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**Summary record of the 2393rd meeting**

Topic:
**<multiple topics>**

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63. Accordingly, he was pleading not only for the word "crime" to be maintained but he also thought that the real problem lay in the word "delict", which also had a negative, criminal law connotation, whereas, in contrast to international crimes, delicts did not involve any kind of notion of fault and did not call for any particular moral rebuke. Paradoxically, therefore, the problem was not the word "crime", but rather the word "delict", which, paired with crime, created the impression that the Commission had an entirely criminal law concept of international responsibility, something which would be quite wrong.

64. Were there grounds for finding a term other than "delict" to designate internationally wrongful acts that were not crimes? In all honesty, he thought that it was too late and that the distinction between crime and delict had taken an established place in international law, that the two words were commonly used by internationalists and that care should be taken to avoid systematically bearing in mind the analogy with internal law. In both cases, notions with specific meanings in international law were involved and the time had come to put an end to that terminological issue.

65. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked Mr. Pellet for his penetrating remarks, but pointed out that in his report, the word "democratic" was placed in quotation marks, which indicated that he had been using the term advisedly. Words had to be understood in context, and in relative terms. He agreed that the concept of democracy could not be transposed entirely intact from the national to the international context. That did not imply, however, that it was inappropriate to stress that an organ such as the General Assembly was more "representative" than one of limited composition. That difference should not be ignored.

66. Mr. ROSENSTOCK said the problem of how the terms "democratic" and "crime" were defined could not be pushed aside by saying that words meant what one wanted them to mean in a given situation.

*The meeting rose at 12.55 p.m.*

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## 2393rd MEETING

*Thursday, 1 June 1995, at 10.20 a.m.*

*Chairman*: Mr. Pemmaraju Sreenivasa RAO

*Present*: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 2]

1. The CHAIRMAN reported on the Enlarged Bureau's discussions of the organization of the Commission's work on the following agenda items: "International liability for injurious consequences arising out of acts not prohibited by international law" and "State succession and its impact on the nationality of natural and legal persons".

2. With regard to the first item, the Enlarged Bureau recommended that the Commission should hold only two plenary meetings so that the Drafting Committee could continue and speed up the consideration of the draft articles on the topic begun at the preceding session. In keeping with the Special Rapporteur's wishes, a working group would also be established whose composition would be announced at a later date and which would help him consolidate and systematize his proposals. The consideration of the topic would thus take place in plenary (9 and 13 June), in the Drafting Committee (for the draft articles) and in a working group.

*It was so decided.*

3. The CHAIRMAN, referring to the second item, said that the Enlarged Bureau recommended that a working group should be established, to be chaired by the Special Rapporteur on the topic and composed of the following members of the Commission: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. Crawford, Mr. Fomba, Mr. Idris, Mr. Lukashuk, Mr. Mikulka, Mr. Rosenstock, Mr. Szekely, Mr. Tomuschat, Mr. Vargas Carreño and Mr. Yamada, it being understood that the working group would be open to the other members of the Commission who wished to contribute to its work on an occasional basis.

*It was so decided.*

4. The CHAIRMAN said that the Enlarged Bureau also recommended that the working group so created, which would meet on 8 and 12 June in the afternoon, 14 and 15 June in the morning and 20 June in the afternoon, should be instructed to identify questions raised by the topic and to classify them according to their relationship with it, to advise the Commission on questions that it would do well to consider first in view of contemporary concerns and to suggest a timetable to that effect. It would then be up to the General Assembly to give the Commission instructions for its further work on the topic.

*It was so decided.*

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

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET said that the successive reports of the Special Rapporteur on State responsibility had consist-

* Resumed from the 2379th meeting.

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

ently provoked impassioned responses, whether positive or negative. That could easily be explained by the nature of the topic, which was at the very core of international law, a State's responsibility being what ensured that international law was, in fact, law, but also by the nature of the reports themselves, which were an expression not only of the Special Rapporteur's skills and wisdom, but also his convictions, those of a man who wanted a better world and who tried to work to that end by improving international law. The seventh report (A/CN.4/469 and Add.1 and 2) was no exception to that rule. A number of members of the Commission, some emphatically and others with moderation, had drawn attention to the parts of the Special Rapporteur's proposals that they regarded as unrealistic, but, for his part, the sole criticism that he would make was that the report was, if anything, too timid.

6. A crime differed in nature, and not only in degree, from a mere delict; there were two main reasons for that. First, a delict was simply an objective breach of international law for which any reprobate or moral connotation was excluded, whereas the concept of fault, of delictual intent, of criminal intent, one might say, was implicit in a crime. Secondly, whereas any breach of the law was unfortunate, in most cases, only the victim had grounds for lodging a complaint. The situation was quite different with crimes, which threatened the very foundations of the nascent international community. The latter was hardly integrated, but, as a result, only a small number of violations of a small number of rules could be considered crimes under international law. Article 19, paragraph 3, of part one of the draft[2] contained examples in an open-ended list. The Special Rapporteur recognized that fundamental distinction and dealt with it in his draft, hence his own broad agreement with a number of the Special Rapporteur's analyses, but the Special Rapporteur, in a reversal of sorts, made the implementation of that concept subject to so many conditions that it was to be feared that its effectiveness would be all but lost.

7. The overall logic of the Special Rapporteur's approach was rigorous and irreproachable; working on the assumption that a crime was more serious than a delict, he very logically concluded that the consequences of a crime must be added to those of a simple delict (draft art. 15). Just as logically, he then listed those consequences, which, on the whole, did not pose any particular problem (draft arts. 16-18). Lastly, the Special Rapporteur provided for a very complicated mechanism (draft art. 19) involving first the General Assembly or the Security Council and then ICJ, their involvement being a *sine qua non* condition for the implementation of the special provisions of draft articles 16, 17 and 18. It was the very principle of that mechanism, set up in advance by draft article 19, that puzzled him, in that it would appear to delay the response to the crime.

8. If, for example, genocide was being committed and a State held another responsible for that crime, for it to be able to take appropriate action, it must first bring the matter to the attention of the General Assembly or the Security Council (art. 19, para. 1), which, secondly, decided, by a qualified majority, that the matter deserved consideration (art. 19, para. 2); thirdly, the State must then bring the matter to the attention of ICJ, which, not known for its rapidity, must, fourthly, determine the existence and attribution of a crime. In the meantime, the perpetrators of genocide would have finished their work. Inasmuch as the whole point in such a situation was to prevent the extermination of the victim population, it was self-evident that a mechanism that was unable to do so was no solution. In reality, if a crime was committed, it must cease and it must cease forthwith. In the absence of a world executive, there was only one way to arrive at that goal: States, each to the extent that it was concerned, must react. In the current state of affairs, States alone had the means to react effectively and with the necessary speed. One must conclude that, far from facilitating that response to the crime, to the "heinous wrongful act", the system proposed by the Special Rapporteur might well paralyse such a response, even creating the paradoxical situation in which States might react rather easily or, indeed, too easily, to cases of a delict, whereas, in cases of a crime, they would have to wait for the successive hypothetical approval of the Assembly or the Council, followed by ICJ. Clearly, it was not the Special Rapporteur's intention to make it impossible to react to a heinously wrongful act, it having just been agreed that a response was urgently necessary.

9. There was, however, no need to be resigned to the anarchy of today's international society. The mechanism proposed by the Special Rapporteur was not devoid of merits, provided that it was simplified and lightened and was used a posteriori to justify or condemn the response to a crime and not actually to prevent that response a priori. When the existence of a crime or its attribution was contested, there was nothing wrong with making provision for a compulsory procedure to settle the dispute and at the same time to decide whether the response or responses to the alleged crime were lawful. Such a shift from a priori to a posteriori involvement would have a number of consequences. In the first place, draft article 19 (and, probably, draft article 20 as well) would no longer belong in part two; and part three would include a provision on dispute settlement that was more binding for crimes than for simple delicts. Secondly, the slowness of the procedure would be somewhat less inconvenient in the case of a posteriori involvement. Thirdly, the system of prior political "filtering" would serve no further purpose and it would then be possible to dispense with the involvement of the General Assembly or the Security Council, whose shortcomings from that point of view had been very nicely described by the Special Rapporteur. It would then suffice to include a provision in part three of the draft which would be modelled on article 66, subparagraph (*a*), of the Vienna Convention on the Law of Treaties and which in substance would say that all parties to a dispute on the application or interpretation of draft articles 16 to 18 of part two might apply to submit the dispute to ICJ for a decision, unless the parties decided by mutual consent to submit the dispute to arbitration. What had been agreed on for *jus cogens* could logically be transposed to crimes. Lastly, as the fourth consequence, the jurisdiction of United Nations bodies must be maintained in full with regard to peace-keeping and international security, as well as, possibly, in the other areas referred to by the

[2] See 2391st meeting, footnote 8.

Special Rapporteur. Accordingly, a provision comparable to draft article 20 would in fact have its place in the draft, more sensibly in part three. In the final analysis, the "a posteriori" system that he had outlined was not very far removed from the concerns raised by the Special Rapporteur, which he shared, but it would make it possible to ensure that the mechanism to be set up did not actually produce the opposite of the results desired: the effective punishment of crimes. In that regard, the proposal by Mr. Bowett (2392nd meeting) to create a "world prosecutor" of sorts contained the same defects—it was unwieldy, slow and premature, but, there again, the mechanism might be of interest if it was used a posteriori, perhaps as an auxiliary to the Court, to help settle disputes.

10. From a technical point of view, the mechanism proposed in draft article 19 also contained drawbacks that had to do with the "constitutional" powers of the General Assembly, the Security Council and ICJ. It was quite possible to confer on those bodies tasks which, although not expressly provided for in the Charter of the United Nations, were in conformity with their general function, but it did not seem possible to impose on the Assembly or the Council through another treaty special majority conditions, for example. Either the conditions provided for by the Special Rapporteur were in conformity with the provisions of the Charter and there was no need to repeat them, or they were not, and, in that case, they could not prevail over the provisions of the Charter, if only because of its Article 103. Likewise, there was reason to doubt that draft article 19, paragraph 4, might open up possibilities of involvement by ICJ other than those covered by Articles 62 and 63 of the Court's Statute.

11. In closing, he said that he fully shared the general philosophical outlook expressed in the seventh report and agreed with the wording proposed for draft article 15, provided that it was understood that the special consequences of crimes were in fact "supplementary", that is to say that they were "in addition" and not "without prejudice" to those of delicts. On the other hand, he disagreed with the position expressed by the Special Rapporteur on draft article 19 in that that article made the implementation of consequences specific to crimes subject to prior intervention by United Nations bodies—what was more, under constitutionally questionable conditions. However, he saw no objection—for crimes, but not for delicts—to providing for a compulsory jurisdiction for ICJ under the same conditions as those laid down by article 66 of the Vienna Convention on the Law of Treaties for disputes relating to *jus cogens*. As to the "positive" consequences specific to crimes, the Special Rapporteur's analysis was persuasive on the whole, with the exception of a number of points to which he would return at a later meeting.

12. Mr. MAHIOU expressed his warm congratulations to the Special Rapporteur on his clear, detailed and cogently argued analysis. His proposals, along with the set of logical, consistent and complex draft articles, were highly interesting, as was the way in which he had made use of article 19 of part one of the draft.

13. It was now up to the members of the Commission not to add to the obstacles on what was already heavily mined ground and not to make certain questions even more difficult and explosive. In the area of terminology, for example, he was surprised at the turn that the discussions on the word "crime" had taken. He knew full well that the word understandably evoked a whole set of theories, concepts and, indeed, ulterior motives. But he doubted whether there was any point in bringing them into play at the present time or whether it would help advance the Commission's understanding of the concept. Assuming that article 19 of part one did not exist or had been discarded and that the word "crime" had been abandoned, as Mr. Rosenstock had wished (ibid.), that did not mean that the emotions aroused by the term and everything it encompassed would subside or that the real problems underlying the article would be solved. Were all delicts—a term that had the same penal connotation as "crime"—equivalent and did they have the same instrumental, substantive and institutional consequences? To be even more specific, it went without saying that the violation of an international tariff provision was not to be treated in exactly the same way as genocide or the occupation of the territory of another State. Those acts were not comparable, any more than their consequences were. The situation of so-called third States, or of the international community, depended on the type of wrongful act committed. There could be no difference of opinion on that point.

14. Instead of making a fetish of words, the Commission should see specifically what they meant. There were internationally wrongful acts that required special responses by the States concerned, by other States or by the international community, whether in an organized form or not. On that point, there could be no disagreement either. Differences of opinion emerged when it came to drawing a distinction between grave wrongful acts and those that were less so, between what, for the sake of convenience, the Commission called crimes and delicts, and, in that regard, subjective elements automatically came into play. While believing that the concept of fault was involved in the issue under consideration, it was at that level that he disagreed with both the Special Rapporteur and Mr. Pellet, but for different reasons.

15. As he understood it, for Mr. Pellet, the concept of fault did not apply in the case of delicts, but played a particularly important role for crimes, because it was impossible to commit a crime without criminal intent, without a politically, morally or even legally wrongful intent; in that sense, the crime was simply the embodiment of that fault. He was not convinced by that argument, for the simple reason that, in his view, wrongful intent was also present in the delict, albeit perhaps to a lesser extent: in actual fact, offences were a continuum which went hierarchically from the simplest delict to the most serious crime. There was a point at which the delict involved intent: when they committed a delict, most States in any event did so intentionally. Hence, he had some difficulty making intent the sole criterion for distinguishing between crimes and delicts.

16. He agreed with the Special Rapporteur that fault, or intent, was already present in delicts, but that led him to draw somewhat different conclusions. It was perhaps

unnecessary to look for the fault of the perpetrator of the wrongful act because what counted was the seriousness of the act's consequences. Distinctions between crimes and delicts should be drawn as a function of the degree of seriousness of those consequences and the Commission might find answers to the difficult questions that had arisen by proceeding from the seriousness of the injury sustained and by considering the degree and the extent of the material, legal and moral harm caused to other States, individually or collectively, and to the international community, whether organized or not. The Special Rapporteur had shown that, with the help of a calm, objective and realistic examination, that exercise was not insurmountable.

17. With regard to the report under consideration, he endorsed the Special Rapporteur's overall analysis of substantive consequences. He generally agreed with the Special Rapporteur's approach and with a number of his conclusions. He recalled that, during the consideration of the sixth report,[3] he had pointed out that the consequences arising from a crime clearly were additional to the consequences arising from a delict. A State which had committed a crime was not to be spared: it must be treated with greater severity during procedures relating to cessation, restitution in kind, compensation, satisfaction and guarantees of non-repetition. However, as noted by the Special Rapporteur, such severity could not be unlimited. Such restrictions concerned two consequences in particular: restitution in kind and satisfaction and guarantees of non-repetition. In theory and a priori, it was reasonable and logical that the consequences of a crime should not jeopardize the existence of the wrongdoing State, violate its territorial integrity or threaten the existence of its population. He could not, however, endorse the Special Rapporteur's position on the issue of territorial integrity. It was not obvious that the territorial integrity of the wrongdoing State must be protected under all circumstances. For example, where a State had committed genocide against part of its population living in part of its territory while claiming the right to self-determination and if the international community took action against that State for the purpose of ending the genocide, should the exercise of the right of self-determination be entirely ruled out for the victim population? He did not think so. Two principles, each equally important, were at stake: the principle of territorial integrity and the right to self-determination. The problem was to strike a balance between the two. He could accept the idea that limits should be set to keep the consequences of a crime within a legal and legitimate framework, but only if such limits were qualified by certain exceptions so that other principles of equal value would not be violated.

18. As far as instrumental consequences were concerned, he would comment only on the reactions of States and the conditions under which countermeasures could be taken. With regard to the first point, while it was true that a crime committed by a State usually involved a violation of an *erga omnes* obligation and therefore concerned all other States, all States still did not have the same rights. The Commission had already established a distinction between directly and indirectly injured States. That a distinction had to be reflected in the instrumental consequences in the sense that certain actions could be taken by all States and others could be taken only by directly injured States. Yet that distinction was made neither in the seventh report nor in the proposed draft articles. In that connection and with regard to article 5, paragraph 3,[4] even admitting that, in the event of a crime, all States were injured States, they were not all injured in the same way, the nature and degree of the injury varied from State to State and the consequences could therefore not be absolutely identical for all States. There was a subjective aspect and an objective aspect of the effects of a crime that had to be taken into account. Moreover, he failed to find in the proposed rules the spirit of draft article 5 *bis* which had been proposed by the Special Rapporteur in his fourth report[5] and referred to the Drafting Committee, and which read:

> Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles.

19. With regard to the conditions under which there could be resort to countermeasures, the Commission should bear in mind that it was dealing with very serious acts—crimes—the effects of which were either unbearable or difficult for the injured State or States to bear. Indeed, no injured State would allow excessive procedural complications to prevent it from reacting rapidly, first by taking interim measures and also by taking appropriate measures and even appropriate countermeasures. The point was to determine, before taking legitimate action and before setting in motion a highly complicated mechanism, whether a crime had actually been committed. Therein lay the entire problem. Who was to characterize the wrongful act, since it had given rise to grave consequences and could not be evaluated solely by the injured State(s). What procedure should be used and within what time limit, so that the crime was not rewarded? He invited the Commission to consider that institutional aspect of the implementation of the consequences of a crime while bearing in mind the current structure of the international community and the wishes of States, which might not always be the same.

20. To his great credit, the Special Rapporteur had submitted realistic proposals in that regard which were both cautious and bold in that he had tried to fit his proposed system into the existing institutional framework. He had chosen the most modest, although perhaps the most complex course, because the point was not to develop the perfect institutional model for determining the existence of a crime, but to find a procedure that would be acceptable to States and prevent the anarchy which was bound to reign if every State was allowed to characterize an internationally wrongful act. In his view, the criteria the Special Rapporteur had followed were reasonable and convincing: first, the proposed system must be part of the existing institutional framework, which was that of the United Nations, even if it was far from

[3] *Yearbook . . . 1994*, vol. II (Part One), document A/CN.4/461 and Add.1-3.

[4] See 2392nd meeting, footnote 13.

[5] *Yearbook . . . 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3, p. 49, para. 152.

perfect, because it was the most appropriate and the most practical; secondly, the possibilities offered by the United Nations system, in terms both of texts (the Charter of the United Nations) and of practice, should be used to the best possible advantage; thirdly, it was important to take full advantage and respect the competence of the organs of the United Nations which were in a position to intervene, namely, the General Assembly and the Security Council (political bodies) and ICJ (legal body); fourthly, it was useful to propose innovations that were acceptable to States and to move them carefully towards the progressive development of the law in that area. The problem was to determine whether such additional procedures were really what the Commission had in mind. The procedure for determining the existence of a crime might, unfortunately, be long, cumbersome and complex, whereas the commission of a crime called for a rapid response. However, he did not think that an entirely satisfactory solution could be found. Imperfect solutions would have to do. For the injured State or States, the reliability and credibility of any system for determining the existence of a crime would be judged on the basis of its swiftness and effectiveness. It might therefore be useful to provide, in addition to the mechanism proposed by the Special Rapporteur, for an alternative system, which might be different. Two proposals had already been made—one by Mr. Bowett (2392nd meeting) and one by Mr. Pellet—and they both warranted close attention. The various proposals were not mutually exclusive. The Special Rapporteur's proposed system could be used and perhaps simplified in certain respects and a more efficient procedure could be added that would enable certain consequences to be implemented rapidly so that the crime could be stopped or its effects mitigated.

21. It was also true that the decision-making process used by ICJ was lengthy and that its fact-finding procedure was not always satisfactory. However, that was not reason enough to rule out a role for the Court. It should be present, it should intervene—even if that meant changing its procedure and, naturally, raising the question of its compulsory jurisdiction.

22. It was obvious that no practical, operational system could be entirely satisfactory. It would, by definition, be a compromise reflecting the international community's strengths and weaknesses. That should not, however, prevent the Commission from proposing various solutions to States, beginning with the crucial phase of determining the existence of a crime and leaving aside for the moment the question of the implementation of consequences, on which he would speak at a later time, particularly as it was only at the stage of the first reading and did not have to strive immediately for perfection.

23. Mr. BOWETT said that he would be grateful to Mr. Pellet for clarifying two points. First, if the response of States was not subject to a prior judicial determination of the existence of a crime, could States set in motion during the initial phase not only the normal consequences of any delict, but also the special or supplementary consequences of crimes? Secondly, assuming that the judicial decision or arbitration took place a posteriori, which State would make such a request? As he had understood it, under the proposed system, States could, from the start, implement the punitive consequences which were attached to crimes and, consequently, the applicant was likely to be the State subject to those consequences. If that was in fact true, which State or States would be the defendant? Might it be the international community as a whole?

24. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had listened with great interest to the suggestions and ideas that had been put forward.

25. In response to the concerns of those who feared that the mechanism proposed in draft article 19 might prevent States and the international community from reacting rapidly, he drew attention to draft article 17, paragraph 2, according to which the condition set forth in draft article 19, paragraph 5, namely, that a decision of ICJ that an international crime had been or was being committed would fulfil the condition for the implementation, by any State Member of the United Nations party to the convention on State responsibility, of the special or supplementary legal consequences of international crimes of States as contemplated in draft articles 16, 17 and 18 of part two, did not apply to such urgent, interim measures as were required to protect the rights of an injured State or to limit the damage caused by the international crime. While perhaps not entirely satisfactory, those provisions of draft article 17 should to some extent meet the concerns of those who feared that States would be unable to act until the Court had handed down its decision.

26. With regard to the slowness of proceedings before the Court—surely a problem—it was not an insurmountable obstacle. Once an appropriate role was recognized for ICJ by a convention on State responsibility, ways and means could be found to ensure a more expeditious treatment of breaches singled out as particularly grave infringements of essential values to the international community. An increase in the number of judges would facilitate, for example, the setting up of a special chamber once a particular case so demanded.

27. Mr. Pellet's suggestion that a judicial decision concerning the existence of a crime might be made a posteriori rather than a priori was worthy of attention.

28. With regard to the unfortunate case of Bosnia, to which Mr. Pellet had referred, the least that could be said was that the international community had failed to demonstrate an ability to respond rapidly. Would some States have been encouraged to act if there had been a prior judicial decision in that regard? It was difficult to say, but it could not be excluded. A Court finding would have been the best way, however, from the viewpoint of the rule of law in the international community.

29. Mr. BOWETT said he did not think that an increase in the number of judges of the Court would be any kind of solution to the problem of the slowness of its procedures. A complaint relating to the genocide in Bosnia and Herzegovina had been brought before the Court some time previously and the Court did not expect to consider it at all during the current year.

30. Mr. PELLET said that the two parties involved—Bosnia and Herzegovina, the applicant and the Federal Republic of Yugoslavia (Serbia and Montenegro), the defendant—were mostly responsible for the slowness of the work of the Court.

31. He would come back to draft article 17, paragraph 2, in detail at a future meeting. For the time being, he simply wished to note that those provisions gave rise to questions about the need for draft article 19. Was it absolutely necessary to have the cumbersome procedure provided for in that article when article 17 would enable States to do what was essential and when it would be enough for the Court to intervene a posteriori?

32. In reply to Mr. Bowett, he said that his idea would be to enable States, without prior determination of the existence of a crime, to implement not only the consequences of any delict, but also the special consequences of crimes. In the case of a crime, it was vital that States should be able to implement special consequences, the most important of which was the cessation of the crime. In the case of a crime, States must be able to react quickly and firmly, on the condition that they were bound to come before an impartial body which would decide whether their reaction had been justified and appropriate because a crime had in fact been committed or whether it had been legally indefensible or disproportionate because a crime had not been committed.

33. In the second phase, the situation would be analogous to that provided for in article 66 of the Vienna Convention on the Law of Treaties: any party to a dispute could apply to the Court; the applicant State would be either the State which was victim of the situation arising from the crime or the State which did not accept the response to the wrongful act and the defendant State would be the other State or States. That was similar to what might happen with regard to *jus cogens*: the defendant State could be either the State which claimed that the treaty was contrary to *jus cogens* or the State which wished to implement a treaty which had been terminated or unilaterally denounced on the grounds that it was contrary to *jus cogens*. If the entire international community reacted to a crime, there might be 170 defendant States for one applicant State. However, in the case of such a massive reaction by the international community, the defendant State would probably not dare to bring the matter before ICJ. In the case where the two parties to a dispute seized the Court, they would be making actual counterclaims before ICJ. He reserved the right to revise and add to his replies at a later stage.

34. Mr. MAHIOU said that a sensitive issue on which the members of the Commission would probably have difficulty reaching agreement was whether each State had the right to decide for itself whether an act could be characterized as criminal. Allowing each State to characterize a particular act as a crime and to act accordingly could lead to international anarchy. As the Jean de la Fontaine fable *Le loup et l'agneau* showed, it was too easy for the stronger party to unjustly accuse the weaker party of a crime in order to justify sanctions it intended to inflict on the weaker party. Of course, any State which had characterized an act as a crime and had applied the resulting consequences would subsequently be responsible for its actions, but, in such a case, the question of time limits would work against the State held to be criminal even if it had not committed a crime. Was it acceptable that a State accused of a criminal act should have to wait four or five years before ICJ finally decided that the act in question was only a minor delict? Much more thought should be given to that problem, to which there was no easy solution.

35. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was fully aware that the slowness of the procedures of ICJ was primarily the result of the fact that the Court depended on the parties to the dispute. As such might well prove to be true also in cases involving crimes, it might be appropriate to consider the possibility, as Mr. Bowett had suggested, of establishing a prosecuting authority which would be appointed by a political body and might be in a better position than States to speed up the proceedings. Be it as it might of the prosecuting organ—one such organ being indispensable anyway, he was somewhat hesitant about the idea of judges being appointed by political bodies. He would much prefer the elected regular members of ICJ, who would sit on the Court for many years and thus have experience and prestige.

36. In reply to a point raised by Mr. Mahiou, he recalled that he had expressed doubts as to whether the territorial integrity of the criminal State should be preserved at any cost (2391st meeting). Mr. Mahiou had referred to the situation in which it might be asked whether the State concerned did not deserve to have part of its territory severed for the greater benefit of the population involved and the international community as a whole.

37. Mr. THIAM said that the principle of the territorial integrity of States should be respected in so far as possible. And even granting that the principle did not have to be applied in every possible case, could some judicial body have the authority to order the severance of a State's territory?

38. Mr. ARANGIO-RUIZ (Special Rapporteur) said that that was a very difficult question to which the members of the Commission had to give careful thought before answering. He felt that, in any event, the principle of territorial integrity had to be applied not by a political body, but by a judicial body. However, the way in which such a judicial body would operate was still to be determined. In any case, his proposed draft articles on the consequences of crimes did not envisage any competence of ICJ to decide sanctions of any kind. ICJ finding of a crime and its attribution was only envisaged, in his draft articles, as a condition of the implementation by States themselves of consequences of a crime set forth in the future convention on State responsibility, as indicated in draft articles 15 to 18.

39. Mr. BOWETT said that he would have no hesitation in answering Mr. Thiam's question in the negative.

40. Mr. THIAM said that, even taking the view that respect for the principle of the territorial integrity of States should not in certain cases prevent the application of a sanction decided by a judicial body, it would be going too far to say that such a body could sever part of a State's territory. The Commission had to stop talking in the abstract and look at the consequences of international responsibility in terms of the situation in the modern-day world and in the light of the experience of international life.

*The meeting rose at 1 p.m.*