing State or the idea that all States should help in responding to the crime. However, the overly rigid logic of that position was attenuated by other considerations.

4. It was clear that a crime did not affect all States in the same way. While some were directly affected and had their individual interests violated in fact and in law, others were affected only as members of the international community whose foundations were shaken by the very fact that the crime had occurred. That was, moreover, what the Commission had said in 1985 in its commentary to article 5, paragraph 3. Paragraph (26) of the commentary stated that, while it was clear from the very wording of article 19 of part one of the draft articles that, in the first instance, all States other than the author State were to be considered “injured States”, the Commission, at the outset, in provisionally adopting article 19, had recognized that the “legal consequences” of an international crime might require further elaboration and distinctions. Paragraph (27) of the commentary stated that, in particular, the question arose whether all other States, individually, were entitled to respond to an international crime in the same manner as if their individual rights had been infringed by the commission of the international crime; paragraph (28) stated that, obviously, paragraph 3 did not and could not prejudice the extent of the legal consequences which were attached to the commission of an international crime; and that that was a matter to be dealt with within the framework of the particular articles of part two of the draft dealing with international crimes. He recalled the fable *Les animaux malades de la peste* (The Animals and the Plague), in which La Fontaine recounted that all did not die of it, but all were affected, it was his view that, while all States were affected by a crime, they were affected in different ways and with greater or lesser intensity and that the Commission must make that distinction in its draft articles.

5. It was evident, for instance, that Kuwait, the victim of Iraqi aggression, was not *vis-à-vis* Iraq in the same situation as Liechtenstein or Australia. Yet, each of the three States was an “injured State” because the aggression had clearly constituted an international crime which had disrupted the entire international order. The same issue arose in relation to the application to ICJ made by Bosnia and Herzegovina against Yugoslavia. It seemed clear that, if Yugoslavia could be accused of the crime of genocide or of complicity in that crime, then all States were entitled to seize the Court or come to the defence of Bosnia and Herzegovina. It was, however, doubtful that New Zealand or France could obtain compensation in the same form as Bosnia and Herzegovina, whose nationals were the direct victims of the alleged genocide.

6. A clear distinction therefore had to be made between different categories of injured States, setting those which had been directly injured apart from those which had been injured solely in their capacity as members of the international community. Such a distinction would have major consequences especially with regard to compensation; it would be difficult to imagine, for example, that France would be entitled to monetary compensation for the murders, rapes or ill-treatment to which the Bosnian Muslims, Serbs and Croats had been subjected.

7. In other words, without contradicting the commentary to article 5 adopted by the Commission in 1985, its reasoning should be taken to its logical conclusion and a distinction should be drawn between the legal consequences arising from crimes which violated the individual rights of injured States and those arising from crimes which violated only the rights of States as members of the international community. The draft articles should accordingly be revised and clarified in that regard. That seemed also to be the Special Rapporteur’s intention according to the comments he had made on draft article 5 *bis*, in the informal addendum to his seventh report.

8. The second general problem concerned the relationship between the draft articles on State responsibility and the system for the maintenance of peace and security established under the Charter of the United Nations. Nearly every member of the Commission had commented on that issue and he himself agreed with what Mr. Yankov had said (2396th meeting). The comments he was about to make were not meant as a criticism of the Special Rapporteur’s seventh report, but were rather an attempt to work with him, on the basis of his report, on the particularly difficult issues that arose. The problem was that, while not every international crime necessarily threatened international peace and security, the crimes which came to mind most spontaneously did. That was true of aggression, to use once again the examples given in article 19, paragraph 3, of part one.³ In contrast, the connection between maintaining international peace and security and, for instance, slavery or serious ocean pollution was less clear. A further complication was the very broad interpretation given by the General Assembly and the Security Council to the concept of a threat to peace, as amply illustrated in the report, in which the Special Rapporteur pointed out that policies of racial discrimination, certain forms of colonial domina-

² See 2392nd meeting, footnote 13.

³ See 2391st meeting, footnote 8.

tion, massive violations of human rights and crimes against humanity had been described by the Assembly and the Council as threats to peace or even aggressive acts. To that list might also be added certain "humanitarian disaster" situations, such as those in Rwanda and Somalia.

9. Such developments could either be regretted or welcomed; he welcomed them. At the same time, he acknowledged that the tendency of the General Assembly and the Security Council to broaden the scope of the concept of a threat to peace made the Commission's task much more difficult. According to the key article of part two, article 4:

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

In 1983, the Commission had already pointed out that the provisions and procedures of the Charter would prevail over any future convention and might even prevent the implementation of the draft articles on State responsibility. According to paragraph (2) of the commentary to article 4:

In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and may result in measures deviating from the general provisions of part 2. In particular, the maintenance of international peace and security *may* require that counter-measures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to conclude "... that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."⁴

10. Virtually the entire body of law of responsibility for international crimes could be affected as a result of the broadening of the system for the maintenance of international peace and security. He did not disagree with what Mr. Rosenstock had said (2392nd meeting), however far he was from agreeing with his general views on international crimes. Mr. Rosenstock had said, in essence, that the Commission must ensure that the draft articles did not interfere with the emergence of a new system for the maintenance of international peace and security, whose foundations were taking shape and which could contribute to international control of the response to a crime—which he himself would call control of a heinous wrongful act.

11. It must be acknowledged that the new system was still in the early stages and often incoherent, that it was used in a partial manner and that, as the Special Rapporteur had noted in his report, the implementation of the consequences of internationally wrongful acts remained in principle, under general international law, in the hands of States.

12. Consequently, the draft articles must carefully avoid two dangers. First, the articles must not deal with crimes from the point of view that they, or some of them, threatened international peace and security; that was the concern not of the Commission, but of the Char-

ter of the United Nations and its progressive development. Secondly, the draft articles must not hamper the development of the new system for the maintenance of peace which was probably in the process of being created and prevent crimes which, for the moment, did not fall within the scope of the maintenance of the peace from subsequently being characterized as doing just that. Thus, while to his knowledge massive pollution of the air or the seas had thus far never been regarded as a threat to peace, it might be so regarded under certain circumstances. As a firm believer in a constructive interpretation of the Charter and one that was as "integrationist" as possible, that is to say promoting the integration of international society to the maximum, he sincerely hoped that the draft articles would not close the door on such a development. While article 4 of part two guaranteed against that, care must be taken to ensure that no element of the draft articles left the question in any doubt. In that connection and since two safeguards were better than one, draft article 17, paragraph 2, would add a useful safeguard if it could be interpreted as maintaining the possibility of applying sanctions within the framework of the system for the maintenance of international peace and security. There again, however, it was important to maintain the system rather than duplicate it and, on reflection, he wondered whether keeping paragraph 2 might not give rise to problems of compatibility with article 4.

13. Those two general comments on the definition of the injured State and on the relationship between the draft articles and United Nations system for the maintenance of international peace and security were less far apart than they might seem. To a certain, but increasingly greater extent, the reactions to a wrongful act by "injured States" whose individual rights had not been violated were governed by the Charter and, in so far as indirectly injured States were entitled to respond to a crime, it was, first and foremost, in their capacity as Member States of the United Nations. In particular, the draft articles ruled out any use of armed force unless it met the criteria provided for or implied in the Charter and, in particular, although not exclusively, in Chapter VII, including Article 51. As a result, the draft articles did not have to deal with that aspect of the matter, and that greatly restricted the possibilities of derogation under the legal regime for international crimes by comparison with that for delicts.

14. In that regard, one should qualify the fears expressed by the Special Rapporteur in his report, where he stated that considering the gravity of crimes and the severity of their special or supplementary consequences, very serious difficulties might arise from a universalization of the status "injured State". The Special Rapporteur also exaggerated the difficulties somewhat when he underscored the risks of arbitrariness and conflict that might result; in any event, he did not see how the Commission could consider the question of the use of armed force, which was solely a matter for the Charter of the United Nations. Two fundamental elements ought in any case to reduce those fears: first, not all injured States were alike and the same rights could not be recognized for all, secondly, in any event, there could be no question of derogating from the provisions of the Charter in the evolving interpretation given to them, particularly with

⁴ Originally adopted as article 5, for the commentary see *Yearbook . . . 1983*, vol. II (Part Two), p. 43.

regard to the use of force. The impact of the special consequences of an international crime as opposed to a delict should therefore not be overrated. All those points constituted another reason for favouring a fundamental change in the spirit of draft article 19 of part two and for hoping that, if an international control must intervene, it would be not a priori, but a posteriori.

15. He did not think that the new proposals made by the Special Rapporteur in the informal addendum were likely to entirely calm the fears which he had expressed at an earlier meeting and which had not been solely the result of the slowness of the procedure proposed. Although the Special Rapporteur's explanations on the problem of the "constitutionality" of draft article 19, paragraphs 2 and 3 (section (b) of the informal addendum) reassured him, he was afraid that the proposals made on how to shorten the legal phase of the proposed procedure (section (a) of the informal addendum) posed other difficult problems of conformity with the Statute of ICJ. While those proposals might be paths worth exploring, in the current state of development of the international community, the system of the kind proposed in draft article 19 could in any case only be optional.

16. In the light of those general considerations, he would refer to the exact consequences of the commission of a crime as envisaged by the Special Rapporteur in draft articles 16 to 18. His remarks would be rather brief and general because it was up to the Drafting Committee to finalize the wording. Like the Special Rapporteur in his report, he would draw a distinction between substantive and instrumental consequences.

17. With regard to substantive consequences, the Special Rapporteur considered that there was no reason to change articles 6 to 8 of part two⁵ on cessation and compensation or make them more stringent. He shared that view entirely about cessation, but was more sceptical about compensation and somewhat surprised that few members of the Commission had touched on that problem.

18. In the first place, he noted that compensation was a question on which it would appear essential to draw a distinction between the reparation owed to the directly injured State, whose individual rights had been infringed, and other injured States whose rights had been infringed only in so far as they were members of the international community. The State directly injured clearly had the right either to full reparation or, if *restitutio in integrum* was impossible, to receive to that end a sum of money as compensation for the material or moral damage sustained, either directly by it or by its nationals. But that was much more debatable for other injured States, which, by definition, had sustained only "juridical damage", if that expression made any sense. He therefore urged the Special Rapporteur to propose wording which took that necessary distinction into account and said that, if the Special Rapporteur so desired, he would be prepared to make one or more alternative proposals to ensure that States not directly injured could not demand a monetary reparation.

19. Secondly, he thought that the question of "punitive" or aggravated damages deserved to be closely studied, at least in the case of crimes. There had been cases in which punitive damages for violations of the law had been awarded by international courts, for example in the "*I'm alone*" case⁶ and many other cases in which such damages had been demanded, especially given the particularly serious nature of the offence, that is to say of the crime. Reference could be made, for example, to the pleadings of the United States before ICJ in the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*⁷ or the pleadings of Nicaragua in the last phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua*.⁸ Given the nature of the obligation breached by the State responsible for the crime and the reintroduction of the concept of fault that that designation implied, as the Special Rapporteur himself acknowledged, the idea of punitive damages would seem a priori to be a logical consequence of the very concept of crime. Although he was opposed to punitive damages in the case of simple delicts, he asked the Special Rapporteur to consider the concept in the case of crimes. Perhaps the Special Rapporteur thought that that was already covered by article 10 (Satisfaction), paragraph 2 (b) and 2 (c), of part two.⁹ But for one thing, paragraph 2 (b) covered only "nominal damages", whereas, in the case of crime, it was necessary to go beyond what was symbolic and, for another, if article 10 did in fact cover that concept, it ought to be revised precisely in order to set aside punitive damages for cases of crimes, but to rule them out for cases of delicts. If he could allow himself in that context to reopen the discussion on the general provisions, he recalled that they had in fact been adopted subject to the results of the discussion on crimes.

20. As to the proposals on satisfaction and restitution in kind contained in the seventh report, he agreed in both cases with the general explanations given, as well as with the wording proposed for the corresponding paragraphs of article 16, at any rate in their general thrust.

21. The only point that might be considered, and the Special Rapporteur did consider it in his report, was whether there was an obligation to preserve the territorial integrity of the State. Some members argued the need to provide for a possibility of infringing territorial integrity, as, for example, in the case where genocide had been committed and the wrongdoing State had been severed of the part of the territory in which the population that had been the victim of that genocide had lived. That case might seem convincing, but he thought that there was reason to proceed more cautiously. The opposing argument advanced by other members, according to which an international court, and even ICJ, could not in any case rule on such an action, did not appear to be decisive because international law was not essentially a law of judges and what a court could do was not necessarily the sole objective of the draft. What was, however,

⁶ See 2392nd meeting, footnote 8.

⁷ *Order of 13 December 1989, I.C.J. Reports 1989*, p. 132.

⁸ See 2381st meeting, footnote 9.

⁹ See 2391st meeting, footnote 9.

⁵ See 2391st meeting, footnote 9.

decisive was that, if the draft provided for the possibility of calling into question the territorial integrity of the State as part of the punishment of the crime, that would constitute interference in the United Nations system for the maintenance of international peace and security. It was inconceivable that the severance of territory or even an infringement of territorial integrity, regardless of the form it might take, could emanate from anything other than the provisions and procedures of the Charter, with which the Commission could not concern itself. Consequently, any infringement of the territorial integrity of a State could take place only by derogating from the provisions of the draft articles and because the Security Council and, perhaps, the General Assembly had found that a severance of territory was necessary to maintain international peace and security. He was therefore firmly in favour of retaining the principle of the "non-infringement" of territorial integrity, even in cases of crime, in article 16, paragraphs 2 and 3. The result would be that the infringement of the territorial integrity of a State could be decided only by the United Nations organs in the framework of their constitutional powers.

22. The same considerations somewhat limited the originality of the "instrumental measures" that might be taken against the State that was the author of a crime as compared to measures that were acceptable in cases of delicts.

23. With regard to that aspect of the debate, however, he would stay at the level of generalities for two reasons. The first reason, of a general nature, was that the provisions on countermeasures—the main, if not the only, "instrumental" consequences of internationally wrongful acts—had still not been definitively adopted by the Commission or even by the Drafting Committee, regardless of what some might think. Hence the difficulty in defining precisely how countermeasures taken in response to a crime could and must differ from those that were admissible in the case of delicts. The second reason, of a personal nature, had to do with the heated controversy at earlier sessions between himself and the Special Rapporteur on the subject of countermeasures, which he thought must be very narrowly restricted and controlled. At the time, he had believed that the general provisions of draft articles 11 to 14 did not sufficiently limit their application. The reason for his hostility to the draft proposed at the time and to that of the articles currently under consideration in the Drafting Committee had been—and continued to be—the fact that those provisions made no distinction between responses to delicts and responses to crimes. But whereas they appeared to be suitable, or almost so, for crimes, they were much too open, permissive and lax for countermeasures in response to simple delicts. That explained why he fully endorsed what the Special Rapporteur stated in his report in which he expressed his hope that the formulation of article 11 could be reviewed and he entertained serious doubts as to the appropriateness of article 13.¹⁰ It was indispensable to reopen the question of countermeasures so as to strike an acceptable balance not only between the various views expressed in the Commission over the past four years on the question, but also between the re-

gime of countermeasures in cases of crimes and that applicable in cases of delicts.

24. He was also prepared to accept the spirit of article 7 of part three proposed in the seventh report, but he preferred wording modelled on article 66 of the Vienna Convention on the Law of Treaties, which would replace both draft article 19 of part two and article 7 of part three.

25. With regard to the other consequences of crimes, he agreed with the general philosophical outlook reflected in the report, but had some doubts about certain aspects of the wording of draft article 18, primarily for two reasons. First, certain provisions of that article failed to distinguish between the rights of the State whose individual rights had been injured by the crime and the rights of other States. Secondly, the wording in certain parts of the article had more to do with the rules on the maintenance of international peace and security than with the law of international responsibility in the strict sense, to which the Commission must confine itself. For example, concerning paragraph 1 (*f*), if the constituent instruments of the competent international organizations, that is to say essentially and almost exclusively the Charter of the United Nations, gave those organizations decision-making capacity, there was no point in repeating it. As to the statement that States should comply with the recommendations of international organizations, that would be to have a particular conception of the term "recommendation" and would also draw the Commission into the field of the maintenance of international peace and security. In sum, the wording of that article would need to be closely examined by the Drafting Committee.

26. The last matter of concern to him involved the relationship, which was obviously both close and complex, between international crimes as such and crimes against the peace and security of mankind. Certain crimes, such as aggression and genocide, came under both categories. Not all international crimes were automatically crimes against the peace and security of mankind and, in that respect, the "pruning" which the Commission had apparently decided to undertake in the framework of the second reading of the draft Code of Crimes against the Peace and Security of Mankind would help highlight that distinction. It was perfectly clear and widely accepted that an intervention or a threat of aggression were not crimes against the peace and security of mankind, whereas it could very easily be argued that they were international crimes within the meaning of article 19 of part one of the draft on State responsibility. On the other hand, all crimes against the peace and security of mankind were international crimes, crimes under international law, which had specific consequences, in particular on one point: the individuals who had committed crimes against the peace and security of mankind were directly punishable. That was the main purpose of that concept.

27. Consequently, for example, article 10, paragraph 2 (*d*), of part two was inadequate when the international crime also constituted a crime against the peace and security of mankind. It provided that, "in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials

¹⁰ *Ibid.*, footnote 11.

or private parties”, satisfaction might take the form of “disciplinary action against, or punishment of, those responsible”. But, when speaking of crimes, for one thing punishment was a necessity and an obligation and, for another, it could be inflicted not only by the State in question, but also internationally. He therefore thought that something must be said about the difference between the two categories of crimes. Without referring in detail to the legal regime of crimes against the peace and security of mankind which was the subject of part one of the draft Code, it would be reasonable and even essential to indicate in a special provision of the draft articles on State responsibility that

“the provisions of the present draft [or of the present convention] shall not prejudge any question which might arise because of the responsibility incurred in the case of the commission of a crime against the peace and security of mankind.”

However, the clarification included in draft article 18, paragraph 1 (e), was useful, provided that its wording was revised.

28. In closing, he said that, while he was certainly not in agreement with everything in the seventh report, its overall thrust seemed quite appropriate, apart from the a priori mechanism envisaged in draft article 19, precisely because it was a priori. Consequently, he was in favour of referring draft articles 15 to 18 to the Drafting Committee. Draft article 19 should also be referred to the Drafting Committee on the understanding that, if no satisfactory solution was found, it could be discarded, even if it meant strengthening draft article 7 of part three. Consideration in the Drafting Committee should lead to fundamental changes in the spirit of draft article 19, without ruling out definitively the eventuality of its deletion. It should also be the opportunity to review articles 11 to 13 and perhaps certain aspects of articles 6 to 10 so as to balance the entire draft with regard to countermeasures and draw a clearer distinction than was currently the case in articles 11, 12, 13 and draft article 17 between measures in response to a crime and measures in response to a simple delict.

29. Mr. EIRIKSSON said that he would confine himself to confirming his general views on the question of State crimes and reacting to one aspect of the Special Rapporteur’s excellent draft articles, namely, draft article 19 and related proposals appearing in the informal addendum.

30. First, he wished to confirm that he had no difficulty, in principle, with accepting the concept of State crimes. Secondly, he did not mind calling such crimes “crimes”. Thirdly, he congratulated the Special Rapporteur on the high quality of his report, which responded to the Commission’s desire to have before it a complete set of draft articles on the consequences of retaining article 19 of part one¹¹ in the text. Fourthly, he did not mind, at least at the stage of first reading, going along with what some called radical paths, even if, in his heart of hearts, he was aware that States were eventually unlikely to follow. However, it would be for them to make their posi-

tion known at some later stage. Fifthly, as to the need to go along such radical paths, he recalled having expressed earlier, in the context of the draft Code of Crimes against the Peace and Security of Mankind, his dissatisfaction with the way the Security Council was discharging its obligations as envisaged in the Charter of the United Nations. In any event, it was not appropriate for the Council to take on a role more suitable for judicial organs. Sixthly, with regard to the link between judicial settlement and countermeasures, he based himself on the text of article 12 of part two adopted by the Drafting Committee¹² and did not believe it realistic to propose that recourse to third-party dispute settlement should be a precondition for the adoption of countermeasures. Seventhly, he believed that ICJ was the appropriate dispute settlement body in the context of the draft articles, particularly in the case of State crimes, but would also support an arbitration mechanism. Lastly, having heard the views expressed during the debate, he would be inclined to support direct referral by States parties to the dispute settlement mechanism decided on and did not believe that the Commission should propose an intermediary role for the Assembly, the Council or some new quasi-judicial body.

31. Mr. ROSENSTOCK said that he was in agreement with much of what had been said by Mr. Pellet, but did not agree that the Drafting Committee had not completed its work on the articles of part two. Of course, the Drafting Committee might have to take another look at a number of points if the Commission decided to go into the question of “State crimes”.

32. What he wanted to do, basically, was to put a question to the Special Rapporteur in the hope that the latter would shed a little light on that question in his final summing up. There was undeniably a split among the membership of the Commission as to whether to make a qualitative distinction between wrongful acts. Among those members who supported such a distinction, some were wedded to the term “crime”, while others preferred such terms as “especially serious acts” or “exceptionally grave acts”. Some saw the need for institutional consequences, while others did not. The institutional scheme contained in the Special Rapporteur’s seventh report and in the informal addendum had been objected to by some members as being contrary to Articles of the Charter of the United Nations and variously unworkable. Other suggestions had been made and problems had been pointed out with regard to those suggestions.

33. Mr. Pellet, apparently, would build on part three, more or less in the form currently contemplated, and would not create any new institutional structures. Some members had objected to that approach as well.

34. Given that level of disagreement, the prospects for early progress were not very encouraging. It would, however, be helpful if the Special Rapporteur, in summing up the debate, could indicate whether he believed there were actions likely to be widely accepted as crimes, although they did not constitute a breach of the peace as that concept had been interpreted within the

¹¹ Ibid., footnote 8.

¹² See 2396th meeting, footnote 7.

context of South Africa, Rhodesia, Yugoslavia, Iraq, Somalia and Rwanda. Were States actually prepared to regard as crimes or specially serious wrongful acts those that did not involve a threat to peace and security? He frankly doubted that, for example, acts of pollution would be so recognized. If there was not a world order imperative to deal with the problems raised by the question of crimes, the question ought to be asked whether the Commission should delay its work on State responsibility by pursuing so difficult and troublesome a goal which was, furthermore, a source of disagreement.

35. Only if it was sure that there really was a world order imperative, as opposed to the mere prospect of intellectual satisfaction to be obtained, should the Commission soldier on to find some way of bridging the very substantial gaps that existed. But if the world order imperative was not so great and bearing in mind the questions which had been, could be and would be dealt with in the context of threats against peace and security, the Commission ought perhaps to get on with the task of dealing with the topic of State responsibility as normally and generally understood, unless the Special Rapporteur in his summing up could provide some specific examples to show the need for that cumbersome addition.

36. Mr. THIAM recalled that the question of differences and resemblances between the topic of State responsibility and that of the draft Code of Crimes against the Peace and Security of Mankind had arisen at the very outset of the latter topic's consideration. Now that the Special Rapporteur on State responsibility was embarking on the consideration of the question of crimes, a very clear-cut distinction had to be drawn between the two topics. The draft Code was, *ratione materiae*, far more limited in scope because even if all crimes against the peace and security of mankind were international crimes, not all international crimes were crimes against the peace and security of mankind. Still more important was the distinction resulting from the fact that the topic of the draft Code covered only the criminal responsibility of individuals, whereas the topic entrusted to the Special Rapporteur on State responsibility dealt with the international responsibility of the State. In any case, he had always refused to deal with the criminal responsibility of the State because he thought that a State could not be criminally responsible. Only individuals could be so responsible, even if the fact that those individuals were sometimes leaders of States could lead to confusion between the two areas. It was the Commission's custom to grant the requests of special rapporteurs who wanted their draft articles to be referred to the Drafting Committee and he saw no reason for departing from that tradition, but special instructions should be given to the Drafting Committee, which was sometimes asked to decide on questions of substance that had not been settled in plenary. In his view, the Commission was unlikely to go very far in the direction chosen by the Special Rapporteur because there was basic disagreement as to whether the State was only a fiction. For his part, he would continue to believe in the responsibility of individuals who abused their powers for a purpose contrary to international law, particularly in committing crimes against the peace and security of mankind.

37. Mr. de SARAM said that he wished to raise four points of a technical nature which the Special Rapporteur might perhaps clarify at some time. The first question was how the constitutional arrangements that would be put in place if the concept of State crimes was implemented would lie side by side with the institutional arrangements in the Charter of the United Nations relating to the Security Council and the General Assembly. In his view, the institutional arrangements provided for in the Charter had to be preserved under any circumstances. If, within the context of a "crime", a countermeasure was taken by a State against another State, would that constitute a threat to peace which could then trigger an intervention by the Council? The second question was what would happen if only some States became parties to the convention that might be adopted on the subject. He asked whether the system that would be put in place would itself represent a potential threat to peace. Thirdly, if such a system were established, would it not be necessary to make it very clear that amendments to the Charter would have to be made or at least considered? Lastly, given the fact that the Charter contained not only institutional arrangements relating to the Council and the Assembly, but also such fundamental principles of contemporary international law as domestic jurisdiction, territorial integrity and political independence, he asked whether an amendment of those provisions would also become necessary. In the system that might be put in place, circumstances could arise where action contrary to those fundamental principles proved necessary.

38. Mr. VILLAGRÁN KRAMER welcomed the clarifications which the debate had provided on the distinction between the topic of State responsibility and that of the draft Code of Crimes against the Peace and Security of Mankind. In his view, the Commission should be very clear about the task to be performed by the Drafting Committee. The Drafting Committee should proceed on the basis of three working hypotheses. The first was that crimes under the draft Code were not necessarily those that would be characterized as international crimes by the Commission. The second was that it was not the international responsibility of States resulting from crimes for which individuals bore criminal responsibility that determined the international responsibility of States from the viewpoint of international crimes. The third, which was a consequence of the second, was that the international responsibility of States arising from acts or omissions characterized as international crimes did not require those crimes to be identified and listed by the Commission. It would be enough to establish criteria and parameters for taking decisions on a case-by-case basis.

39. Mr. ROBINSON wondered, first, whether, given the imperative constitutional role of the Security Council in connection with the maintenance of international peace and security, there was anything left for the Commission to consider in connection with the topic under discussion and, secondly, whether there was any State conduct properly to be considered, given the tendency of the Security Council to be very liberal in characterizing acts as constituting a threat to the peace. On the first of those two points, he felt instinctively that the answer should not be negative. There were many international instruments which in the past had had to concern them-

selves with regimes more or less parallel with that of the Council and they had all taken the precaution of elaborating formulations which preserved the Council's competence. He saw no reason why that approach should not produce the same results in the present case.

40. As to the second point, although he had not studied the matter in the detail it deserved, he was inclined to believe that there were crimes which could properly form the subject-matter of the instrument in the process of elaboration and which did not constitute crimes against the peace and security of mankind or threats to international peace and security. In saying that, he did not mean only pollution. It was true that the Security Council tended rather liberally to invoke threats to international peace and security and he thought that, in many instances, it had overstepped its competence, its characterizations being, furthermore, unilateral, discretionary and not challengeable by any other organ. But was it not precisely for bodies such as the Commission to tackle controversial issues? His feeling was that there was a significant area left for consideration by the Commission in relation to the particular matter on which the Special Rapporteur had reported. The idea of studying that aspect was, in any event, a useful one.

41. Mr. ROSENSTOCK explained that his point had not been to ask whether there were any matters which the Commission might study, but, rather, whether there were matters in the consideration of which it was imperative for the Commission to embroil itself and which might stand in the way of the reasonably timely conclusion of its primary task relating to State responsibility in general.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459,¹³ A/CN.4/464/Add.2, sect. E, A/CN.4/468,¹⁴ A/CN.4/471,¹⁵ A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)

[Agenda item 5]

TENTH AND ELEVENTH REPORTS OF THE
SPECIAL RAPPORTEUR

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved the composition of the working group on the identification of dangerous activities under the topic, the establishment of which had already been decided at the 2393rd meeting, and which would be composed of the following members: Mr. Barboza (Chairman), Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Lukashuk, Mr. Rosenstock, Mr. Szekely and Mr. Yamada, it being understood that the working group was open-ended and that other members wishing to participate in its work would be welcome.

It was so decided.

¹³ See *Yearbook* . . . 1994, vol. II (Part One).

¹⁴ Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

¹⁵ *Ibid.*

43. Mr. BARBOZA (Special Rapporteur), introducing his eleventh report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/468), explained that the report dealt with the role of the issue of harm in the draft articles. Harm was a concept at the heart of the topic of no-fault liability; in that area, there was no such thing as liability without harm, harm being the condition *sine qua non* of any reparation that might be due. And harm to the environment was, in turn, at the heart of the concept of harm, at least so far as the draft articles were concerned. While it was true that the Commission had discussed the concept of harm in general, it had not sufficiently developed that of harm to the environment, which had special characteristics and deserved separate consideration.

44. Taking certain liability conventions already in force as his model, he proposed to incorporate the definition of harm in article 2 of the draft (Use of terms). The definition would consist of three subparagraphs, the first two reflecting the traditional concept of harm (loss of life, personal injury or impairment of the health or physical integrity of persons; damage to property or loss of earnings) and the last dealing with harm to the environment. The latter appeared to differ from traditional harm in some important respects. It was also distinct from harm caused to persons or to their property through harm to the environment, which, in law, was not differentiated from traditional harm: a case in point might be, for example, harm suffered, in the form of loss of earnings, by a hotel owner who lost customers because of pollution of the water of the river which flowed near his hotel or harm suffered by persons as a result of drinking polluted water or inhaling harmful fumes.

45. He asked about the harm caused to things, independently from that suffered by the persons concerned and the harm caused to the global commons which had no visible link with direct injuries caused to persons or things. He said that two questions, in particular, required attention. One question was who was the party injured by environmental damage and the other was what did that damage consist of.

46. As to the first of those considerations, damage was harm caused to someone, thus it was always damage to someone, to a person or to a human group and its heritage; it did not seem possible to accept the concept of damage occurring in a vacuum. That was what accounted for the difficulties experienced by lawyers in understanding what was meant by environmental damage *per se*—damage which appeared to be unrelated to harm caused to persons or to their heritage—as if the adverse effect on the environment were sufficient to constitute an injury in law, whether or not there were any natural or juridical persons who might be harmed by it. If the extremist position adopted by certain ecologists and environmental law specialists boiled down to that, if they really considered environmental protection as an end in itself and believed that species and natural resources should be respected for their so-called “intrinsic” value—a value independent from the worth attached to them by human beings—then dangerous confusion could indeed result.

47. Looked at closely, harm to the environment was not differentiated in any way from harm to the person or property of a juridical person, in whose favour there arose a right to reparation: the person was compensated because the change in the environment produced by a certain conduct had harmed him, since he had lost one or more of the values provided to him by that environment. In brief, what was called harm to the environment *per se* was a change in the environment which caused people loss, inconvenience or distress, and it was that injury to people which the law protected against in the form of compensation. It was possible that harm to the environment *per se* could injure a collective subject, such as a community, which in any case would be represented by the State or by other public bodies, according to the circumstances.

48. The second matter was to determine who was injured by ecological harm, since the environment did not belong to anyone in particular, but to the world in general or to the community. The United States Congress had adopted three laws on harm to the environment, the Comprehensive Environmental Response, Compensation and Liability Act of 1980,¹⁶ the Clean Water Act of 1977¹⁷ and the Oil Pollution Act of 1990,¹⁸ by which it had empowered government agencies with management jurisdiction over national resources to act as trustees to assess and recover damages; the public trust was defined broadly to encompass "natural resources" belonging to, managed by, held in trust by, appertaining to or otherwise controlled by Federal, state or local governments or Indian tribes. Thus, in his view, under international law, a State whose environment was damaged was also the party most likely to have the right to take legal action to obtain compensation, and that right might also be granted to non-governmental welfare organizations.

49. The report also dealt with the issue of reparation and discussed the differences between reparation for harm caused by a wrongful act and reparation for harm which had occurred *sine delicto*, the situation on which the draft articles were primarily based. In the first case, the *Chorzów* rule¹⁹ would apply: reparation must wipe out all the consequences of the wrongful act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Since it set forth the consequences of violation of a primary rule, the *Chorzów* rule was clearly a secondary rule. Nevertheless, its content had been shaped by international custom, which the Commission was, moreover, endeavouring to codify and progressively develop within the framework of State responsibility.

50. In the case of liability *sine delicto*, on the other hand, the damage was produced by an act which was not prohibited by law. Therefore, the compensation was ascribed to the operation of the primary rule: it was not a

reparation imposed by the secondary rule as a consequence of the violation of a primary obligation, but rather a payment imposed by the primary rule itself. Reparation in that case was therefore a secondary obligation and not reparation *stricto sensu*: it was a payment imposed, for example, on the operator as a prior condition which must be met if the activity was to be considered lawful; in other words, the activity would be lawful only if the operator was prepared to repair any possible damage that might be incurred. As a result, compensation did not necessarily have to meet all the criteria of the *restitutio in integrum* imposed by international custom for responsibility for a wrongful act. While, under general international law, there was apparently no clear international custom with respect to the content, form and degrees of payment corresponding to the damage in liability *sine delicto*, there were some indications that it did not necessarily follow the same lines as the *Chorzów* rule. *Restitutio in integrum* was not being as rigorously respected in that field as in that of wrongful acts, as illustrated by the existence of thresholds below which the harmful effects did not meet the criterion of reparable damage, as well as the imposition, in legislation and international practice, of ceilings on compensation. Both the upper and lower limitations, which were imposed for practical reasons, created a category of non-recoverable harmful effects.

51. The *Chorzów* rule, however, obviously served as a guideline, although not a strict benchmark, in the field of liability *sine delicto* as well, because of the reasonableness and justice it embodied. It was true that there were differences between the circumstances of any damage produced by wrongful conduct and the harm produced by legal conduct, and that those might well be treated differently from a legal standpoint; however, that distinction was drawn mainly for practical reasons, such as, in the case of the ceiling, to fix an upper limit on the amount insured or, in the case of the lower threshold, to acknowledge the fact that all human beings today were both polluters and victims of pollution. It was evident, however, that the law must seek reparation, as far as possible, for all damages. In that connection, it was noteworthy that, in the conventions on nuclear material and oil pollution, an attempt had been made to go beyond the ceiling by establishing funds to help approach full restitution in circumstances where compensation might reach extremely high amounts.

52. In the case of reparation, the method generally selected was restoration, or re-establishment of the damaged or destroyed resources. That was a reasonable approach, since what was most important in that situation was to return to the *status quo ante*; in principle, ecological values prevailed over economic values to such an extent that, unlike what happened in other fields, some domestic laws specified that the compensation which might be granted to the injured parties in certain cases should be used for ecological purposes as well. The cost of restoration or replacement of elements of the environment provided a good measure of the value of the loss. That usually varied when the costs, especially of restoration, were unreasonable in relation to the usefulness of the damaged resources, which confirmed the idea that the predominance of ecological purposes was overruled only by the unreasonableness of the costs.

¹⁶ *Comprehensive Environmental Response, Compensation and Liability Act 1980*, United States Code, 1994 edition, vol. 23, title 42, chap. 103, sects. 9601 *et seq.*

¹⁷ *Clean Water Act of 1977*, *ibid.*, vol. 17, title 33, chap. 26, sects. 1321 *et seq.*

¹⁸ *Oil Pollution Act of 1990*, *ibid.*, chap. 40, sects. 2701 *et seq.*

¹⁹ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

53. Restoration or replacement was thus the best form of reparation for damage to the environment. Identical restoration might be impossible, however, in which case most modern trends allowed for the introduction of equivalent elements. Article 2, paragraph 8, of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which had been drafted by the Council of Europe and was perhaps the most detailed in that field, defined “measures of reinstatement” as

any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment.

The idea of introducing equivalent components was therefore accepted in international practice.

54. The conventions generally stopped there, that is to say with compensation for measures of restoration or replacement which had actually been taken or would be taken; in the latter case, compensation was used to pay for them. What happened in the cases where restoration was impossible or when the costs of restoration were unreasonably high? In his eighth report, he had cited a statement by Rest in 1991, in reference to the *Exxon Valdez* case, although the circumstances might have changed since that time:

As in this case it was impossible to clean up the oil-polluted seabed of the Gulf of Alaska because of the factual situation, the Exxon Corporation . . . saved the clean-up costs. This seems to be unjust. According to the Guidelines, the polluter could perhaps be obliged to grant *equivalent compensation*, for instance, by replacing fish or by establishing a nature park.²⁰

Draft article 24, paragraph 1, covered that situation, providing that

if it is impossible to restore these conditions in full [that is to say the *status quo ante*], agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.²¹

55. All the liability conventions also included in the definition of harm the costs of preventive measures and any damage or loss caused by those measures, which might be more serious. They referred to preventive measures taken after an incident to minimize or prevent its effects; those measures were defined in all the conventions as reasonable measures taken by any person following the occurrence of an incident to prevent or minimize the damage.

56. The report also dealt with the difficult question of assessment of harm to the environment. Restoration did not present serious problems of assessment: it was a matter of determining at what point the cost became unreasonable in relation to the usefulness of the restoration. But what happened in cases when restoration was impossible or only partially feasible? The damage must then be assessed according to other criteria, such as determination of the extent to which the public had been deprived of services formerly provided by the damaged environment and estimation of the monetary value of those ser-

vices. In the United States, the laws already mentioned included abstract theoretical models for quantifying the loss; however, they were extremely elaborate and complex.

57. In view of the difficulties of the alternative assessment methods, it was easy to understand the trend in international practice to limit reparation of environmental damage to the payment of costs of restoration, the replacement of damaged or destroyed resources or the introduction of equivalent resources where the court deemed that to be reasonable. The quantification of costs using methods employed in the United States hardly seemed appropriate for a draft that aspired to become a global convention, with courts that were part of different cultures having such disparate attitudes towards the environment. However, if restoration or replacement of resources could not be partially or fully accomplished and real harm to the environment had occurred, it did not seem reasonable for the damage to be totally uncompensated. The court should perhaps have some leeway to make an equitable assessment of the damage in terms of a sum of money, which would be used for ecological purposes in the damaged region, perhaps in consultation with the State of origin or with public welfare bodies, without having to resort to complicated alternative methods such as those used by some national courts. After all, the courts granted compensation for moral damage, which was as difficult to assess as environmental harm. He asked how anguish and suffering could be measured or why the courts should not have the same freedom in assessing damage to the environment.

58. He had referred in his report to the possibility of incorporating a definition of environment into the draft articles, since there was currently no universally accepted concept of environment: elements considered to be part of the environment in some conventions were not so considered in others. The definition of environment would thus determine the extent of the harm to the environment; and the broader the definition, the greater would be the protection afforded to the object thus defined, and vice versa. Such a definition did not necessarily have to be scientific and, thus far, the definitions that had been tried had simply enunciated the various elements they considered to be part of the environment. According to the “Green Paper on Remedying Environmental Damage” of the Commission of the European Communities:

Regarding the definition of “environment”, some argue that only plant and animal life and other naturally occurring objects, as well as their interrelationships, should be included. Others would include objects of human origin, if important to a people’s cultural heritage.²²

A restricted concept of environment limited harm to the environment exclusively to natural resources, such as air, soil, water, fauna and flora, and their interactions. A broader concept covered landscape and what were usually called “environmental values” of usefulness or pleasure produced by the environment. Thus, such concepts encompassed “service values” and “non-service

²⁰ *Yearbook . . . 1992*, vol. II (Part One), p. 59, document A/CN.4/443, appendix, para. 10.

²¹ For the text of article 24, see *Yearbook . . . 1990*, vol. II (Part Two), p. 101, footnote 354.

²² Commission of the European Communities, “Communication from the Commission to the Council and Parliament and the Economic and Social Committee: Green paper on remedying environmental damage”, document COM(93) 47 final (Brussels, 14 May 1993), p. 10, sect. 2.1.7.

values"; for instance, the former would include a fish stock that would permit a service such as commercial or recreational fishing, while the latter would include the aesthetic aspects of the landscape, to which populations attached value and the loss of which could cause them displeasure, annoyance or distress. It was difficult to put a value on those if they were harmed. Lastly, the broadest definition also embraced property forming part of the cultural heritage.

59. Those were, in summary, the questions raised in his eleventh report and on which he would appreciate the first impressions of the members of the Commission.

60. In terms of translation, he suggested that the Spanish word *daño* should be translated into English as "damage" rather than as "injury", which, according to common law experts, meant damage produced by a wrongful act.

61. Mr. ROSENSTOCK, referring to the Special Rapporteur's last point, said that the words "harm", "injury" and "damage" had all been used in the topic under consideration and, for practical purposes, a somewhat artificial distinction between the words "harm" and "injury" had been established or tried a few years earlier. He would appreciate clarifications on that point.

62. Mr. BARBOZA (Special Rapporteur) said that it had been decided that in English, "harm" would be more appropriate than "injury", but that "damage" could also be used. The problem arose because some authors made a distinction between "harm" and "damage", the former referring to the actual deleterious effects and the latter referring to the legal consequences of those effects. While he saw no problem in using the word "harm" for the moment, he was suggesting the word "damage" and, with all due respect to the common law experts, it was his view that the two words could be used interchangeably.

The meeting rose at 12.50 p.m.

2398th MEETING

Friday, 9 June 1995, at 10.25 a.m.

Chairman: Mr. Guillaume PAMBOU-TCHIVOUNDA
later: 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. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vilagrán 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, at the previous meeting, he had asked for the floor to answer two of the questions that had been addressed during that meeting. They concerned the issue of "if" or "whether" and the issue of "when".

2. With regard to the first issue, he would remind members that in 1976 article 19 of part one of the draft had been adopted,² that in 1985 and 1986 the proposals of the previous Special Rapporteur, Mr. Riphagen, had been referred to the Drafting Committee³ and that at the forty-sixth session of the Commission he had himself been entrusted with the task of dealing with the consequences of crimes within the framework of parts two and three of the draft. That being so, he was unable to see how the Commission could now shelve the matter of the special consequences of internationally wrongful acts singled out as crimes in article 19 of part one.

3. It had been said, and rightly so, that there were difficulties. In particular, as had been mentioned at the previous meeting, there were difficulties with regard to the institutional aspect, due to the problems of coexistence between, on the one hand, the law of State responsibility in the part that dealt with crimes in particular, and on the other, the existing system of collective security. There were other difficulties too, such as the multiplicity of differently or equally injured States. But, apart from the fact that some difficulties—for example, those relating to a plurality of injured States—also existed for delicts, was it conceivable that a group of lawyers such as the members of the Commission could abdicate their duty to try to reach a reasonable solution whatever the difficulties? In addition to his own proposals—and he was ready to consider any possible improvements to them—there were the suggestions made by Mr. Pellet (2393rd meeting) and Mr. Mahiou (2395th meeting). There were the preferences expressed by a number of speakers for a purely political solution, while other preferences had been expressed for a purely judicial solution. Mr. Eiriksson (2397th meeting) had also delivered a telegraphic message to that effect. Moreover, he had also seen an informal draft prepared by a member of the Commission which offered a combination of the "political" and the "judicial" roles of international institutions that was different from the one he had proposed.

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

² See 2391st meeting, footnote 8.

³ For the texts of draft articles 6 to 16 of part two referred to the Drafting Committee, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 20-21, footnote 66. For the text of draft articles 1 to 5 of part three and the annex thereto as proposed by the previous Special Rapporteur, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86. Those provisions were referred to the Drafting Committee at the thirty-eighth session.