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Summary record of the 2405th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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46. Such wishes, then, were expressed in the form of reservations, declarations or statements of understanding. Any ambiguities perceived from either a theoretical or a practical perspective could be resolved by the time-honoured method whereby the depositary circulated the reservation, declaration or statement of understanding, without attaching any value judgement, to the other States parties. It was then for the States parties to determine the legal value of the reservation, declaration or statement and hence to determine the legal relationship that could exist as between the reserving State and themselves.

47. There was, no doubt, a certain fluidity in such a position, but it was a fluidity that could be tolerated and that was better suited to the promotion of widely subscribed and implemented treaty obligations. Any other system imposing a cut-and-dried formula would only break, because of its brittleness, under the weight of the variety of different interests and stages of economic development of States.

48. It was also important that the Commission should not, in its study, isolate various categories of multilateral treaties in an attempt to establish different standards within a universal regime of reservations to treaties. As noted by Mr. de Saram, that so-called discriminatory approach had been considered earlier and had not been accepted. Considerations that had prevailed in the 1960s and 1970s when only 120 to 130 sovereign States had existed were all the more relevant and important now that there were nearly 200 such States and the gaps between them in terms of economic, political and other factors had grown wider. In the circumstances, the Commission's task was to guide and help States in expressing their intent more methodically and in a legally consistent manner. Its objective was not to suppress reservations as a method but, where they were otherwise permitted by a treaty, to allow them to be made in a certain format within a certain degree of acceptable flexibility.

49. As for the difference between interpretative statements and reservations, the key would seem to lie in what was permitted or not permitted under a State's domestic law and to what extent that State was prepared or able to change its domestic law in the prevailing political, economic, social or religious conditions. A declaration, in his view, was more a matter of the time-frame needed for the full acceptance of the treaty by the State in question. It was not a reservation and could not be prohibited on the same grounds as a reservation.

50. In conclusion, he wished to congratulate the Special Rapporteur on his first report, which had commendably guided the Commission in its deliberations, and said that he looked forward to the future reports on the topic.

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

[Agenda item 2]

51. The CHAIRMAN, recalling that the Commission had not yet referred to the Drafting Committee the issue of wilful damage to the environment, which the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind had proposed for inclusion in the list of crimes against the peace and security of mankind, said that, after consultations, he wished to recommend the establishment of a small working group to examine the possibility of covering that issue in the draft Code in an appropriate way. There would be no time for the working group to hold any meetings at the present session, but it could hold four meetings over a period of two weeks at the beginning of the next session. If the working group succeeded in producing an acceptable formula, the formula could then be briefly considered in plenary and referred to the Drafting Committee. Alternatively, given the greater priority assigned to completing the work on the draft Code within the quinquennium due to expire in 1996, the working group might decide to do no more than think about the problem. The group would be chaired by Mr. Tomuschat and would, of course, include Mr. Thiam *ex officio* in his capacity as Special Rapporteur. The decision as to the remaining membership of the group would be left to Mr. Tomuschat and Mr. Thiam.

52. Mr. THIAM (Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind) said that he had no objection to the suggestion, but feared that the Drafting Committee would have no time at the next session to consider the results of the proposed working group's deliberations. Would it not be possible, in the circumstances, to omit the Drafting Committee stage?

53. The CHAIRMAN said that if the working group felt, after initial deliberation, that it could come up with a satisfactory text, he saw no reason why the text should not be considered quickly in plenary and then transmitted to the Drafting Committee. If that was not possible, the issue should be allowed to mature within the working group. The precise mechanics could be considered at the next session. If he heard no objection, he would take it that the Commission agreed to the establishment of a working group on the issue of wilful damage to the environment.

It was so agreed.

The meeting rose at 1 p.m.

2405th MEETING

Tuesday, 27 June 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Ro-

senstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. ARANGIO-RUIZ (Special Rapporteur), summing up the debate in the Commission on State responsibility, said that, to respond to all the interesting comments made on his seventh report (A/CN.4/469 and Add.1 and 2), he would group them into two sets of questions. He would first refer to the "if", that is to say the question whether crimes should be the subject of provisions in part two of the draft articles, and then the "how", namely, which provisions should govern those crimes or, more specifically, their consequences.

2. The "if" question, which concerned the basic concepts, had drawn comments from several members, who had all dealt with the appropriateness of the term "crime" and, more fundamentally, with whether a "criminal liability" of States was conceivable. For part two, which was currently under consideration, he suggested leaving aside problems of terminology, which had been temporarily settled by article 19 of part one.[2] As to the concept of the "criminal liability" of a State, he fully agreed with the above-mentioned speakers when they contested the possibility of bringing into international law the concepts of punishment and criminal procedure typical of domestic legal systems. In fact, at no time had he used any of those concepts in his draft articles and, if he had employed terms borrowed from national criminal law, for example "prosecutor", he had done so very rarely and only in order to make himself clear. He had been so cautious that some members of the Commission had suggested that more room should be made in the draft articles for "severe" forms of responsibility.

3. One serious problem which in a sense lay halfway between the "if" and the "how" was the relationship between the international crimes listed in article 19 of part one and individual crimes against the peace and security of mankind contemplated in the draft Code of Crimes against the Peace and Security of Mankind. Comments on that point had been made by Mr. Thiam (2397th meeting), Special Rapporteur on that topic, as well as by several other members. The connections were striking, as the same fact might give rise, albeit from different viewpoints, to individual crimes and State crimes. However, the area of wrongful acts singled out as crimes in article 19 of part one appeared to be broader than what he would refer to as the "Thiam code". While individual crimes against the peace and security of mankind (such as a State crime against the environment) would not necessarily be found "behind" a crime under article 19, an individual crime under the "Thiam code" would almost always also be an international crime of a State, especially as such crimes were often committed by individuals who were at the head of a State. But apart from that, individual crimes and State crimes were very different. The former entailed the criminal responsibility of individuals, who must be prosecuted in accordance with domestic criminal law and criminal procedure, whereas the latter—"monstrous" violations, according to the terminology used by one member, or "most heinous" violations, to use the wording employed by Mr. Pellet, of the fundamental interests of the international community—were committed by States as collective entities and gave rise to responsibility in inter-State relations.

4. It was, however, clear that the reaction to certain forms of individual responsibility of the type covered by the draft Code could become part of the "sanctions" to which a State might be subject as a consequence of a crime of its own. The prosecution of the individuals responsible was thus envisaged as a derogation from the general rule of immunity of State bodies acting within the scope of their competence. That was precisely the purpose of draft article 18, paragraph 1 (*e*), proposed in his seventh report, which Mr. Rosenstock (2392nd meeting) had somewhat playfully defined as a fugitive from the draft Code of Crimes against the Peace and Security of Mankind. On the other hand, Mr. Barboza (2396th meeting) had rightly pointed out that the prosecution of the responsible individuals could not represent *per se* an adequate response to the international crime of a State. Obviously, the punishment of a few individuals could not solve the problem of physical and moral reparation of the damage caused by the conduct of the State's machinery as a whole (because in reality, it was the conduct of the State itself that constituted the particularly "heinous" or "monstrous" wrongful act). As noted by some members, it would be a serious error to believe that the problem of the "monstrous" acts of a State could be settled by relying exclusively on the Code of "individual" Crimes against the Peace and Security of Mankind, assuming that the latter eventually became a legal reality.

5. Two other general issues raised during the debate related to the need to examine separately the question of State crimes and of acts that constituted a threat to international peace and security, on the one hand, and the potentially negative reaction of Governments to his proposed solutions, on the other. He would revert later to Mr. Rosenstock's argument (2392nd meeting) about "overlapping" when he dealt with institutional aspects. As to the potentially negative attitude of Governments, he shared the views of several members, which could be summed up in the following way: the Commission, composed of independent members taking part in their personal capacity, should not subject its work to the real or presumed will of one or more—or even all—States. Its purpose was to contribute, through exploratory work, to

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* Resumed from the 2398th meeting.

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

[2] See 2391st meeting, footnote 8.

the progressive development of existing law, which of course, it had no power to alter, and realism in that regard must consist in striking a fair balance between the ideal and what was possible. Mr. Brierly, who had represented the United Kingdom of Great Britain and Northern Ireland during the drafting of the statute of the Commission, had stressed that the purpose of the Commission was the progressive development of international law and not merely the codification of existing rules, which was taken care of at universities. He also shared the view of Mr. Mahiou (2395th meeting) that the Commission should, if necessary, present to the General Assembly (and to Governments) not just one, but two or more alternative versions of a regime of the international crimes of States. That point of view seemed to have been endorsed, or at any rate had not been contested, by a number of members. An alternative solution, however, would not be to postpone the problem of the consequences of crimes to the second reading. That would be not a solution but an arbitrary suppression of the problem by turning article 19 of part one into a dead letter. It would amount to a simple refusal, on the part of the Commission, to deal with a problem whose existence was recognized since, at least, 1976.

6. Turning to the "normative" aspect of the subject, the consideration of draft articles 15 to 18 of part two, he said that the Commission had reached a relatively high degree of consensus on the "supplementary consequences" of the crimes covered in draft article 15. Most speakers were in favour of excluding or reducing, in the case of crimes, the "attenuating circumstances" envisaged for the wrongdoing State in the case of delicts. For example, on the question whether the territorial integrity of the wrongdoing State should be preserved under all circumstances, some members had not excluded that the obligations of cessation, restitution, satisfaction and guarantees of non-repetition might have territorial consequences (contrary to the present formulation of draft article 16 as proposed in the seventh report), whereas other members were in favour of territorial integrity being in any case respected. That question called for further reflection, particularly in a number of specific cases, such as that of the secession of a population which had been denied the right to self-determination or of a territory acquired by force.

7. Doubts had also been expressed about the propriety of the distinction that he had drawn between two concepts of political independence, one recognizing a State's status as an independent member of the inter-State system and the other considering that all political regimes in power, regardless of how objectionable, must be preserved. Comments had been made on that issue particularly with regard to the freedom of States to choose their own form of government (a freedom surely covered by *jus cogens*, if any). He personally felt, however, that a despotic regime that had committed a crime should not be able to avail itself of that freedom in order to evade its obligations of restitution and compensation or to refuse satisfaction and adequate guarantees of non-repetition. He admitted, on the other hand, that the matter deserved closer examination by the Drafting Committee at the appropriate time.

8. Another point raised had been the distinction, now generally accepted, between the responsibility of a State and that of the State's population. While recognizing that the vital needs of the population, both physical and moral, must be duly protected, as in fact they were in his proposed draft article 16, paragraphs 2 and 3, he believed that that distinction should not be pushed too far because it might encourage those elements of the population that were the least peace-loving and the least inclined to abide by international law and were thus ready to lend support to the reprehensible and, indeed, criminal policies of their leaders.

9. With regard to satisfaction, interesting remarks had been made by Mr. Yankov (2396th meeting) and Mr. Pellet (2391st meeting) about "punitive damages", which should not be just symbolic. Mr. Yankov had suggested that a sharper distinction should be drawn between delicts and crimes in that respect than that drawn in the seventh report.

10. Mr. Tomuschat (2392nd meeting) had deplored the absence of a specific provision on compensation in the case of crimes. That was not an oversight on his part: as article 8[3] already provided for full compensation, no "aggravation" of that provision seemed to be called for with regard to crimes (contrary to the case of restitution in kind, for which the higher degree of seriousness of the wrongful act was taken into account by an express provision).

11. Another problem which had been raised by many speakers was the fact that States were not necessarily injured to the same degree by a wrongful act and that there was a need to distinguish between the various categories of injured States. The problem, which he had already dealt with in his fourth report,[4] primarily with regard to delicts, probably deserved further study in respect of crimes. The first point to be made in that regard was that the very definition of crimes contained in article 19 of part one implied that all States were directly injured by such wrongful acts (and did not simply suffer the indirect legal effects of the infringement of the rights of one or more other States). That was not to suggest that a crime could not affect different States differently. Three hypotheses could be considered in that connection: the first was that a crime resulted *grosso modo* in equal damage to all the injured States (for example, the wilful massive alteration by a State of the ozone layer). In such a case, all States would be entitled to demand cessation and "restitution in kind" (to the extent possible) of the global commons, as well as to demand guarantees of non-repetition and to resort to countermeasures. The sole difference would concern compensation if the economic damage was not the same for all States. That hypothesis could be covered by combining the provisions of draft article 15 proposed in his seventh report and the provisions of article 8, as adopted.

12. The second hypothesis was that a crime, while affecting the fundamental interests of the entire international community, did not affect any State in particular

[3] See 2391st meeting, footnote 9.

[4] *Yearbook... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3.

in material terms. That was true, for instance, of crimes which had been committed by a State against its nationals or against minority groups and which involved human rights or self-determination. In such cases, all States were equally entitled to demand cessation, restitution in kind, satisfaction and guarantees of non-repetition as provided for in draft article 16 and to take interim and other measures necessary to obtain redress. Since no State had suffered economically assessable harm, however, there should be no distinction among States with regard to compensation. In such cases, it also did not seem necessary to establish a special regime for crimes as opposed to *erga omnes* delicts.

13. The third hypothesis was that a crime, while affecting the entire international community, was particularly injurious to one or more specific States. That might apply not only to crimes of aggression, but also to crimes against human rights and the principle of self-determination or crimes against humanity which had a more direct impact on certain States by virtue of their geographical proximity to or their ethnic or religious ties with the victim populations. Similarly, grave and wilful pollution might affect certain States more than others. It was obvious that, in such cases, the principal victims of the crime could not be placed on the same footing as the rest of the international community. There again, however, the need to strengthen the protection of the principally injured States did not seem to require any particular qualification of the special or supplementary consequences provided for in draft articles 15 to 18. With regard to substantive consequences, the principally injured States were, as a result of the greater amount of material or moral injury they had suffered, clearly entitled to "demand more" than the other injured States by way of restitution in kind, compensation and even satisfaction and guarantees of non-repetition.

14. The same could be said of countermeasures. It was reasonable to assume that paragraph 2 of draft article 17, which concerned urgent interim measures, should not apply in the same way to all injured States. While any injured State was entitled to take immediately any measures needed to obtain cessation and avert an irreparable disaster, only the most directly concerned States were entitled to take the urgent interim measures needed to protect—in the case of aggression—their territorial integrity or their political independence. The principle of proportionality referred to in article 13,[5] by nature a flexible principle, was bound to apply in such cases even if it had not been expressly designed for that purpose. At any rate, it would be preferable to resolve the matter of variously injured States, as suggested in one of his previous statements (2395th meeting), by adding appropriate wording to the article 5 *bis* he had proposed in his fourth report.

15. A number of interesting comments had been made on the supplementary consequences of crimes dealt with in draft article 18. He was referring in particular to the question raised by two members, namely, whether paragraph 1, subparagraphs (*a*), (*b*) and (*c*), of that article should not be applicable equally to delicts, and to the suggestion by two other members that, at least with regard to paragraphs 1 (*a*) and 1 (*b*), the requirement of a prior institutional decision might be waived. Those questions might be examined further by the Drafting Committee. In considering the possibility of applying the provisions of subparagraphs (*a*), (*b*) and (*c*) to delicts, a distinction should be made between ordinary "bilateral" delicts and *erga omnes* delicts. Account must also be taken of the position of "third" or less directly injured States with regard to the consequences of the internationally unlawful act. As to the second question, he was hesitant to accept the suggestion that the essential condition of a preventive collective determination should be left aside. He was rather inclined to share the concern of Mr. Barboza (2396th meeting), who had wondered whether, in the absence of prior determination by a judicial body, the obligations set forth in paragraph 1, subparagraphs (*c*), (*d*) and (*f*), of draft article 18 might not imply that all States would be bound to follow the measures which had been taken by any one of them and which might well be excessive, inadequate or even unlawful. The ideal solution would, of course, be to entrust the determination of the appropriate measures to the judicial body called on to decide on the existence or attribution of the internationally wrongful act or to an ad hoc coordination mechanism which would be set up collectively by the injured States. He had, however, put that idea aside for fear of excessive institutionalization which might have made the proposed mechanisms more difficult to accept. He had limited himself to saying, in paragraph 1 (*c*), that States should, in so far as possible, coordinate their respective reactions through available international bodies or ad hoc arrangements or, in paragraph 1 (*g*), that States should facilitate, by all possible means, the adoption and implementation of any lawful measures. He hoped that those elements would at least help induce States to consult each other; but the Drafting Committee would probably be able to find more appropriate formulations.

16. Two main objections had been raised with regard to draft article 18, paragraph 1 (*f*): first, a possible intrusion into the area of collective security and, secondly, an inappropriate incidence on the legal effects of resolutions of international bodies. He would deal with the first objection when he discussed the institutional aspects of the topic. He did not see any major difficulties with regard to the second. In the case where the international organization's resolution was binding, no problem arose. In the case of a simple recommendation, the States parties to the convention on State responsibility could decide among themselves whether to abide by it. There again, though, the question might usefully be reviewed by the Drafting Committee. The same applied to Mr. Pellet's suggestion (2397th meeting) that a clause should be included in the draft articles stating that the provisions of the future convention did not in any way prejudice questions which might arise in the context of the Code of Crimes against the Peace and Security of Mankind.

17. Turning to the more difficult "institutional" aspects of the topic or the way in which the consequences of crimes should be implemented, he pointed out that all the speakers, including those who had rejected the concept of international crimes of States, had acknowledged the need for an institutional mechanism.

[5] See 2391st meeting, footnote 11.

18. With regard to the nature of the mechanism, the prevailing viewpoint was apparently that, at the least, the conclusive determination of the existence and attribution of a crime should be entrusted to a permanent judicial body such as ICJ, which was more likely than any other body to offer the guarantees of competence and impartiality which were indispensable. That had been the opinion of several members and, despite a reservation with regard to the specifically "civil" competence of the Court, of another. The role of ICJ had also been recognized by Mr. Pellet (2393rd meeting), although he would attribute jurisdiction to the Court a posteriori. At the same time, the possibility of entrusting such tasks to the Court had given rise to various objections. A few members had first of all emphasized that it was unlikely that States would accept the compulsory jurisdiction of the Court with regard to crimes.

19. Leaving aside the question whether such a skeptical evaluation was plausible, it was inevitable that any mechanism chosen would have to include a certain measure of obligation in order to guarantee a minimum of reliability and efficiency to the process of determining conclusively the existence/attribution of a crime. It was precisely with a view to avoiding the indiscriminate use of the compulsory jurisdiction of the Court that he had proposed to subordinate it to the prior adoption of a resolution by a political body. Screening by a political body, in addition to eliminating any clearly unfounded allegations of criminal conduct, would help to exclude or at least keep to a minimum any abuses on the part of Governments which were trying to take advantage of the Court's compulsory jurisdiction and bring before it cases concerning responsibility for ordinary delicts.

20. In connection with one of Mr. Szekeley's remarks (2395th meeting), he noted that there were precedents for the acceptance of the compulsory jurisdiction of ICJ over disputes concerning particularly grave violations. He was referring in particular to the conventions mentioned in his seventh report on genocide, racial discrimination, apartheid, discrimination against women and torture. States were perhaps less reluctant than it appeared and, in any event, it was better to encourage them than to discourage them.

21. A second objection to the attribution of a role to ICJ, which had been raised by several speakers concerned the lengthy nature of the Court's proceedings. Two proposals had been made with a view to avoiding that difficulty. Mr. Bowett had suggested (2392nd meeting) the establishment of an ad hoc committee of jurists assisted by an ad hoc prosecutor or prosecuting body. Mr. Pellet had proposed (2393rd meeting) that the decision of ICJ should be considered as an a posteriori rather than an a priori verification of legality.

22. Those proposals, which both merited careful consideration, had given rise to an interesting debate. In reference to Mr. Bowett's proposal, it had rightly been agreed that the appointment of members to an ad hoc body might be influenced by political considerations and, consequently, might give rise to concerns of partiality. In that regard, he recalled the remarks of Mr. Robinson (2396th meeting), Mr. Al-Khasawneh (2394th meeting) and Mr. Szekely (2395th meeting). Furthermore, entrusting the task to an ad hoc body would mean, in his view, renouncing the inestimable advantage of continuity of legal interpretation and application which was inherent in decisions of ICJ. The value of precedent would be lost in an area which was even more sensitive than others to the need for consistency.

23. With regard to the reluctance of States to accept the compulsory jurisdiction of ICJ, the same could be said with regard to the proposed ad hoc body. The only difference—and apparently for the worse—was that, in the case of an ad hoc body, States would have to accept that the basic determination would be entrusted to a special body appointed, on a case-by-case basis, by a political body rather than to a standing tribunal specifically indicated in a convention on State responsibility. If States had to choose between the compulsory jurisdiction of ICJ and the equally compulsory jurisdiction of a group of judges specially—and politically—appointed, it would hardly be surprising if most Governments preferred the former.

24. He was, on the other hand, well aware of the merit of assigning to an ad hoc body, obviously a different one, the role of prosecutor and the task of carrying out a thorough and expeditious investigation of the facts. The presence of such a body would also help speed up the judicial proceeding itself. That aspect of the ad hoc solution thus dovetailed usefully with the role of ICJ which he himself had proposed.

25. Making use of the Court for an a posteriori rather than an a priori verification, as suggested by Mr. Pellet, would, of course, eliminate any delay in the international community's response to the crime. However, that would imply an exceedingly high degree of reliance on the unilateral evaluation of—supposedly all—the injured States. Furthermore, as Mr. Mahiou had correctly pointed out (2393rd meeting), an a posteriori verification did not really solve the problem of delays, but simply transferred, to the detriment of the accused—and possibly wrongly accused—State the consequences of the lengthy procedure before the Court. The accused State would be exposed immediately, by a unilateral decision of the injured States, to the aggravated consequences of a crime. Only at a later stage could it benefit by the possible determination by the Court that it had not actually committed a crime or even, in some cases, a simple delict. In his own view, moreover, the disadvantages of the delay arising from the need for prior judicial determination of existence/attribution were not as serious as it might appear.

26. First of all, under the proposed system, the States injured by a crime would not be completely powerless to act against the wrongdoing State while waiting for a judicial pronouncement. In fact, under paragraph 2 of draft article 17, a provision which had perhaps been insufficiently considered by Mr. Pellet, injured States were authorized to take "urgent interim measures" in order to reduce or eliminate the risks and to limit the damage caused by the crime.

27. Secondly, States injured by a crime would not be prohibited, prior to the judicial determination of that crime, from putting forward any claims and from resorting to any countermeasures which were justified as a re-

sponse to an "ordinary" wrongful act, namely, a delict, in accordance with articles 6 to 14,[6] as adopted or soon to be adopted, as they applied to that portion of a crime which constituted a delict.

28. Thirdly, as he had already suggested on an earlier occasion, the length of the proceedings before ICJ was not unalterable. As he had also suggested in the informal addendum to the seventh report, it might be envisaged that, once a case of "crime" had been brought before it, the Court would appoint an ad hoc chamber for that specific purpose, in view of the urgency of the situation. Such an arrangement might be sufficient. If not, it might be possible to add five judges to the Court so that the establishment of an ad hoc chamber would not interfere with the Court's ordinary operations. Considering the gravity of the wrongful acts involved, that would be a relatively modest innovation. In contrast, it would be much more dramatic, in cases of State crimes, to let the matter be decided by a unilateral decision of the injured States, by the purely political findings of a political body or even by the legal decision of an ad hoc body whose members had been appointed by a political body.

29. He none the less considered that the various solutions proposed by the members of the Commission should be studied closely and, where appropriate, put forward in the final document that the Commission would submit to the General Assembly and Governments as possible alternatives. He fully endorsed the proposals made in that connection by Mr. Barboza (2396th meeting), Mr. Mahiou (2395th meeting) and Mr. Al-Khasawneh (2394th meeting).

30. With regard to the question of the compatibility and conformity of the proposed institutional mechanism with the Charter of the United Nations, he would first answer the questions raised concerning the "constitutionality" of the role assigned to the General Assembly and the Security Council under draft article 19 of part two as proposed in the seventh report.

31. According to some speakers, the proposed mechanism would vest in either political body the power to make a binding decision concerning the jurisdiction of ICJ or the activation of the jurisdiction of the Court. But it was in no way his intention, in his proposed draft article 19, to vest any new power of that kind in the General Assembly or the Security Council. The compulsory jurisdiction of the Court would be created not by the "concern resolution" that either body would adopt on the initiative of any Member State of the United Nations which was party to the convention on responsibility, but by the convention itself. The "concern resolution" was conceived merely as a "triggering" condition which would simply bring into effect, in a given case, a jurisdictional link already created by the convention. It would not result in any alteration in the functions of the Assembly or the Council. In other words, paragraph 2 of draft article 19 was simply an arbitration clause which provided directly for the competence of the Court to settle by a judgement any dispute between contracting States over the existence/attribution of a crime.

32. Another "institutional" preoccupation had been manifested with regard to the qualified majority requirements set forth in paragraph 3 of draft article 19. As he saw it, a qualified majority should be required on account of the moral, political and legal gravity of an allegation of crime brought against a sovereign State. It did not, however, follow that the convention should dictate the conduct of the General Assembly or Security Council with regard to their respective voting procedures. Articles 18 (for the General Assembly) and 27 (for the Security Council) of the Charter of the United Nations would not be affected save in so far as either body was disposed to take account of the particular consequence that paragraph 2 of draft article 19 (once embodied in a convention on responsibility) would attribute to a "concern resolution". It would be implicit that, if the Assembly decided, in any given case, that an allegation of crime should not be dealt with as an important question, within the meaning of paragraph 2 of Article 18 of the Charter, a "concern resolution" within the meaning of draft article 19 would simply not come into being. If the resolution were adopted by a simple majority, under paragraph 3 of Article 18 of the Charter, the jurisdictional link created by draft article 19 would simply not become effective. The same applied to the qualified majority requirement referred to in paragraph 3 of draft article 19 concerning the Council.

33. In his view, therefore, the provisions proposed for a future convention on State responsibility would not be "constitutionally" incompatible with the Charter of the United Nations. Those provisions would be and would remain part and parcel of an instrument other than the Charter and would not contradict any of the provisions of the Charter. As he had already indicated, however, it would not be absolutely essential to refer expressly to those majority requirements in the draft articles. He nevertheless trusted that the Drafting Committee would examine closely the allegedly "constitutional" issue before deciding to remove those requirements from the text. They were particularly necessary, in his view, given the gravity of the consequences of a judgement by the Court relating to the existence/attribution of a crime.

34. Mr. Bennouna had raised certain questions concerning the "universalization" of the category of injured States and the mechanism of implementation envisaged in draft article 19. He had stated, first, that to consider all States as being injured by a crime implied that they were all entitled to resort to countermeasures. Consequently, the treaty would function for the entire community of nations, not just for the States parties. To that, his answer was that the difficulty arose in the case not only of crimes, but also of *erga omnes* delicts. Secondly, it was normal that the conclusion of a codification convention resulted in the coexistence, at least temporarily, of general and conventional rules, as had occurred in the case of the law of the sea and in other areas. At all events, the right of all injured States to take countermeasures was a matter of the norms and principles of general international law which the convention on responsibility would simply codify and clarify.

35. Mr. Bennouna had remarked, secondly, that a future convention on responsibility would create a situation of inequality where the participating States might be

[6] See 2391st meeting, footnotes 9 and 11.

the subject of a determination of international concern made by a political body—the General Assembly—some of whose members would not be parties to the convention and might therefore not be the subject of such a determination. While such a situation might indeed occur, its undesirable effects would be considerably reduced because of the guarantees provided by the proposed mechanism. First of all, any accused State which was the subject of a "concern resolution" by the Assembly would be entitled to refer the matter unilaterally to ICJ. Secondly, a "screening" of the allegations of crime, made by a qualified majority of the Assembly, would in any event offer better guarantees of objectivity than accusations made unilaterally by one State or a group of States outside any institutional framework. Thirdly, before rejecting the proposed mechanism because of that disadvantage, the other solutions should be considered carefully. The only existing alternatives were either unverified unilateral allegations emanating from one or more States or the pronouncement of the restricted political body entrusted with the implementation of Chapter VII of the Charter for purposes of collective security and not of State responsibility. As an alternative, Mr. Bennouna had suggested that some separate instrument should be adopted by the Assembly, by consensus or by a simple or two-thirds majority, which would overcome the difficulty in question. He personally, however, was unable to see how such a result could be achieved by an organ which, like the Assembly, was not empowered to enact binding rules. A treaty would be essential.

36. Some members of the Commission had, moreover, called into question the compatibility of the proposed mechanism with paragraph 1 of Article 12 of the Charter, under which the General Assembly must refrain from making any recommendation on disputes or situations with regard to which the Security Council was exercising, in respect of such dispute or situation, the functions assigned to it in the Charter. Without entering into a discussion of the precise interpretation to be given to that provision, he would recall that the Assembly had frequently ignored or circumvented that limitation, so much so that some commentators, and even the legal services of the United Nations, were wondering whether that limitation had not become largely obsolete. He would refer the members of the Commission to the relevant paragraphs of the works of Yehuda Blum,[7] Hailbronner and Klein[8] and P. Manin.[9]

37. In any event, his view, was that paragraph 2 of draft article 19 did not present any real incompatibility with paragraph 1 of Article 12 of the Charter. Were the General Assembly to be seized of an allegation of crime under paragraph 1 of draft article 19, at a time when the Security Council was dealing with a related or even with the same question under Chapters VI or VII of the Charter, the only consequence, even on a strict application of paragraph 1 of Article 12, would be to preclude the Assembly from proceeding to the adoption of a "concern resolution" under draft article 19 as a condition for a possible unilateral referral of the matter to the Court by the States for it to decide on the existence/attribution of a crime. That would not, however, preclude the adoption by the Council of a "concern resolution", for the purposes of paragraph 2 of article 19, thus paving the way for the States to seize the Court. If, on the other hand, neither body were to adopt a "concern resolution", the State or States referred to in paragraph 1 of article 19 would have to resign themselves to the fact that an essential element of the institutional mechanism had not materialized. That might mean either that the "community" so represented—*faute de mieux*—by the Assembly or the Council failed to acknowledge the existence of sufficient grounds for concern or that the "community" deemed that it was expedient to deal with the matter as one involving the maintenance of peace and security rather than as a matter of State responsibility. It therefore seemed to him, unless he was mistaken, that there was no real incompatibility between his proposed draft article 19 and Article 12 of the Charter.

38. Considerations that were similar in part applied to the delicate question of the relationship—and possible interference—of the proposed mechanism and the existing system of collective security. Despite the safeguard clause contained in draft article 20 proposed in his seventh report, some speakers had expressed the opinion that the proposed mechanism, and particularly draft article 19, would interfere with the powers of the Security Council and particularly with its powers under Chapter VII of the Charter.

39. Mr. Tomuschat (2392nd meeting), for instance, had pointed out that the reference to Chapter VI of the Charter in draft article 19 would not be appropriate in that a decision according to which a State was subjected to the jurisdiction of ICJ did not come within the scope of Chapter VI, but necessarily fell within the scope of Chapter VII. Furthermore, whenever international peace and security were at stake, any decision must be left, according to Mr. Tomuschat, to the Security Council. According to Mr. Rosenstock (ibid.), international crimes were always susceptible of endangering international peace and security for the maintenance of which the Council was responsible, especially with regard to the "special" measures necessary to meet the emergencies brought about by those crimes. In Mr. Rosenstock's opinion, that fact of life would strengthen the view that the Commission should refrain from dealing at all with the grave violations in question (and their consequences) within the context of the draft on State responsibility.

40. Accordingly, if he interpreted Mr. Rosenstock's and the other named members' remarks correctly, the Commission should confine itself to a mere "*renvoi*"—to borrow the terminology of private international law—of the matter to the system of collective security provided for in the Charter. Another alternative, according to Mr. Rosenstock, would be to adapt the concept of international crimes of States in such a manner as to turn it into a synonym of "threat to the peace". A similar, though not identical, vein seemed to characterize the views of certain members of the Commission who ap-

[7] Y. Z. Blum, *Eroding the United Nations Charter* (Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1993), pp. 103 *et seq.*

[8] K. Hailbronner and E. Klein, "Article 12", *The Charter of the United Nations: a commentary*, B. Simma, ed. (Oxford University Press, 1994), pp. 254 *et seq.*

[9] P. Manin, "Article 12, paragraphe 1", *La Charte des Nations Unies: commentaire article par article*, 2nd ed., J. P. Cot and A. Pellet, eds. (Economica, Paris, 1991), pp. 295 *et seq.*

plauded the current tendency of the Security Council to extend the concept of "threat to the peace" so as to encompass, actually or potentially, the whole spectrum of hypotheses contemplated in article 19 of part one. According to those members, the Commission should actually go along with that trend. It should refrain not only from including in its draft any provision that was not perfectly compatible with the *de lege lata* powers of the Council, but also from proposing any solutions which might be an obstacle to *de lege ferenda* developments that might be perceptible in the Council's broadened capacity for action which manifested itself since the end of the Cold War.

41. According to his own understanding of that view, the draft should contain a clause under which the law of State responsibility would "withdraw", yield as it were, whenever the dispute or situation to which any provision of that law should in principle apply might involve—or be connected with—one of the hypotheses with regard to which the Security Council might be called upon to exercise its functions under Chapter VII of the Charter. Mr. Pellet (2397th meeting) had even referred expressly to article 4 of part two, as adopted, according to which

> 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[10]

and Mr. Pellet had emphasized, in particular, the importance of that provision and the need, *inter alia*, for strict adherence to it in dealing with the consequences of crimes.

42. Before making some comments on the many difficult problems raised by certain members of the Commission, he wished to clarify a general and vital point relating to the interpretation of the Charter: a matter with regard to which his views differed from those of a few members. Of course, it was not the task of the Commission, as a subsidiary organ of the General Assembly, to interpret the Charter, except to the extent necessary for the performance of its functions. The principal organs themselves could do so only for the purposes of their functions, without such interpretation being binding on other bodies. Nevertheless, he was firmly convinced that the Commission could not give technical help to the General Assembly in the progressive development and codification of international law if it backed away from every problem involving the interpretation of the Charter. Moreover, it would be noted that the various speakers who maintained that the Commission was "not worthy" of such a task were the first to interpret the Charter in their own way and even to indicate in which direction the law of the Charter should develop.

43. Having said that, he wished to point out that it was not entirely correct to say that the subject-matter of paragraphs 1 and 2 of draft article 19 of part two belonged to Chapter VII of the Charter. Within the framework of his proposal, the General Assembly and the Security Council would not be operating in the area of "action with respect to threats to the peace, breaches of the peace, and acts of aggression" (the title of Chapter VII), but in that of the "pacific settlement of disputes" covered by Chapter VI. The reference to Chapter VI in paragraph 1 of draft article 19 had been included *ex abundanti cautela*. Likewise, it was not quite correct to say that, where a crime was likely to endanger international peace and security (or, in any case, where it represented, from the viewpoint of peace and security, one of the hypotheses or situations contemplated in Article 39 of the Charter), any decision with regard to that crime should be left to the Council. In view of the primary responsibility assigned to it by the Charter, the Council was competent to adopt any decision and, if necessary, take any action it deemed necessary "to maintain or restore international peace and security". That was the text of the Charter, not an interpretation. Consequently, it would be incorrect to assert, even where a crime was also considered to represent a threat to the peace, that the performance by the Council of its "constitutional" functions exhaustively settled the problems of the determination of the infringed rights and obligations, the attribution of the violation, and the ordinary and special consequences deriving therefrom. Whatever their interaction or overlapping with collective security, such problems belonged to the surely distinct area of State responsibility. Mr. Tomuschat himself had stated at the preceding session[11] that "he was very much in favour of a broad interpretation of the powers of the Security Council under Chapter VII", adding, however, that the "international peace and security" formula had certain limits and even that the Security Council had essentially been entrusted with police functions and its jurisdiction might at most have a preventive character, but under no circumstances that of a court of law.

44. The distinction in question led to the problem of the alleged prejudice that the Security Council's primary function might suffer from the fact that a State responsibility convention introduced a legal regime for the international crimes of States and, in particular, from any institutional mechanism that might be devised for the implementation of such a regime. Whatever the scope of the notion of a threat to the peace or the scope of the Council's powers and whatever the doctrinal or other opinions on current trends in the Council's practice, the regime proposed in draft articles 15 to 20 of part two did not represent any danger of such a prejudice. It was precisely in order to avert such a danger that article 20 had been devised, expressly to provide that the implementation of the consequences of international crimes of States through the proposed institutional mechanism did not hinder the decisions and actions by which the Council exercised the functions assigned to it by the Charter with regard to the maintenance of international peace and security.

45. He deemed it indispensable to reiterate that in the wording proposed by the previous Special Rapporteur and adopted by the Commission, article 4 of part two, referred to by Mr. Pellet, drastically subjected the articles on State responsibility, "as appropriate to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security".

[10] See 2391st meeting, footnote 9.

[11] See *Yearbook . . . 1994*, vol. I, 2343rd meeting.

46. For the reasons he had already explained in part, he was unable to accept Mr. Pellet's view on article 4. As he had stated on previous occasions and then again in his seventh report, article 4, as adopted, amounted to a highly problematic and, in his view, unacceptable attempt against the integrity of the law of State responsibility, which would be practically set aside or otherwise deprived of legal force whenever the Security Council exercised its functions relating to the maintenance of international peace and security. Any rights or obligations deriving from the law of State responsibility would thus be subordinated to the discretionary power of the Security Council. In his view, on the contrary, the law of State responsibility, including any mechanism for which it might provide, should remain in force and fully operative even in the case of delinquencies that might, for the distinct purposes of Chapter VII of the Charter, fall within the scope of the collective security system. The law of collective security should prevail only in the event of absolute incompatibility between the two systems and only in the measure strictly indispensable for the maintenance of international peace and security.

47. That principle meant that only the law of State responsibility should govern such issues as: (*a*) whether the alleged facts constituted an internationally wrongful act of a State; (*b*) whether that wrongful act qualified as a crime; (*c*) what consequences, special or supplementary, derived therefrom; and (*d*) what mechanisms or procedures should be involved in order to settle any disputes that might arise between the law-breaking State and any other State with respect to the implementation of the said consequences. The answers to all those questions, in so far as the law was concerned, would have to be sought in the rules embodied in any future State responsibility convention, as well as in any rules of general international law or treaty law relating to the kinds of behaviour qualified as internationally wrongful acts of States—whether characterized as delicts or crimes within the meaning of article 19 of part one of the draft.

48. It should be noted that Mr. Pellet's current adherence to article 4 was in striking contrast with the position he had taken at the preceding session[12] on the subject of the relationship between the law of State responsibility and the system of collective security. At that time, Mr. Pellet had stated that it was not for the Security Council to determine whether a particular action was or was not a crime; that the Council could, under the Charter, determine the existence of at least one crime, the crime of aggression, but was not required to define it as a crime; that its jurisdiction as far as other crimes were concerned could, at best, be only derived; and that its power to sanction derived not from the finding that a crime had been committed, but from the actual text of Chapter VII of the Charter. He had even added that the Charter regime should be set aside for the topic under consideration and had suggested that the Special Rapporteur might include a provision stating, in substance, that the draft articles were without prejudice to any powers that might be vested in the United Nations or certain regional bodies in the event of a threat to the peace, a breach of the peace or an act of aggression.

49. Those concerns were, he believed, exactly met by draft article 20 as proposed in his seventh report. Under that draft article, the provisions relating to the consequences of international crimes of States, or, for that matter, of any internationally wrongful act—including the institutional provisions contained in draft article 19 of part two—are without prejudice to any measures decided upon by the Security Council in the exercise of its functions under the provisions of the Charter or to the inherent right of self-defence as provided in Article 51 of the Charter.

50. It should be noted that the necessity to preserve the integrity and effectiveness of the law of State responsibility from any undue interference on the part of political bodies did not arise merely in conjunction with the regime of crimes or, in particular, with any mechanism devised for its implementation. Even if article 19 of part one disappeared from the draft and even if the "monstrous" delinquencies were finally equated with threats to the peace or breaches of the peace under Article 39 of the Charter, the problem of State responsibility would not be eliminated. There would still remain, first, the applicability of the law of State responsibility to delicts, which also included *erga omnes* delicts, and, secondly, the need to preserve, side by side with the regime of collective security, the applicability of the law of State responsibility to the "monstrous" wrongful acts in question, whatever name they were given. Getting rid of draft article 19 of part one or draft article 19 proposed for part two and having the law of State responsibility dealt with or set aside by political bodies would not solve the problem. The law of State responsibility, whether codified or not, existed in general international law. Besides, in the face of such difficult problems, no perfect solution could be found. In such a situation, it was necessary to accept the relativity of things and weigh the advantages against the disadvantages of those necessarily imperfect solutions. In any case, it would be unacceptable for the law of State responsibility to be set aside, as draft article 4 seemed to suggest, where an international crime of State gave rise to problems relating to the maintenance of international peace and security. It would be ironic for such a major weakening of the law of State responsibility to be promoted by the Commission, a body entrusted by the General Assembly with developing and codifying the law of State responsibility. The community of scholars of international law would find such a result most awkward.

51. In conformity with his interpretation of the results of the debate, as well as with the result of the informal consultations held during the week, he suggested that the Commission should refer to the Drafting Committee his proposals—together with all other proposals, written or oral, and statements made—so that the Drafting Committee might work on the topic at the next session in time for the Commission to acquit itself of its task of completing the consideration on first reading of the whole of parts two and three of the draft.

The meeting rose at 11.50 a.m.

[12] Ibid.