UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.4/476
14 May 1996

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-eighth session
6 May-26 July 1996

EIGHTH REPORT ON STATE RESPONSIBILITY

by

Mr. Gaetano ARANGIO-RUIZ, Special Rapporteur

CONTENTS

GE.96-61685 (E)

INTRODUCTION

1. The object of the present report is to address a few issues to which the Special Rapporteur would hope that the Commission gives some further thought before completing, as planned, the first reading of the Project. The issues in question, some of which are interrelated, concern only Parts Two and Three of the Project. The main issues among them relate to matters that the Commission will consider in the course of its forty-eighth session - in plenary, in the Drafting Committee, or in both - with regard to the legal régime of the consequences of the internationally wrongful acts singled out as "crimes" in article 19 of Part One of the draft as adopted on first reading.

CHAPTER I. Problems relating to the *Régime* of internationally wrongful acts singled out as "Crimes" in article 19 of Part One of the Project

2. Although this is not the place nor the time to resume the 1995 debate on the crucial problem of the internationally wrongful acts as distinguished from delicts in article 19 of Part One as adopted on first reading, a few clarifications seem indispensable. These clarifications focus on: (i) the fate of article 19 of Part One and of the distinction between "delicts" and "crimes" within the framework of the first reading phase; and (ii) the substantive as well as the procedural-institutional consequences of crimes in the light of the 1995 debate.

(i) The fate of article 19 of Part One

3. The Special Rapporteur believes that article 19 of Part One as adopted in 1976 should remain what it is, namely, an integral part of the first reading project that the Commission intends to complete within the forty-eighth session.

4. Firstly, this is the clear decision which emerged, at the forty-seventh session, from two informal consultations and decisively from two formal votes. A clear majority of the Commission adopted that view. Secondly, the proposal made in the Sixth Committee to include in the General Assembly's instructions to the Commission a mandate to postpone until the second reading the consideration of the consequences of the wrongful acts in question did not meet with the Sixth Committee's approval. The proposed draft paragraph that would have reduced article 19 of Part One to the status of a "dead branch" during the whole period between the first and the second reading of the project was thus rejected by the General Assembly.

5. It follows that a serious effort should be made by the Commission, at its forty-eighth session, to cover, by adequate provisions of Parts Two and Three, the consequences of international crimes of States. The fate of article 19 and of the distinction between "delicts" and "crimes" should be decided, in the Special Rapporteur's view, only after the United Nations membership will have expressed themselves in their comments on the complete first reading text of the whole set of articles.

6. The Special Rapporteur is of course aware that article 19 of Part One as adopted is far from perfect. The original drawbacks noted since the outset by a number of commentators are even more perceptible at present after 20 years, especially when one deals with the difficult problem of the consequences of the breaches in question. They are likely to be even more clearly perceptible by the time the second reading will be undertaken. None of those drawbacks, however, would warrant a virtual rejection of the article at the present stage or justify a hasty, superficial treatment of the consequences of the grave internationally wrongful acts in question.

7. Having done his best first to explore the matter thoroughly and then to comply, by means of his Seventh report, with the mandate received from the Commission in 1994, the Special Rapporteur has little to add to the merits of the distinction or to the terminological issue of whether the term "crime" is justified or appropriate.

8. Irrespective of the terminological issue, with regard to which the 1996 Drafting Committee may try to find, if it is really necessary, a temporary solution, the practice of States shows clearly that internationally wrongful acts of a very serious nature and dimension meet with severe reactions on the part of States acting individually or collectively. No obstacle can be found either in the maxim *societas delinquere non potest* or in the consideration that to label the conduct of a State as criminal would involve the people of that State. Both objections are dealt with in our Sixth and Seventh reports and in paragraphs 261 and 263 of the Commission's report to the General Assembly on its forty-seventh session. 1/ In both documents, due account is taken of the distinction between the State as currently personified by its rulers, on the one hand, and the State's population, on the other hand.

(ii) The special and additional substantive consequences of crimes

(a) A general point

9. Irrespective of the solution that will be adopted with regard to the terms to be used, the forty-seventh session's debate on the special or additional consequences of the internationally wrongful acts in question shows that the 1995 proposals concerning those consequences "met" - to use the terms of the Commission's report on its forty-seventh session - "with a wide measure of support" and "gave rise", at the same time, "to reservations". 2/

1/ As stated by a number of members, "it was preferable to designate a specific conduct of States as criminal and to regulate the consequences through judicial review and the introduction of substantive rules to spare the population of the criminal State extreme hardship rather than to leave that whole area unregulated, concealing the punitive element under the guise of restitution or guarantees against repetition. It was said in this connection that some States had been subjected to penal consequences, sometimes exceeding those usually attached to crimes, without their actions being designated as crimes". Report of the International Law Commission on the work of its forty-seventh session (A/50/10), p. 106.

2/ Ibid., para. 284.

10. It should be noted, however, that support came not just from members favouring but, despite their "reservations", also from members who opposed the article 19 of Part One. No one contested, in other words, the fact that most modifications proposed in draft articles 15 to 18 for the purpose of adapting to crimes the provisions relating to delicts, should be embodied in the project in any event in order to cover the consequences of the most serious among internationally wrongful acts, whatever their denomination. 3/

(b) Draft article 16 as proposed

11. Apart from the general objection to the real or assumed punitive connotation of some of the consequences envisaged in draft article 16 - an objection obviously connected with the general conceptual and terminological issue we set aside 4/ - a number of specific reservations were expressed.

12. One reservation related to the distinction between political independence (namely, independent international statehood) and political *régime* for the purposes of the mitigation of the obligation of restitution in kind. 5/ Concern was expressed that that mitigation should apply not only to the need for safeguarding that State's independent statehood but also to the safeguard of its political *régime*. In our view, the extension of the mitigation to the political *régime*, for example, of an aggressor State or of a State in grave breach of obligations relating to human rights or self-determination, might practically amount to a condonement of the breach. A strong demand for a change of political *régime* might well prove to be an essential requirement not only as a matter of reparation but also as a guarantee of non-repetition. The Drafting Committee would be well-advised if it gave further thought to the matter before rejecting the proposed distinction between independent statehood and political *régime* for the purposes of restitution in kind.

13. Remarks on draft article 16 were also addressed with regard to the issue of territorial integrity, the preservation of which was indicated in that draft article as a cause of mitigation of the law-breaking State's obligation to provide restitution in kind. 6/

3/ This conclusion emerges clearly from paragraphs 282-305 of the Commission's report on its forty-seventh session.

4/ See paras. 39 and 42 to 46 infra.

5/ See Report of the International Law Commission on the work of its forty-seventh session (A/50/10), para. 289.

6/ Ibid., para. 291.

14. While most of the speakers agreed with the Special Rapporteur's suggested inclusion of the safeguard of territorial integrity (together with the preservation of independent statehood and the population's vital needs) among the mitigating factors, and while several members concurred in the doubt expressed in that respect by the Special Rapporteur as to whether any exceptions should be considered, some members questioned the Commission's competence "to ask that kind of question". Unaware of any limitation of competence of the Commission to discuss and express its views on any issue which may be of relevance for the proper performance of its role in the progressive development and codification of international law and the law of State responsibility in particular, the Special Rapporteur is of the view that the Drafting Committee should give some thought to the matter. No doubt, territorial integrity should in principle not be put in jeopardy by the implementation of the obligation to provide restitution in kind. Which, if any, exceptions should be envisaged and of what kind (the only point of doubt raised by us) should be the task of the 1996 Drafting Committee to explore to the best of its ability.

15. Although in the 1995 debate, several members expressed reservations over the view that article 8 of Part Two on compensation did not call for any adaptation in its application to crimes, the Special Rapporteur can hardly understand their philosophy. To say that a mitigation of the compensation obligation would be imposed - as explained in paragraph 293 of the cited report of the Commission - by the difficulty of implementing such an obligation in the case of "major disasters like the Second World War" seems to us to imply that States responsible for a disaster of such terrible gravity should be treated less severely than a State responsible for a minor breach of a treaty of commerce! Of course there should be limits. But the only conceivable mitigation should be, in our view, an express or implied extension of the provision safeguarding the vital (physical and moral) needs of the law-breaking State's population to the duty to provide compensation for crime.

16. Considering the guarantees of non-repetition, the Special Rapporteur is puzzled by the reservations expressed by some members relating to the proposed waiver of the mitigation of that obligation which is based (for the case of delicts) upon respect for the dignity of the law-breaking State. While unnecessary, wanton humiliations of the law-breaking State would surely be inappropriate, one finds it difficult to see - for example - how a State guilty of such a crime as a deliberate armed attack and invasion, or deliberate, systematic, massive violations of human rights or self-determination should not be required to offer guarantees that, while preserving its independent statehood and territorial integrity, could be viewed as incompatible with such a formal attribute of a State as its "dignity". The main consideration should be the effectiveness of the guarantees to be demanded, rather than a "dignity" which the law-breaker itself is offending in the first place.

17. Similar considerations apply to the preoccupations expressed by some members with regard to the protection of the sovereignty and liberty of the law-breaking State. Again, all will depend on the nature of the crime and the kinds of guarantees to be sought in order to avert repetition. For example,

could a demand to hand over the responsible government officials for trial before a (lawfully established) international tribunal be resisted as contrary to the law-breaking State's sovereignty and liberty? 7/

(c) Draft article 17 as proposed

18. Doubts were expressed with regard to the admissibility of dealing with countermeasures in reaction to crimes. Such doubts were based on the consideration that such measures would "legitimize power play and coercive measures" and let "claimant State(s) acquire the status of a judge in its own cause" rather than "promoting the equity and justice essential for a new world order". 8/ The same speakers emphasized instead "the need for a careful structuring of the restraints in the interest of sovereign equality, territorial integrity, political independence and the regulation of international relations on the basis of international law, equity and justice". 9/ These remarks are puzzling for two reasons. Firstly, they seem to question, not only any attempt at regulation of the additional consequences of crimes or major breaches otherwise designated, but also any regulation whatsoever of the reaction to internationally wrongful acts of any kind.

19. Secondly, the above-mentioned remarks seem to overlook the fact that, in dealing with the instrumental consequences of crimes, draft article 17 expressly provides (as well as art. 16 does for the substantive consequences) that the injured State's entitlement to resort to countermeasures "is subject to the condition set forth in paragraph 5 of (draft) article 19", as proposed. The envisaged condition is a decision of the ICJ that a crime has been or is being committed. Consequently, draft article 17, far from legitimizing "power play" or the acquisition by a claimant State of the "status of judge in its own cause", does attempt, whatever the merits of the whole scheme proposed, to promote at least more "equity and justice essential for a new world order" than this would be done by a system controlled exclusively by the States themselves (or some of them) or by a restricted and selective political body. 10/

20. We find equally hard to understand the gist of paragraph 299 of the cited ILC report. What, if not resort to "urgent, interim measures as are required to protect (its) rights" etc., should an injured State do while

---

7/ It should not be overlooked that an excess of guarantees in favour of the law-breaking State would jeopardize the attainment of the very purpose of the rule on guarantees of non-repetition. Moreover, this might encourage arbitrary action, including unlawful military action, by single powers.

8/ Doc. A/50/10, para. 298.

9/ Ibid., para. 298.

10/ See paras. 31 and 39 to 41 infra.

waiting for any decision to come from some international body (possibly judicial)? How do the "difficulties inherent in that concept" (of interim measures) impose the "rejection" of the proposed provision of draft article 17? Is it not obvious that, if anything serious has to be done by the 1996 Drafting Committee concerning the consequences of the most grave internationally wrongful acts, it would be for that Committee to see, also in the light of the remarks on interim measures made further on in the present report, whether and in what terms the difficulties inherent in the concept of interim measures should be resolved? Does the fact that the exercise was not made in connection with delicts prevent the Commission from doing something on the subject? 11/

21. The remarks referred to in paragraph 300 of the cited 1995 Commission report will be addressed further on.

(d) Draft article 18 as proposed

22. The observation, contained in paragraph 301 of the Report of the ILC on the work of its forty-seventh session, that in some of the provisions of article 18 care should be taken to distinguish the rights of the State whose individual rights were violated from the rights of other States seems justified. The 1996 Drafting Committee should be so advised.

23. On the other hand, we are puzzled by the second general remark, according to which "some of the wording [of draft article 18] had more to do with the rules on the maintenance of peace and security than with the law of State responsibility". Considering the degree of gravity of crimes, the most serious of which is aggression, this statement is what the French call a "*lapalissade*" ["truism"].

24. The Commission's task is precisely to distinguish, despite any degree of interrelation, what belongs to the law of State responsibility from what belongs to the law of collective security. This is also true for delicts although it is more so for crimes. We pointed out this problem of distinction but little has been done in that respect during last year's debate. The main contributions (although not the majority of them) made on the subject in the course of that debate were those of the members who, instead of trying to find a demarcation line, preferred simply to absorb the law of responsibility into the law of collective security by subjecting the former to the latter in toto. Almost no attention was paid to the questions raised since 1992 by the Special Rapporteur with regard to Article 4 of Part Two as adopted on first reading or to a comparison between that Article and draft article 20 as proposed in the Seventh report. But more on this in paragraphs 42-46 infra.

11/ One cannot but wonder how the preoccupation about the difficulty of defining urgent interim measures (in order, supposedly, to prevent abuse) logically coexists with the preoccupation, expressed with respect to other provisions, that the requirement of a prior decision of the ICJ "would have an adverse effect on the effectiveness and promptness of the reaction".

(iii) The institutional aspects of the legal *Régime* of "Crimes"

25. The arguments against the institutional consequences scheme embodied in draft article 19 as proposed in the Seventh report must be distinguished according to whether they consist of *de lege lata* 12/ or *de lege ferenda* objections. 13/

26. Although the distinction between *de lege lata* and *de lege ferenda* obligations should not be understood or applied too strictly in the work of a body which, like the Commission, is entrusted with both progressive development and codification - the first task being inevitably preponderant in determining a possible legal *régime* for the consequences of crimes - we shall try to deal with the two sets of the above objections separately.

(a) *De lege lata* objections

27. With regard to the objection based upon Article 12 of the Charter and the alleged "risk of conflict" between Assembly and Council, the task entrusted by the scheme to both organs does not seem to be of such a nature as to increase significantly the possibility of divergence between the two bodies.

28. Firstly, it must be stressed again that Article 12 of the Charter has so frequently been ignored or otherwise circumvented by the General Assembly that many commentators believe that it has become obsolete. The only clear demarcation line is that which precludes the Assembly from interfering in the exercise of the Security Council's functions under the Charter: and that line would not necessarily be crossed by the fact that while the Security Council is dealing with a dispute, the General Assembly adopts a recommendation acknowledging the existence of sufficient concern over a situation allegedly amounting to an international crime. Such a recommendation would operate as a condition triggering (under the future State Responsibility Convention) the possibility for the allegation to be brought to the International Court of Justice either by injured States or by the alleged wrongdoer. As regards in particular the subsequent effect of the Assembly's preliminary resolution - as well as that of a similar resolution by the Security Council - that effect would follow from the future Responsibility Convention and not from the Charter: there is nothing in the Charter preventing States from attributing certain effects, by treaty, to a resolution of the General Assembly or of the Security Council, including an effect such as the jurisdiction of the International Court of Justice in certain cases.

29. The only hypothesis where serious conflict could arise would be if the Security Council had made a finding under article 39 and were acting accordingly under Chapter VII. Apart from the fact, however, that the proposed scheme does safeguard, by means of draft article 20, the Security Council's functions relating to the maintenance of international peace and security - the latter functions prevail to the extent to which they do pertain to that area - it does not seem that, even in such a case, the

---

12/ See Doc. A/50/10, para. 307.

13/ Ibid., para. 307.

possibility of Assembly pronouncements about the seriousness of an allegation of crime could significantly increase the risk of conflict. Considering that the scheme only provides for the consequences of crimes (as envisaged in the provisions of draft articles 15 to 18) and not for Security Council security measures and that the International Court of Justice procedure could be triggered (by virtue of the Convention) by a resolution of either body, no increase in the risk of *conflits de compétence* (overlapping jurisdictions) seems to be likely to arise from the scheme.

30. Assuming that the Security Council had made a finding of aggression under article 39 and were acting accordingly under Chapter VII, it could either decide that there is serious ground for a crime allegation, or that there is no such ground. If the Assembly, in its turn, did also adopt a decision along the same lines, the crime procedure could be followed without interfering with the Council's security measures thanks to the proviso contained in draft article 20 (paras. 44 to 46).

31. Conflict would be even less likely in the case of crimes other than those partly coinciding the hypothesis involving Article 39 of the Charter. In areas such as human rights, self-determination or environment violations the competence of the General Assembly seems to us more probable - *de lege lata* - than that of the Security Council. It is difficult to see, therefore, with regard to the violations in such areas, why the attribution to the Assembly under the proposed scheme (as an alternative to the Council) of a role of preliminary finding should be inconsistent with article 12 or otherwise increase the risk of conflict between the two bodies. We assume, of course, that both bodies, including the Security Council, maintain their action within the limits of their respective spheres of competence.

32. It is of course quite possible that the risk of conflict is being perhaps unconsciously magnified, in the minds of some of the critics of the proposed scheme, by their view that all or most crimes qualify as situations under article 39 (especially as threats to the peace). Crimes should thus fall, in their opinion quite naturally, in the sphere of action of the Security Council. But that is *lex ferenda*, not *lex lata* of State responsibility.

33. A second objection *de lege lata*, seems to point that the Security Council could not legitimately proceed to the preliminary finding envisaged in the proposed scheme - i.e., the "crime *fumus* resolve" - because that body is only empowered, under the Charter (Arts. 34 and 39), to determining threats to the peace, breaches of the peace or acts of aggression. But it is easy to see that a number of international instruments confer on the Security Council, in a sense, *extra ordinem* or additional functions: such functions obviously pertain to the relations among the States participating in each instrument. Consequently, nothing more than that would be done by a future State responsibility Convention under the proposed scheme.

34. With regard to the third set of objections, a few remarks are necessary about the contested majority requirements set forth in draft article 19, paragraph 2. In our view, the fact that the Assembly is empowered to determine, under Article 18 of the Charter, the matters requiring a two-thirds majority would not constitute a legal obstacle in the case that a convention, conferring a certain function upon the Assembly (under the practice just evoked in the preceding paragraph), indicates also the majority required for

the performance of this function. Were that majority not attained, one would simply have to conclude that the preliminary finding condition has not materialized. In any event, we find it hard to admit that the Assembly would have any difficulty in accepting the notion that a "crime *fumus* resolve", so to speak, should be adopted by a two-thirds majority.

35. The question is of course less simple for the Council because it is complicated, to some extent, by the distinction between Chapters VI and VII and between disputes and situations. On the first issue, one must again distinguish, as already pointed out, between the role that the Security Council would perform under the proposed scheme and the role it performs anyway under Chapter VII. In our view, the role envisaged in the scheme would fall under Chapter VI. In addition, and as in the case of the Assembly, this function could be conferred on the Council by an international instrument - a State responsibility convention - other than the Charter. No legal obstacle should exist to such an instrument - an instrument which develops and codifies the law of State responsibility and not the law of collective security - requiring, in addition to a certain majority, the abstention of "a party to a dispute".

36. With regard to the second issue - the dispute/situation distinction - the answer to the objection is, firstly, that the situation where a State is accused of a crime by other States surely qualifies more as a dispute than as a mere situation. Secondly, the obligation to abstain would constitute once more a question pertaining to the law of State responsibility as codified in an *ad hoc* convention and not a matter governed by the Charter. No legal obstacle can be found in the Charter to such an instrument attributing given legal consequences (such as the triggering of the legal possibility to resort to the International Court of Justice) to a resolution taken by the Security Council by a determined majority and an equally determined number of abstentions.

37. Another objection was that a decision according to which a State would be subjected to the International Court of Justice's jurisdiction would "necessarily" fall under Chapter VII and therefore be subject to the veto. The answer to that argument is, again, that the ICJ's jurisdiction would be imposed to States neither by the Council's nor by the Assembly's "crime *fumus* resolve". It would derive from the convention developing and codifying the law of State responsibility and not from the collective security law of the Charter with regard to which the responsibility convention does not and should not include any provisions.

38. The objection that a permanent member of the Security Council could legitimately not bind itself not to use the so-called "veto power" might be, to some extent, not groundless as a matter of Charter law. It might also be contended that the veto power is attributed to given member States not just in their interest but also in the interest of the other members. The objection would not be valid in the crimes context, however, because it is based on the above-mentioned, unjustified confusion between the law of collective security as embodied in the Charter, on the one hand, and the law of State responsibility, on the other hand. The law of State responsibility could quite legitimately provide - and a convention on the subject would legitimately provide - for the waiver by given States, for the sake of justice and equality in the area of State responsibility, of their "veto power".

The Charter embodies, and is based upon, principles of justice and equality. The fact that a derogation from the equality of States was rightly considered to be necessary for the maintenance of international peace and security - namely for the purposes of the law of collective security - does not imply that States should be unequal in an area which is covered by the law of State responsibility.

(b) *De lege ferenda* objections

39. As regards the allegedly "cumbersome" nature of the institutional scheme proposed, it is quite obvious that the conditions to be envisaged for the triggering of the consequences of crimes should be stricter than those envisaged for the consequences of delicts. One reason is the higher degree of severity of the substantive and procedural consequences to be attached to crimes as compared to those to be attached to delicts. It is natural that the former should be subject - except, of course, those urgent interim measures that the critics seem to ignore - to stricter "collective" or "community" control. The alleged "response paralysis" would not affect urgent measures anyway.

40. Considering the gravity of the breach alleged by the accuser(s) and the interest of all States - whether prospective victims or prospective accused - that the determination of existence/attribution of a crime be made by the most objective procedure available at the present stage of international "institutional law", the possibility that States accept the ICJ's compulsory jurisdiction for the purpose of such a determination does not appear to be so problematic as to justify a reluctance, on the part of the Commission, to include the requirement in question in a project intended for the progressive development and codification of the law of State responsibility.

41. As regards the "undesirable practical effects" for the injured States or the wrongdoing State (*scilicet*: allegedly injured and allegedly wrongdoing State(s)), we believe that the "practical effects" of the proposed scheme should be considered not in the absolute but in comparison with the alternative solution or solutions. Indeed, the alternative to the "cumbersome procedure" proposed in the Seventh report is represented either by unilateral and possibly arbitrary action by single, allegedly injured, States or groups thereof, or by merely political decisions by a political body and the action it may authorize. In either case there is a high risk of arbitrariness and selectivity, whether individual or collective, on the part of the "strong" States. The "cumbersome procedure" proposed presents at least a higher degree of objective evaluation and "crime *fumus* resolve" by (i) extending the competence of political evaluation to a more representative - and by definition more objective - General Assembly; and (ii) by adding, more significantly, a technical pronouncement such as the judicial decision of the ICJ.

(iv) Conclusions: Article 4 as adopted and draft article 20 as proposed in the Seventh report

42. As explained in the Seventh report, the Special Rapporteur believes that the legal consequences of international crimes of States pertain, as well as the consequences of any internationally wrongful act, to the law of State responsibility. Considering, however, that some of the wrongful acts

qualified as crimes in article 19 of Part One as adopted on first reading may coincide, to a certain extent, with one of the situations contemplated in Article 39 of the Charter, it is possible that problems of demarcation arise. We refer particularly, although not exclusively, to the demarcation line between any institutional procedures envisaged for the triggering of the consequences of crimes, on the one hand, and the Charter procedures relating to the maintenance of international peace and security (particularly, but not exclusively, those of Chapter VII) on the other hand. The possibility that problems of this kind arise should not lead to the conclusion, however, that the law of State responsibility should, for instance, "give way" or be set aside, by subjecting any of the substantive or procedural consequences of a crime exclusively to the law of collective security.

43. The problem of the coexistence of the law of State responsibility with the law of collective security was not adequately discussed, although it was not ignored, during last year's debate on the consequences of crimes. All members, no doubt, perceived the existence of the problem. The members who addressed the matter explicitly did so, if we understood correctly, in two ways. A number of them indicated - and rightly so - that some of the provisions of the proposed draft articles (15 to 19) touched upon matters relating also to the maintenance of international peace and security. Some members stressed instead - quite drastically - that the whole matter of crimes should simply be left to the care of the Security Council acting under its powers relating to the maintenance of international peace and security. Considering that, in their view, most, if not all, crimes would constitute at least threats to the peace, no provision needed to be included for crimes in a State responsibility convention. Despite the fact that most members of the Commission did not seem to share this view, the debate did not do justice, in our opinion, to the importance of the issue.

44. In conformity with his opinion that the legal consequences of crimes are part of the law of State responsibility and should be treated as such in the project (*de lege ferenda* or *de lege lata*, according to the case), the Special Rapporteur proposed last year a draft article 20. 14/ That article was intended to ensure that neither the provisions of draft articles 15 to 18 nor those of draft article 19 would interfere unduly either with the measures decided upon by the Security Council in the exercise of its functions under the relevant provisions of the Charter or with the inherent right of self-defence as provided for in Article 51 of the Charter. It was also intended, at the same time, to make clear that, to the extent that the law of State responsibility would "be subject" to any decisions or measures of the Security Council (or, for that matter, the General Assembly), such decisions or measures would be maintained within the limits set by the relevant provisions of the Charter.

45. In the pursuit of the above-mentioned purpose - and in its formulation - draft article 20, as proposed, differs from article 4 of Part Two as adopted on first reading on the basis of the proposal of our predecessor. That provision seems to us to proclaim in such terms a precedence of the law of collective security over the articles on State responsibility as to open the

---

14/ Document A/CN.4/469/Add. 1.

way, for the purposes of the legal consequences of internationally wrongful acts (and apparently not just crimes) to a sort of subordination of the law of State responsibility to the action of political bodies.

46. Considering the great importance of the subject-matter, the Special Rapporteur is confident that the 1996 Drafting Committee shall look into it as thoroughly as it deserves. The Commission would be ill-advised, in our opinion, if it maintained article 4 as it stands. Regardless of the extent to which the Drafting Committee or the Commission itself will ultimately be disposed to accept the Special Rapporteur's proposed draft articles 15 to 20, a provision such as the one embodied in the said Article 4 would seriously affect the distinction between the law of collective security and the law of State responsibility and gravely undermine the impact of the latter. 15/ The preservation of the distinction is a vital element - *de lege lata* as well as *de lege ferenda* - of the existence, the effectiveness and the future development of the law of State responsibility. The Drafting Committee, to which draft articles 15 to 20 were referred last year, should not fail to address the matter to the extent and depth necessary to maintain and clarify the distinction. In our opinion, it would be not prudent for a body of lawyers like the International Law Commission to suggest that the validity or application of the articles that they adopt would be subject to decisions or any other action of political bodies - be it the Security Council or the General Assembly - except to the extent strictly necessary for the maintenance of international peace and security. A provision of the kind of article 4 of Part Two, as adopted, would not only undermine the effectiveness of the law of State responsibility as indicated above. It would also constitute a major factor encouraging political bodies to broaden the sphere of their functions and competence on the basis of unquestionable doctrines of evolutionary interpretation, implied powers and/or federal analogies in the United Nations Charter. Draft article 20, in our view, is more prudently formulated in that respect: and the involvement of the International Court of Justice, which is provided for in our draft article 19, should help to ensure some judicial control of the respect of the demarcation between the law of international security and the law of State responsibility. 16/

15/ We have been contesting the wording of article 4 since at least 1992 (A/CN.4/SR.2277, pp. 3-5; and Official Records of the General Assembly, Forty-seventh session, Supplement No. 10 (A/47/10) paras. 261-266). See also Seventh report, paras. 95 ff. (and footnote 49) and 136-138.

16/ The opinion that more room should be made for the role of the Court in the area of State responsibility (including particularly those areas which are close to that of the maintenance of peace and security) is being shared increasingly by international legal scholars.