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Summary record of the 2436th meeting

Topic:
State responsibility

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arising out of State succession. In his view, the first "and" in the title was misleading.

The meeting rose at 11.15 a.m.

2436th MEETING

Wednesday, 5 June 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Bennoua, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrá Kramer, Mr. Yamada, Mr. Yankov.

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his eighth report on State responsibility (A/CN.4/476 and Add.1), said that he proposed to focus his statement on two closely interrelated issues with regard to which a further effort of clarification seemed indispensable before the Drafting Committee took up draft articles 15 to 20 referred to it at the forty-seventh session in 1995. The first issue was the relationship between the law of State responsibility, on the one hand, and the law of collective security, on the other; the second, that of the comparative merits of article 4 of part two and draft article 20. It was essential that the Commission should clearly indicate its position on those two issues, which pertained to the most crucial aspect of the development and codification of the law of State responsibility with regard not only to crimes, but also to ordinary internationally wrongful acts or, in other words, also with regard to delicts.

2. Before taking up those two problems, he wished to revert to the question of the Commission's competence to interpret the Charter of the United Nations. While it was true that the Commission was no more entitled than any other principal or subsidiary organ of the United Nations to produce Charter interpretations ex professo, it was bound to take Charter interpretation problems into account in the performance of its duties whenever the solution of such problems was relevant to the solution of the issues before it. Thus, Charter interpretation had rightly been called for when the Commission had debated the issue whether an international criminal court could be established by a resolution of a United Nations organ such as the General Assembly or the Security Council. It was therefore correct for the Commission to interpret the Charter also in the context of the consideration of the institutional aspects of the consequences of crimes. To his mind, there was not the shadow of a doubt that the two issues he had indicated involved problems of Charter interpretation; those who denied that fact were either disregarding legal logic or simply using a very poor pretext to thwart the discussion of important issues. In that connection, he referred the members of the Commission to the report of the Commission on the work of its forty-seventh session, which showed that some of the participants in the previous year's debate had gone well beyond a mere interpretation of the Charter. They had referred to, and had approved without reservation, extensive interpretations of the Charter implied in the practice of a political organ. By wondering whether, given the Council's liberal interpretation of a "threat to the peace" there was anything left for the Commission to consider in connection with the consequences of crimes, those members had admitted a fortiori that it would be perfectly appropriate for the Commission to deal with Charter interpretation in order to solve a problem that was before it.

3. Turning to the first of the two issues he had mentioned, namely, the relationship between the law of State responsibility and the law of collective security, he said that he was convinced of the necessity to keep them distinct. Considering the lack of institutionalization of the law of State responsibility and the relatively advanced degree of institutionalization, however imperfect, of the law of collective security, to bundle the two together de lege lata or de lege ferenda would inevitably lead to the subjection of the former to the latter. It would simply lead to the provisions and procedures relating to the maintenance of international peace and security being extended to the area of State responsibility.

4. At the forty-sixth and forty-seventh sessions, it had become clear that some members of the Commission were opposed to the preservation of article 19 of part one because they considered that the consequences of international crimes of States simply should not be covered by the draft on State responsibility. Their most important argument seemed to be that the acts qualified as examples of crimes in article 19 of part one were of such...
Chapter VI. Since any action of the Council under that the existence and attribution of such an act, pertained to obligations deriving from an internationally wrongful cil's role under Chapter VI and its role under Chapter the well-known distinction between the Security Coun-

7. First of all, the Charter of the United Nations made the well-known distinction between the Security Council's role under Chapter VI and its role under Chapter VII. Any issues between States relating to the rights and obligations deriving from an internationally wrongful act, obviously including, first and foremost, the issues of the existence and attribution of such an act, pertained to Chapter VI. Since any action of the Council under that Chapter was merely recommendatory and non-binding, it could not affect any rights and obligations deriving from the law of State responsibility. Any alteration, termination or suspension of such rights could therefore be done only by mutual agreement between the interested parties or through binding third-party procedures.

8. Chapter VII of the Charter was, of course, another matter, but, even in that case, there was a demarcation line inherent in the very nature of the function for the exercise of which binding decision powers were attributed to the Security Council by Chapter VII. The function in question was that of determining the existence of the conditions contemplated in Article 39 of the Charter and deciding on the measures to be applied by States or by the Organization in order to deal with a particular situation. That function extended neither to adjudication nor to law-making; still less did it extend to a constituent role. It followed that the Council had no more power under Chapter VII than under Chapter VI to terminate or alter the rights and obligations for States deriving from the law of State responsibility or from any other rules of international law. The fact remained, however, that the Council could, in the exercise of its powers for the restoration or preservation of peace and security, take decisions requiring a suspension or, as it were, a compression of the rights and obligations of the States involved, but only to the extent strictly necessary for the proper performance by the Council of its function relating to the maintenance of international peace and security.

9. The problem did not arise exclusively within the framework of international law of collective security. Limitations of a similar kind existed in national legal systems, which had constitutional or legislative rules that could be brought into play in the event of war, grave civil disorder or natural disaster. In such cases, the executive could proclaim a state of emergency, a state of siege or martial law to enable the Government to rule by decree and to suspend civil and political rights and liberties. It was an accepted principle, however, that exceptional measures of that kind affected individual or collective rights only to the extent and for the length of time strictly necessary to deal with the emergency situation. The restriction was even more evident in the case of ordinary police action intended to maintain public order or to prevent or prosecute criminal conduct.

10. A similar principle obviously applied, mutatis mutandis, to the effects on the rights and obligations of States of any decisions taken by the Security Council in the presence of a threat to the peace, a breach of the peace or an act of aggression. It followed that the subject-matter of the consequences of crimes—or, for that matter, of any internationally wrongful act—was not one which belonged de lege lata to the competence of the Council. The limitation of the Council's powers under Chapter VII was in fact to be drawn from the relevant Charter provisions even more convincingly—de lege lata—than would be the case within the framework of a national Constitution. National legal systems were inherently organized systems in which private parties were inherently subject to governmental power, whereas, in international society, organization was still the exception and any form of majority rule or "supra-ordination" was even more exceptional, especially in the
case of a "supra-ordination" of restricted bodies characterized by even more restrictively distributed voting rights. It followed that any function or power attributed to an international body, especially a body of the kind described, could not reasonably be interpreted extensively, especially if it meant attributing to the political body in question, essentially concerned with peacekeeping or peacemaking, law-making or adjudicatory functions which did not fall within its purview.

11. As a lawyer, he found it difficult to conceive of the United Nations membership having accepted a derogation from the principle of equality of States for such purposes. Yet that was precisely the daring proposition that the Commission was being asked to accept by those members who suggested that the consequences of crimes should be left to the exclusive care of the Security Council. For his part, he firmly believed that law-making had not been entrusted to the Council and that State responsibility for crimes, not to mention delicts, did not fall among the matters with which a political organ was legally empowered to deal. It would therefore be very strange if the Commission concluded otherwise.

12. All the arguments he had advanced in the context of lex lata applied a fortiori to lex ferenda. The notion that a political body, and particularly a restricted one, should be entrusted with the judicial or law-making powers necessary to deal with the international crimes of States was contrary to the most elementary principles of a civilized legal system. For the reasons already given in the sixth and seventh reports on State responsibility, it would be the negation of the very idea of law.

13. Referring to the question of the relative merits of article 4 of part two and of draft article 20 as possible ways and means by which the Commission might preserve the necessary distinction between the law of State responsibility and the law of collective security, he reiterated the view that the preservation of article 4 would involve an unacceptable subordination of the articles on State responsibility to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. Apart from the danger represented by the words "as appropriate," which seemed to imply that the question whether the law of State responsibility should bend before the law of collective security was a political matter to be settled in each specific case by the political organ concerned, the article seemed clearly to mean that any rights and obligations of States deriving from the provisions of part two of the draft and eventually from the corresponding provisions of a convention on State responsibility could be put in jeopardy or, in other words, terminated or altered as well as suspended by political decisions taken by the United Nations simply on the basis of the Charter provisions relating to the maintenance of international peace and security. Considering that the article, as formulated, referred to the legal consequences of an internationally wrongful act of a State set out in the provisions of part two of the draft, the caveat seemed to be intended to apply to delicts as well as to crimes. Considering also the close interrelationship between part two of the draft, on the one hand, and parts one and three on the other, it was likely that the impact of article 4 would extend to the whole future convention on State responsibility. Considering further that the provisions of the article in question would inevitably also affect the further development of the law of State responsibility, the subordination of that law to the law of collective security would undoubtedly be the result in the future and for an unlimited period of time.

14. On the other hand, draft article 20 aimed to preserve the integrity of the law of collective security without making it prevail over the law of State responsibility. To that end, he had inverted the order of the two sets of rules in that article with a view to ensuring, on the one hand, that the rules on State responsibility would not interfere with the Security Council's legitimate measures for the maintenance of international peace and security in conformity with the Charter and, on the other, that those rules would not be subject to derogation through decisions of the Council. Of course, he was also relying on the judicial competence attributed by draft article 19 of part two to ICJ for determining the existence/attribution of a crime. Considering the different kinds of relationships thereby established between the law of State responsibility and the law of collective security, he thought it possible to extend the impact of the draft article to internationally wrongful acts in general, as covered in part two, including delicts as well as crimes. Therefore, draft article 20 was by far preferable to article 4 in a convention on State responsibility because, whatever its shortcomings, it certainly respected the law of State responsibility to a greater extent.

15. He was, of course, aware that some members of the Commission preferred not to take a position on draft article 20, to leave article 4 as it stood and to postpone any decision on crimes or on the "institutional" aspects of their consequences until the second reading. That would not be a wise course. First of all, the postponement until second reading of the whole subject of crimes would leave a great gap in a draft whose provisions in part two and part three had been conceived solely for ordinary internationally wrongful acts. The "freeze," so to speak, on article 19 of part one would not only prejudice in a negative sense the very distinction between ordinary wrongful acts and the most serious among the erga omnes breaches of international law, but would also make manifest—article 19 of part one remaining, despite the freeze, in part one—a curious renunciation on the part of the Commission to dealing with those most serious breaches.

16. The postponement of the treatment of crimes would create, in particular, a very ambiguous situation with regard to the two issues which he had been addressing in his introduction to the eighth report. It must be realized that the solutions given to those two issues at the current session would affect the international law of State responsibility, for better or for worse, well before

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8 See 2434th meeting, footnote 5.
9 For the text, see Yearbook . . . 1995, vol. II (Part Two), footnote 117.
the Commission’s draft went through a diplomatic conference and eventually came into force as an international convention. Rightly or wrongly, not only scholars but also Governments drew conclusions from what the Commission accepted or rejected and even from what its members or special rapporteurs proposed or stated with regard to any issue. The same comment obviously applied to any inaction on the part of the Commission on given aspects of a draft. Thus, the postponement to second reading of the treatment of crimes in part two and part three—namely, the postponement of the consideration of problems covered by draft articles 15 to 20 as proposed at the preceding session—would not fail to have important consequences with regard to the application and development of the law of State responsibility. It would be indicative of the Commission’s views about the chances of survival of article 19 of part one as adopted on first reading and would also send a message to all concerned about the way in which the Commission envisaged the relationship between the law of State responsibility—as applicable especially, but not exclusively, to crimes—and the law of collective security. A postponement would also acquire a particularly grave significance in respect of the crucial issues—\emph{de lege lata} and \emph{de lege ferenda}—which scholars had been debating for several years with regard to the powers of international political and legal bodies. The mere postponement would create at least a temporary vacuum in the law of State responsibility. And just as nature, which abhors a vacuum, immediately sought to fill it, in the same way international political bodies would hasten to assert and exercise legally questionable powers in an area not belonging to them. Those bodies would wait neither the two years between the first and second readings nor the time that elapsed between the finalization of the draft, the diplomatic conference and the entry into force of a convention. They would quickly conclude that, at least in the view of the Commission, which after all was composed of jurists, the law of State responsibility gave way, so to speak, to the law of collective security or, more precisely, to a questionable competence of a political body in an area that only the law of State responsibility must naturally be called on to cover.

17. In conclusion, he said that the Commission was confronted with a crucial choice: between doing a distinguished service, or a disservice, to the preservation, development and codification of the law of international responsibility of States. The Commission would do a service to that law if it included, among the articles it adopted on first reading, provisions on the consequences of crimes—particularly with regard to the “institutional” problem—sufficient at least to eliminate any possibility of doubt, even during the period between the first and second readings, as to which law and which international body or bodies should concur—with States—in the implementation of those consequences. An essential element of the institutional aspect would have to envisage a significant judicial role for ICJ as an indispensable complement of any preliminary determination by the General Assembly or the Security Council on the existence of a crime. The Commission would, however, do a disservice to the law of State responsibility—not to mention other areas of international law—if it accepted, whether expressly or by implication, the baneful theory according to which the consequences of crimes were exclusively a matter of collective security to be handled exclusively by a political body. Considering the obvious impact of a mere postponement of the choice (a decision by which the Commission would practically "wash its hands" of a most crucial matter), he urged members not to yield to that temptation.

18. The Commission had a unique chance to make a significant contribution to placing both the development of the law of State responsibility and the law of collective security itself on a more acceptable track.

19. Mr. ROSENSTOCK said that the Special Rapporteur’s introduction had focused essentially on questions which had already been referred to the Drafting Committee. He had not heard any new arguments, but only misleading analogies which were not in support of the premises for which they had been asserted. He had, however, noted that, in his eighth report, the Special Rapporteur recognized the possibility of replacing the term "crimes" by the expression "internationally wrongful acts of a very serious nature and dimension", which would make it possible to avoid the inescapable penal implications and leave open the question whether the Commission was describing two qualitatively different categories or a continuum which went from minor delicts to a serious breach to acts of a very serious nature and dimension. He nevertheless wondered whether it made sense to adopt that new phrase in the framework of the consideration of part two on consequences without at the same time re-examining article 19 of part one. That was one of several reasons for taking the advice offered by Mr. Vereshchetin at the forty-sixth session to postpone consideration of the possible consequences of article 19 of part one until the second reading, when the Commission could consider article 19 and possible consequences together.\textsuperscript{10} As the Special Rapporteur favoured reconsidering article 4 of part two, he could not logically decline to do the same for article 19 of part one, which, in several respects, had the same status.

20. Without wishing to embark on an in-depth consideration of the arguments set forth in the eighth report to support the text of draft articles 18 and 19 of part two, he drew attention to the subjective nature of the Special Rapporteur’s analysis of what constituted \textit{lex lata}. For example, his argument that a recommendation of the General Assembly did not violate Article 12 of the Charter of the United Nations flew in the face of the meaning and intent of the text. That the Special Rapporteur should maintain, in support of that analysis, that Article 12 might not always have been strictly observed was a trifle astonishing, in particular as an argument before the Commission. Article 2, paragraphs 2, 4 and 5, as well as Article 55 of the Charter had been violated more often than Article 12. It was to be hoped that the Commission would not be party to the view that the violation of an article established \textit{lex lata}, thereby permitting a conduct in conflict with the said article.

21. To show that those proposals did not infringe Article 24 of the Charter, the Special Rapporteur asserted that certain acts, which he called crimes, did not consti-
tute threats to the peace or even situations that could lead to international friction. He considered it useful in that connection to quote from the statement made by the President of the Security Council on 31 January 1992:

The absence of war and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.°

22. The arguments put forward by the Special Rapporteur were not convincing; furthermore, it was difficult to take a position on the issue as long as the Commission did not know with certainty whether it was talking about crimes or internationally wrongful acts of a very serious nature and dimension. It was certainly not reasonable to brush aside the problem, as the Special Rapporteur did in one paragraph of chapter I of his eighth report, by airily asserting that the scope of the concept of so-called crime was lex lata, because the evidence to support such a conclusion did not exist. A statement made in the same paragraph that the role assigned to the Security Council by the Charter constituted lex ferenda was only slightly more breathtaking. The Special Rapporteur’s arguments that his proposals were not incompatible with Articles 18, 27 and 39 of the Charter were no more convincing at the current session than they had been at the preceding one. His idea of creating, in the context of the United Nations, by separate treaty, regimes incompatible with those Articles of the Charter, among others, was no more appealing as a matter of policy than it was as a matter of law. Nowhere were the members of the Commission reassured that that would not lead to a major weakening of the system, which, although imperfect, was the best as yet devised for dealing with issues of collective security. It seemed grossly ambitious, to say the least, to attempt to use the topic of State responsibility to amend the Charter, de jure or de facto, whether for the sake of justice and equality or for more pedestrian and academic reasons and preoccupations.

23. Concerning the arguments deployed by the Special Rapporteur to put into question the existing text of article 4 of part two, the Drafting Committee might consider their validity if the Commission decided to refer the question back to it. Consideration should also be given to whether reopening already adopted articles was consistent with the Commission’s commitment to conclude the first reading of the draft articles on State responsibility at the current session. The elaborate and cumbersome regime contained in the proposed articles posed other problems which the Special Rapporteur did not seem to address. Did it make sense to postulate a regime based on States’ accepting the jurisdiction of ICJ for the extremely sensitive area of so-called crimes of State? It was one thing to ask States to go a bit further than they ever had before. It was quite another to require a quantum leap in an area in which there was a demonstrated lack of willingness to take small steps. There were also other practical problems with the proposed system, to which Mr. Bowett had referred at the preceding session. More generally, was it realistic to expect that States would accept greater restrictions on their response by way of a countermeasure to extremely serious acts than to relatively minor ones? Was the coherence of the regime for countermeasures enhanced by borrowing the notion of interim measures from an entirely different context? Finally, speaking of crimes by States undermined the notion of individual responsibility and thus reduced the effect of the Commission’s work on a draft statute for an international criminal court and the draft Code of Crimes against the Peace and Security of Mankind.

24. He reserved the right to return to chapter II of the Special Rapporteur’s eighth report, which he had only been able to peruse. But he was against the idea of reconsidering article 12 of part two. If there was any reason to look again, a third time, at article 12, it was not to raise the same tired issues again, but perhaps to consider in plenary whether part three provisionally adopted by the Commission at the preceding session made the article unnecessary.

25. Mr. VILLAGRÁN KRAMER said that the Commission’s attitude towards the conclusion of its work of codification and progressive development of the law on State responsibility was very positive. The Commission was not sidestepping the subject of crimes or the consequences that flowed from them at the international level. In the case of lex lata, there were no provisions, though the Commission could produce a text. The question, however, was how far it would venture into the field of lex ferenda.

26. The question of crimes was, of course, not only extremely important, but also highly sensitive. In the 1960s and 1970s, it had been set in an ideological context. Soviet writers had submitted proposals with a view to placing the discussion in that context and the then Special Rapporteur, Mr. Ago, had put forward ideas to avoid creating an ideological conflict in the law and in the Commission. The question had now taken on another dimension. It was clear that there were jus cogens rules which, though not themselves erga omnes, had erga omnes effects: a breach of them could result in an international crime, namely, a serious act prejudicial to an essential interest of the community of States. In that regard, he agreed that an international crime produced erga omnes effects and not only with regard to the directly injured State. Consequently, the problem for jurists was now no longer to ask whether international crimes existed since the debate had moved on. It was now a question of conceptualization.

27. Many jurists from third world countries drew a distinction between the Charter of the United Nations prior to General Assembly resolution 377 (V), entitled “Uniting for peace”, and the Charter after that resolution. According to those jurists, there had been a de facto revision of the Charter which had not taken the form of inflexible rules or of a text revising it. It was a de facto revision that had taken shape over time.

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11 See Official Records of the Security Council, three thousand and forty-sixth meeting.
13 For the text of the articles of part three and the annex thereto provisionally adopted by the Commission at its forty-seventh session, see Yearbook . . . 1995, vol. II (Part Two), chap. IV, sect. C.
28. In 1992, the sceptics had had a big shock when the Security Council had taken far-reaching decisions with respect to Iraq involving sanctions and restrictions on its territorial rights, serious political limitations and prohibitions within its territory, more particularly with regard to the right or otherwise to manufacture weapons, in other words, restrictions on its sovereignty.

29. Nowadays, the debate, which could not be ignored, was about the Security Council's powers. Reisman, a Yale University professor, had concluded, in an analysis of the decision handed down by ICJ in the cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America), that the Council had powers under which it could suspend the effects of an international treaty. The Council therefore filled an extraordinary role of which the Commission must be aware.

30. He would invite members to ponder what their attitude would be if an international treaty embodied provisions similar to article 19 of part one or article 5 or to draft articles 15 to 20 of part two of the draft, if they themselves were responsible for advising the representative of their country on the Security Council. How would they answer the question whether the Council had fewer powers or whether it retained the powers vested in it under the Charter in the event of a threat to the peace, a breach of the peace or an act of aggression? Would any restrictions be of a legal, political or other kind?

31. As to the verification of legality to which the Security Council's acts might be subject, he would refer to an article by Mr. Bowett which had appeared the previous year and from which it was apparent that the advisory opinions of ICJ were the only possible way of verifying legality. In theory, therefore, it was not impossible that the Council might unanimously generate a situation of "agreed" illegality. Consequently, in his view, the law of the Charter could be applied and borne in mind, but not changed.

32. The term "crime" was not important in itself and the Commission could consider another phrase such as "a heinous wrongful act", as proposed by Mr. Pellet at the preceding session. Above all, it was important to complete the codification of lex lata. If the Commission could start on the de lege ferenda exercise as well, that was to be welcomed.

33. Mr. BOWETT said that he fully shared the premise from which the Special Rapporteur started, namely, that the Security Council could at best ask Member States to suspend the exercise of their rights in the interests of international peace and security and that it could not alter, modify or negate those rights. The question therefore was which organ would be empowered to determine whether a State had committed a crime. There were three possible choices. The first was to create a new body for the purpose, but that choice had little chance of success. The second choice was to have recourse to the Council. The advantage there was that the Council already had competence under the Charter of the United Nations and that its intervention did not therefore require the consent of States. The drawback was that the Council was a political body. Sharing, as he did, all of the Special Rapporteur's misgivings about conferring on a political organ responsibility for deciding whether a State had committed a crime, he had proposed, at the preceding session, that that task should be entrusted to a commission of jurists. The Special Rapporteur, for his part, had opted for the third choice, which was to have recourse to ICJ. As the Court had jurisdiction only if States accepted its jurisdiction, the Special Rapporteur proposed that such consent should stem from ratification of the future convention. Obviously, that solution would be likely to deter very many States from signing the convention, which would remain a dead letter.

34. Mr. PELLET said that the Special Rapporteur had rightly taken the view that the distinction between crimes and delicts should be retained, that that distinction was now enshrined in positive law and that it would be unwise to postpone codifying the rules applicable to crimes until later. The Special Rapporteur had, however, been wrong to try to link the law of State responsibility to the law of collective security at any cost. The two aspects were perhaps linked, but, in the case of the topic under consideration, one had to deal with the first while avoiding any encroachment on the second; in other words, a satisfactory form of wording for article 4 and, if necessary, for draft article 20 had to be found. The system under the Charter of the United Nations was a given whose mechanisms could be used or ignored, but it would be very inadvisable to try to change it.

35. Furthermore, the Special Rapporteur had drawn numerous analogies with internal law. Such analogies were often misleading, but, if they really had to be made, it was on the Charter of the United Nations that constitutional value should be conferred and not, as the Special Rapporteur did, on the law of the international responsibility of States which would have more in common with the law of civil liability. The Special Rapporteur's approach to the actual process of arriving at legal norms, which he regarded as existing per se, was also surprising. Law was a product of politics and its processes, a fact that no desire for doctrinal purity could alter. National law was made by parliaments, and international law by States within bodies such as the General Assembly and the Security Council but, above all, at diplomatic conferences. That law was made according to rules which, in the case of the Assembly and the Council, were laid down in the Charter. Thus, the Special Rapporteur had managed to weaken his own argument by blaming the system under the Charter and making the mistake of latching an institutional provision onto a legal provision in the draft articles. When the Commission had included jus cogens in articles 53 and 64 of the Vienna Convention on the Law of Treaties, it had done precisely what had to be done, namely, it had alerted the international community to a problem and tried to solve it. It should do the same in the case of crimes, that is to say, it should

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show that international crimes of States—or, if one wanted to avoid the word "crime"—particularly serious violations of a kind that were different from mere delicts—did indeed exist, show what the consequences were and regulate the matter conclusively. If, once that task had been carried out, an institutional provision proved to be necessary, that would be the time to deal with the matter.

36. Mr. IDRIS said that he would like to seek serious clarification on two points. First, had the Special Rapporteur considered any alternative formulation for the expression "crimes of States", since there was a fairly substantial body of opinion in the Commission that the use of the word "crime" was neither necessary nor appropriate and that it was not simply a matter, as the Special Rapporteur stated, of a purely "terminological problem"? The second point concerned the very serious issues to which the proposals made by the Special Rapporteur in draft article 19 of part two gave rise since they tended to involve the General Assembly, the Security Council and ICJ in finding that a State had committed a crime. According to the Special Rapporteur, those proposals would apply only as between the parties to the future convention on State responsibility and would not affect obligations under the Charter. The question then was whether the proposals were consistent with the responsibilities and relations that should exist as between the Assembly, the Council and the Court. Moreover, if a matter were referred to the Assembly or the Council, would that not be tantamount to introducing a procedure other than the one envisaged under the Charter? Lastly, if the reply to the question whether there had been a crime was in the affirmative, would those proposals not have the serious consequences of a use of force contrary to the Charter and its provisions on domestic jurisdiction? It was crucial to clarify those extremely important points.

37. Mr. LUKASHUK said that a considerable number of norms of international law had been produced over the past 10 years, but there were still gaps so far as mechanisms for applying them were concerned. The adoption of the draft articles on State responsibility would mark a significant step forward, particularly since those articles were already regarded as norms of international law: provisions among those examined by the Commission had, for example, been invoked in the Rainbow Warrior case. All those considerations, along with the General Assembly resolutions, thus vested the Commission with special responsibility for completing its consideration of the draft articles in question on first reading. The difficulties to which the consideration of those articles had given rise within the Commission was an indication of the difficulties that their consideration by Member States in the Sixth Committee would encounter. But the fact that States were apparently still not ready to take strong measures to improve the application of international law should not prevent the Commission, as a body of independent experts, from fulfilling its task of strengthening international law and the draft articles were on the whole likely to help it do so. None the less, they obviously could not be accepted universally without some compromise on a number of provisions.

38. The concept of crimes of States was fairly widespread throughout the legal literature and its use should in principle have no adverse effects. "Criminalization" certainly existed in international law, as was attested to by the settlement that had followed the Second World War and the measures taken against Iraq. Since the Commission’s main task was to save such an important draft, however, the word "crime" should perhaps be replaced by another form of wording such as "particularly serious violation". As to the powers and functions of the General Assembly and Security Council, they gave rise to special political and legal problems that affected the constitution of the international community, namely, the Charter of the United Nations. At the very least, therefore, it was a matter of a broad interpretation of the Charter. The Commission was entitled to interpret the Charter, but must bear in mind the possibilities of that interpretation being accepted by States. If no agreement could be reached, the draft articles should perhaps be referred to the Assembly in the form of annexes. In more practical terms, the task of the Commission, and of the Sixth Committee, would be facilitated if all the draft articles on State responsibility, which constituted a whole, were grouped together in a single document. He congratulated the Special Rapporteur and thanked him for having carried out a colossal task and made a significant contribution to the progressive development of international law.

39. Mr. EIRIKSSON said that his basic premise was that the Commission should not revisit part one of the draft articles, still less article 19. As he had explained at the previous session, he had no difficulty with the concept of crime of States or in calling that kind of crime a "crime". The Special Rapporteur should be congratulated on having done exactly what he had been asked to do, namely, on having devised a system to complete the preparation of a complete set of draft articles. He saw no difficulty in following what some might regard as a radical path, although he realized that States might not ultimately follow it. But it would be for them to tell the Commission so at some later stage.

40. As to the links between politics and law, and specifically the role of the Security Council, he would once again voice his dissatisfaction with some of the paths followed by the Council. As he had already stated in the context of the draft Code, while there had to be a link between the law and the activities of the Security Council, it was for some other body to determine what the law was. So far as the link between judicial settlement and countermeasures was concerned, there was no need to revisit article 12 of part two otherwise than to see if some of its provisions had not become pointless as a result of the adoption of part three of the draft articles.

41. The Commission had adopted part three of the draft articles, article 5, paragraph 2, of which provided for compulsory arbitration in the event of countermeasures. It would perhaps be advisable to extend that concept of compulsory arbitration to any case in which a crime under article 19 of part one was committed and to

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16 Ruling of 6 July 1986 by the Secretary-General (United Nations, Reports of International Arbitral Awards, vol. XIX (Sales No. E/F.90.V.7), pp. 197 et seq.).
elaborate some mechanism to that effect instead of considering machinery such as that contemplated by the Special Rapporteur or Mr. Bowett. In the circumstances, he therefore proposed that crimes should be the subject of a separate section in part two. The section would start with the articles following article 6 bis and would specify which provisions in that article were not applicable to State crimes. As article 4 of part two would remain as drafted, part two would include an article similar to draft article 18 proposed by the current Special Rapporteur and even to former article 14 proposed by the previous Special Rapporteur, Mr. Riphagen,17 as well as a specific reference to compulsory arbitration if it was stated that a crime had been committed.

42. Mr. CRAWFORD said that, if it was to be able to complete its first reading of the draft articles at the current session, the Commission should focus on points of agreement, rather than on the differences of opinion that continued to arise.

43. To begin with, it was accepted that the Commission could not, directly or indirectly, amend or seek to amend the Charter of the United Nations. In a number of ways the Charter was lex specialis. The Commission could not tamper with it. Rather, its concern should be with the lex generalis of State responsibility. State responsibility formed a set of rules of general international law applicable unless the provisions of the Charter were duly applied to the contrary in a given case. Secondly, the Commission could not allow itself to reopen the debate on part one of the draft articles at the current late stage, since no agreement would be reached.

44. Thirdly, flexibility was called for. Regarding the nomenclature of serious breaches of international law, it seemed entirely possible for the Commission to include in the commentary to part two, and also of course in its report to the General Assembly, an explanatory note in which it would make it clear that the issue of terminology was left open and that it would return to it when it considered the draft articles, including, of course, article 19 of part one, on second reading. It was a fact that the terminology used needed reconsideration, given that different views were held and that different views were possible. For example, the French word délit seemed to have penal overtones that its English equivalent "tort" did not have. It could be clearly seen from the commentary to article 19 of part one 18 that the Commission had not proceeded from an acceptance of the concept of "crimes" to an acceptance of the concept of "different consequences". Rather, the opposite was true: it had come to the conclusion that there were some acts of a qualitatively different character, which it had called "crimes"—a word which, furthermore, was placed in quotation marks in the bulk of the commentary.

45. It seemed that there was a category of most serious violations of fundamental norms of international law and the Commission must therefore not hesitate to make distinctions. It was significant that, in codifying the law of treaties, it had made a categorical distinction between jus cogens norms, for the application and interpretation of which there was compulsory jurisdiction, and non-jus cogens norms.

46. At the current session the Commission must elaborate a set of consequences of serious violations of international law. In that regard, article 19 of part one, by the distinction it established between "international crimes" and "international delicts", raised practical as well as conceptual difficulties which should be reconsidered in the context of part three of the draft.

47. It must of course be borne in mind that, if the State became subject to adverse consequences arising specifically from an accusation of international criminality and which would not otherwise have arisen, then, as a general principle of law, that State had a right to clear its name. Some additional provision for jurisdiction was therefore required, which should leave aside the question of the Security Council. The Commission could reach a compromise, but only if it considered its work on the topic as a continuum with a distinction between the first and second readings of the draft articles.

48. Mr. PAMBOU-TCIVOUNDA, offering his preliminary comments on the eighth report of the Special Rapporteur, said that the debate on the topic had been going on for so long, with no end in sight, quite simply because the Commission wanted to close its eyes to the fact that the debate was basically addressed to itself. For it was the Commission that was at the origin of what had now become an accepted fact, rather than a working hypothesis, for the construction of a comprehensive system of State responsibility. And if its work was to be positive and objective, no methodological misunderstanding must be allowed to arise from the tacit adoption of an approach based on the assumption that the concept of "crime" had a political connotation. That would be tantamount to giving the concept of "international crime" a political content.

49. The Commission would be making a mistake if it adopted such an assumption because, by so doing, it would completely reverse the approach it had hitherto followed; it would call itself into question, particularly where its role in the codification of the law of State responsibility was concerned. On the other hand, by avoiding that wrong turn, by not reopening the debate on part one of the draft as adopted on first reading and by opting for a realistic and coherent approach, it would succeed in formulating substantive rules on the topic, while providing for procedural rules to implement the substantive rules. The temptation to favour the political aspect of the concept of "State crime" would then become less appealing. Were it to proceed in any other manner, the Commission would unduly favour the Security Council, and, by the same token, the political dimension. And it was impossible to abandon a considerable segment of the law of responsibility to that merely political dimension.

50. In fact, no provision of the Charter of the United Nations, either in Chapter VII or elsewhere, assigned jurisdiction to the General Assembly or the Security Council in matters of international responsibility of States. However, an instrument that had the same value as the Charter, namely, the Statute of ICJ, contained a provi-
sion, its Article 36, which gave the Court jurisdiction as to the substance over disputes relating to responsibility. In its deliberations concerning the machinery to be established, the Commission must not forget that competence of the Court. He wondered whether, by striving to overlook the role of the Court, the Special Rapporteur was not attempting to circumvent the problems posed by its current functioning. The Special Rapporteur had thus proposed a two-track system, comprising a political track to safeguard sovereignties by means of the conciliation mechanism, and a legal track enabling the Court to intervene on the procedure and the merits. In so doing, the Special Rapporteur had not strayed into futile digressions: he was, quite rightly, confronting the Commission with its responsibilities. It was now for the Commission to assume those responsibilities.

51. Mr. TOMUSCHAT said that most of the issues raised by the Special Rapporteur in his eighth report had already been discussed at the Commission’s preceding session. That report, or at least chapter I, contained no absolutely new element.

52. He agreed that the notion of “international crime” was firmly established and that there was no need to revisit part one before having completed the first reading of part two. He also agreed that the word “crime” had some criminal connotation and he associated himself with other members of the Commission who had favoured the use of a different word. In that regard, he could accept Mr. Crawford’s proposal concerning the insertion of an explanatory note in the commentary and in the Commission’s report to the General Assembly.

53. The debate that had just taken place did not augur well for the success of the Commission’s work, for time was running out and consensus should be sought. A special rapporteur was a servant of the Commission—though not its slave. It was not his task to defend law and justice as he saw fit; rather, he should join the mainstream of the Commission’s thinking, assuming that such a mainstream could be identified. In that regard, it was good that Mr. Crawford had emphasized the points of agreement among members.

54. The main question was whether some special machinery was needed in view of the particularly grave consequences of international crimes. Normally, those consequences were dealt with in a purely bilateral framework. If consequences were very harsh, when the interests of the international community as a whole were affected, then the international community must inevitably step in. And that was the difficulty. It could not be left to individual member States to make determinations about the existence of crimes and the consequences that resulted therefrom. And in that regard, none of the proposals before the Commission was fully persuasive. But the Commission could resort to other models: for example, there were references in the United Nations Convention on the Law of the Sea to competent international bodies—in other words, bodies other than those of the United Nations system, in addition to the Security Council and the General Assembly.

55. It was clear that the Commission could not amend the Charter of the United Nations or confer on institutions powers that were not provided for therein. The system of State responsibility and the system of collective security inevitably overlapped and keeping the two systems separate was not as easy as Mr. Pellet seemed to think.

56. Any major breach of an international obligation automatically had political overtones. Consequently, those members of the Commission who claimed that ICJ had the last word were wrong. The Court could not intervene in all matters between States: its action was dependent on the consent of the parties. On the other hand, the Security Council could, independently of the parties, intervene in any dispute between Member States, and that was the difficulty.

57. Mr. HE said it was not appropriate at the current stage to reopen the debate on an issue that had been under consideration for a number of years. He thanked the Special Rapporteur for his work, although he was not convinced by the arguments put forward in the eighth report, and particularly by the notion of a “State crime”. Having already had occasion to state his position at earlier sessions, he reserved his comments on the many interesting points raised in the report, particularly on the institutional aspect of State responsibility and the relationship between the law of State responsibility and the law of collective security as embodied in the United Nations system in the framework of the Charter of the United Nations, which there could be no question of amending.

58. He drew attention to the fact that, while it was true that in its resolution 50/45 the General Assembly had urged the Commission to complete at the current session its first reading of the draft articles on State responsibility, it had also urged it to take account of the divergent views that nevertheless existed both in the Commission and in the Sixth Committee. Mr. Crawford’s proposal was thus worthy of consideration, both by the Commission and by the Drafting Committee.

59. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he found it difficult to understand the assertion made by some members, and by Mr. Tomuschat in particular, that his eighth report added nothing new to the seventh. On the contrary, it answered, point by point, the debate that the Commission had held on the topic at its preceding session. That debate had certainly not been complete; it had been disturbed and disrupted by the attempts of a minority of members of the Commission to postpone consideration of article 19 of part one or even to get rid of that article altogether.

60. The question of international crimes of States clearly did not seem to be of real interest to the majority of the members of the Commission, who were either absent or were unwilling to speak on a question that he personally regarded as extremely important for the development and codification of the law of State responsibility.

61. He would have hoped that, after the incomplete debate at the preceding session, the Commission would at least have made some attempt to conclude that debate at
the current session. That, however, did not seem to be
the wish of the Commission.

62. He believed he must thus conclude that his views
on questions he regarded as essential were not shared by
the Commission. Consequently, he considered that the
Commission should now appoint, if it deemed it neces-
sary to do so, a new special rapporteur on the topic of
State responsibility. He intended to resign from the post
of Special Rapporteur with which, on a proposal by Mr.
Reuter, the Commission had entrusted him in 1987. He
believed he had said, done and written everything he
should on the question of State responsibility. In his
view, it was high time for him to stop resisting the views
that the Commission seemed to prefer and for someone
else to take his place.

63. The CHAIRMAN expressed the hope that the Spe-
cial Rapporteur would reconsider his decision.

The meeting rose at 1.05 p.m.

2437th MEETING

Thursday, 6 June 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Ben-
nouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Craw-
ford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba,
Mr. Güney, Mr. He, Mr. Idris, Mr. Kabati, Mr. Luka-
shuk, Mr. Mikulka, Mr. Pambou-Tchivouna, Mr. Pellet,
Mr. Sreenivas Rao, Mr. Razafindralambo, Mr. Rosen-
stock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrá
Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security
of Mankind (continued)* (A/CN.4/L.472, sect. A, A/
and 3, ILC(XLVIII)/DC/CRD.3)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING

1. The CHAIRMAN invited the Commission to con-
sider, article by article, the text of the 18 draft articles of
the draft Code of Crimes against the Peace and Security
of Mankind adopted by the Drafting Committee on sec-

2. Mr. CALERO RODRIGUES (Chairman of the
Drafting Committee), introducing the draft articles
adopted by the Drafting Committee on second reading,
said that the Commission had decided at its previous ses-
tion to allocate at least three weeks of concentrated work
for the Drafting Committee in order to achieve the goals
it had set for the current quinquennium, of which it was
now in the final year. The Commission, at its current
session, had agreed with that plan of work for the Draft-
ing Committee. As a result, the Drafting Committee had
held 23 meetings from 7 to 31 May, which had necessi-
tated intensive work for its members, for the Special
Rapporteur and, of course, for the secretariat. He there-
fore wished to express his wholehearted thanks to all
those involved, for their hard work, spirit of cooperation
and discipline in attending all 23 meetings.

3. At the forty-seventh session in 1995, the Drafting
Committee had provisionally completed its considera-
tion, on second reading, of articles 1, 2, 4 to 6 bis, 8 to
13, 15 and 19. The Commission had taken no action on
those articles, instead deferring action to the current ses-
tion, when it could have all the articles of the draft
Code.3 In order to facilitate the Commission’s work, all
the articles of the draft Code adopted by the Drafting
Committee at the preceding and the present sessions
were reproduced in document A/CN.4/L.522 and Corr. 1
(reproduced in para. 7 below).

4. At the previous session, the then Chairman of the
Drafting Committee, Mr. Yankov, had indicated that the
report was of a tentative character and that some of the
articles provisionally adopted at that time might need to
be looked at again or modified in the light of the defini-
tion of crimes. The current Drafting Committee had
modified the text of some of the articles adopted in 1995
precisely for the reasons anticipated by Mr. Yankov.
He would indicate those changes when introducing the
respective articles.

5. In his statement at the forty-seventh session, the pre-
vious Chairman of the Drafting Committee had also ex-
plained that the work of the Drafting Committee had
been much more substantive than the usual second read-
ing exercises, owing to a variety of factors. First, the
Commission had deliberately deferred some important
issues to the second reading. Secondly, the commen-
taries adopted for the articles on first reading had indi-
cated that on a number of issues the views of members
of the Commission were divided and that those issues
would be reconsidered on second reading. Thirdly, the
mandate given to the Drafting Committee by the Com-
mission had implied possibly major changes in the scope
of the draft and the structure of a number of articles. In
addition, when, at the previous session, the Commission
had referred to the Drafting Committee the articles on
four crimes, namely, aggression, genocide, systematic or

* Resumed from the 2431st meeting.
1 For the text of the draft articles provisionally adopted on first
reading, see Yearbook... 1991, vol. II (Part Two), pp. 94 et seq.
3 For the texts of the draft articles and the statement of the then
Chairman of the Drafting Committee, see Yearbook... 1995, vol. I,
2408th meeting; see also Yearbook... 1995, vol. II (Part Two),
paras. 142-143.