UNITED NATIONS

General Assembly

FIFTIETH SESSION
Official Records

SIXTH COMMITTEE
17th meeting
held on
Wednesday, 18 October 1995
at 10 a.m.
New York

SUMMARY RECORD OF THE 17th MEETING

Chairman: Mr. LEHMANN (Denmark)

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Distr. GENERAL
A/C.6/50/SR.17
1 November 1995
ENGLISH
ORIGINAL: SPANISH

95-81691 (E)

The meeting was called to order at 10.25 a.m.

AGENDA ITEM 141: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION (continued) (A/50/10 and A/50/402)

1. Mr. CEDE (Austria) said that the codification of a workable procedure to be applied prior to taking countermeasures should constitute the centrepiece of the codification endeavour on the topic of State responsibility. The idea of applying the notion of crime prevailing within the realm of domestic law to determine the procedure to be followed prior to taking countermeasures gave rise to problems. Moreover, in the absence of an obligatory international jurisdiction having the authority to apply punitive measures against a delinquent State, it could be counterproductive. Austria was in favour of the obligatory jurisdiction of the International Court of Justice, as demonstrated by the declaration it had made under Article 36 of the Statute. However, only a minority of States had made such a declaration. In those circumstances, it was not worth wasting time on a concept based on a utopian view of international relations which was of little help in finding solutions which would effectively influence the behaviour of States.

2. Austria was therefore dissatisfied that the Commission was still working on a subject which should have been eliminated from the list of priority topics, particularly since a number of States had taken the view that it was futile to try to impose notions of domestic law on the relations between States. The codification of State responsibility should concentrate on approaches adapted to the specific needs of inter-State relations. That meant that proposals that were "unattuned to States' sense of international law" must be discarded since the principles par in parem non habet imperium and societas delinquere non potest would continue to stand in the way of any attempt to establish a regime governing the responsibility of States based on a notion of crime.

3. The second subject dealt with by the Special Rapporteur in his report did not merit priority either. Adding another set of rules on the peaceful settlement of disputes to the rules already in existence was of very limited importance for the codification of international law on State responsibility.

4. Article 13, on the issue of proportionality, was one of the cornerstones of the text, since it was designed to provide a primary regulatory element for the establishment of a reasonable and acceptable regime on countermeasures. The concept of proportionality, although broadly accepted in legal doctrine, was difficult to apply, as the International Court of Justice itself had recognized. Indeed, since there were no objective criteria for establishing proportionality, a court or a conciliation commission would have to assess the effects of a violation and of countermeasures after the violation had taken place and the countermeasures had been adopted. That raised the problem of the lack of specific criteria which could be applied by States wishing to apply countermeasures that were within the law. Article 13 did not address that question because it did not take into account the effect of the countermeasure on the author of the internationally wrongful act.

5. His delegation therefore considered that the Commission's decision to link the notion of proportionality to the regime of prohibited countermeasures envisaged in part two, article 14 was correct, but felt that it was inappropriate to prohibit any conduct which derogated from basic human rights, since neither the text nor the commentary indicated specific criteria for determining which human rights were "basic".

6. Other parts of the draft articles also gave rise to significant problems. Article 18, paragraph 1 (f) was mandatory in form ("all States shall ... take part"), and its adoption would amount to a tacit amendment of the constituent instruments of the international organizations concerned. Moreover, article 19, concerned with the right of States to have recourse to the International Court of Justice when an international crime had been or was being committed, left a number of questions unanswered. For example, in paragraph 2, a State against which a claim was made was entitled to bring the matter before the International Court of Justice, but it was not specified who the respondent would be. Nor was it clear what would happen in the case of crimes committed by States which were not parties to the convention. Lastly, the adoption of paragraph 3 would in practice amount to an amendment of the Charter which would not correspond to the procedure for amendments laid down in the Charter.

7. His delegation proposed that at its next session the Commission should reconsider its work schedule on the topic of State responsibility with a view to completing its work in 1999 and that, in particular, the Commission should be requested to determine which rules were indispensable for an early establishment of a regime of State responsibility, which rules should have priority for consideration by the Committee or a diplomatic conference, and which issues could be codified at a later stage. It also proposed that the Special Rapporteur should be requested to prepare proposals on the topic, taking into account the comments made by States in the Committee or sent to him before March 1996.

8. Lastly, since, at the current stage, a convention might not be the most suitable format to give effect to the principles reflected in the draft articles that had been provisionally adopted, the Committee should consider the possibility of adopting an alternative instrument, endorsing principles which already had a high degree of acceptance, and trying to find compromise solutions to other issues, particularly the most controversial issues.

9. Mr. PERRIN DE BRICHAMBAUT (France) said that his delegation's position on the concept of "State crime" had not changed since the previous session. In its view, the absolute dichotomy that some were trying to establish between crimes and delicts was false, since there was a continuum ranging from minor breaches to very serious breaches. Moreover, the argument that a crime was distinguishable from a delict in that it constituted a violation of an international obligation which was essential for the protection of the fundamental interests of the international community was flawed. Even though international obligations could be defined in principle, it was not clear who would determine that such obligations were essential in nature, particularly in relation to the international community, a concept which, although corresponding to a political reality, was an indeterminate entity from the legal point of view.

10. Another postulate of article 19 was that very serious breaches constituted a crime and would therefore be comparable to crimes defined in national criminal codes. However, in his delegation's view, State responsibility was sui generis, neither criminal nor civil, but purely international. Moreover, criminal justice presupposed a legislator with the authority to define crimes and establish corresponding penalties, but at the international level there were no authorities empowered to attribute criminal responsibility to States or compel them to respect criminal legislation that might be applicable to them. In that respect, it should be made clear that, if the Commission did not intend to establish a criminal responsibility of States, it should stop using the term "crime", since that would give rise to criminal responsibility.

11. His delegation was opposed in principle to attributing crimes to States. The indictment of a State could lead to the punishment of an entire people, which would be unjust. From the point of view of international law, the State was an abstract legal entity consisting of a territory, a population and a set of institutions and, although it existed in the legal and political sense at the international level, in essence it was legally neither good nor bad, neither innocent nor guilty.

12. With regard to the consequences of internationally wrongful acts characterized as crimes, the definition of "injured State" raised difficulties because of the confusion surrounding the very concept of "State crime". Since that notion was based on the rather unjuridical concept of "international community", all member States of that community could be deemed to be injured States, a corollary that was difficult to accept. Consequently, a distinction should be made between directly injured States and other States.

13. Moreover, draft articles 15 to 19 of part two raised problems of compatibility with the legal regime laid down in the Charter. The Commission was tending gradually to venture into the field of maintenance of international peace and security, thereby encroaching on the competence of the Security Council. In that regard, the role assigned to the International Court of Justice in article 19 of part two of the draft was particularly open to question. That article conferred upon the Court a kind of a priori competence, by entrusting it with the task of determining whether, in a given case, an international crime had been committed. A grave danger of provoking a conflict between the Court and the Security Council was thus being incurred. In addition, article 19 was at variance with the principle laid down in Article 36, paragraph 2 of the Statute of the International Court of Justice, which provided that the Court's competence depended on the prior consent of the State. Given the current state of international law and of the organization of international society, it was difficult to accept that position, which was lacking in realism.

14. With regard to the settlement of disputes, the mechanism provided for that purpose attributed, once again, binding competence to the International Court of Justice. The fact was certainly welcome that such competence was limited to countermeasures and that, in other cases, only the initiation of negotiations was mandatory; yet the limitation was not only arbitrary, since there was no reason to place exclusive emphasis on countermeasures, but also inadequate. It was necessary to reconcile the desire to improve the cohesiveness and

organization of the international community with the demands of the real world. One possible solution would be to make part three of the draft optional.

15. The Commission should try to ensure that its drafts would command broad acceptance. When the Charter assigned to the General Assembly the role of encouraging the progressive development of international law, it meant by the term "progressive" that such development should proceed at a pace that was consistent with the evolution of international society, a consistency that guaranteed respect for the rules on the part of States. Moreover, the Commission should not go beyond its mandate, since, in its desire to prescribe to States the manner in which they should act in the event of an "international crime", it was inappropriately venturing into terrain that was eminently political.

16. As for international liability for injurious consequences arising out of acts not prohibited by international law, an attempt had been made to define the concept of "harm", and particularly that of "harm to the environment" without, in the latter case, achieving any satisfactory result, since the definition was more concerned with arrangements for compensation than with the harm itself, whose own definition combined heterogeneous elements.

17. Article C, "Liability and reparation", advanced the general principle on which the draft articles were based. However, at the current stage of its consideration of the topic, the Commission did not define the characteristics of liability arising from significant transboundary harm caused by acts not prohibited by international law. In that regard, it should be recalled that State liability could not but have a subsidiary character vis-à-vis the liability of the entity which engaged in the activities that gave rise to the transboundary harm. The mere recognition of the subsidiary liability of States for the harm caused by wrongful acts would indicate considerable progress for international law, given that so far States had accepted it only in specific treaty instruments, such as the Convention on International Liability for Damage Caused by Space Objects. Consequently, without prejudice to the final form which the draft articles should have, it seemed useful to prepare a compendium of the principles on which States could base their efforts to establish their own liability regimes.

18. Mr. CALERO RODRIGUES (Brazil), referring to article 13 of the draft articles on State responsibility, which enunciated the principle of the proportionality of countermeasures, said that the article's requirement that there should be proportionality on two counts - in relation to the degree of gravity of the wrongful act and in relation to the effects thereof on the injured State - might create more problems than it solved. Consequently, it would be sufficient to give a general indication that countermeasures should not be out of proportion to the internationally wrongful act.

19. From a technical point of view, the title of article 14, "Prohibited countermeasures", was inadequate, since in fact the article dealt with actions or conduct which were wrongful ipso jure and could not be considered as countermeasures. His delegation considered satisfactory the enumeration in the article of acts and conduct which were unacceptable as countermeasures. Subparagraph (a), which strictly speaking might be unnecessary, since it was

already contained in subparagraph (e), should be retained at the head of the list, given the paramount nature of the prohibition of the use or threat of use of force among the peremptory rules of international law. With regard to subparagraph (b), on coercion, his delegation supported the current formulation, except with regard to the concept indicated by the word "designed". That term meant that the State applying coercive measures must have the intent of endangering the territorial integrity or political independence of the other State, but what mattered was whether the countermeasures constituted an actual danger, whether or not that was the intent of the State applying them.

20. The seven provisionally adopted articles on the settlement of disputes were by and large acceptable to his delegation. It was interesting that a distinction should have been drawn between voluntary arbitration and mandatory arbitration, which would begin when requested by a party against which countermeasures had been taken. The articles adopted did not envisage judicial settlement and only occasionally gave the International Court of Justice a technical role of confirming or denying the validity of an arbitral award. There was no recourse on appeal to the International Court of Justice.

21. The inclusion of mandatory conciliation was also to be welcomed: although it did not produce binding determination, it could clarify the issues and establish the bases for a settlement. The inclusion of mandatory arbitration was also welcome. Before a State applied countermeasures, a third party should decide whether there were reasons for their application and whether they were within the limits established by the law. If it was felt that mandatory pre-countermeasures arbitration would impose too long a delay in the response of an injured State, a special commission or an impartial commissioner might be empowered to determine whether or not there was justification for the application of countermeasures.

22. With regard to the legal consequences of acts characterized as "crimes", he was afraid that the Special Rapporteur’s proposals, which nevertheless represented a brave effort, were too conservative and made no significant contribution to resolving the issue.

23. In relation to delicts, all injured States were entitled to apply countermeasures. He entirely agreed with the removal of the element of excessive onerousness but had doubts about the other changes suggested.

24. Although the limitation of the substantive rights of the injured State was reduced, only a new obligation would be imposed on the wrongdoing State not to oppose missions sent to its territory for the purpose of verifying whether the obligations of cessation and reparation were complied with, which was admittedly little.

25. A new element introduced in article 19 was that a decision of the International Court of Justice would be required before States were authorized to apply countermeasures. The adopted text had two deficiencies: the first was that such jurisdictional control would not apply to all countermeasures, and the second was that the intervention of the International Court of Justice would not take place before a "political" decision had been taken, which made the whole procedure a clumsy one.

26. He agreed that international society currently was not structured to deal with "crimes"; unsurmountable difficulties would persist regarding the implementation of the articles as long as conditions of decentralization prevailed in the international community. It was possible that some of the problems with which the Commission had been struggling might be insoluble unless a radical change occurred in some of the fundamental conceptions of international life. In any event, the Commission should for the time being give up its attempt to regulate the consequences of international crimes in the draft articles.

27. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he was reluctant to accept the idea that only activities entailing risk could give rise to liability, since liability should be based on the fact that harm had been caused, independent of the nature of the activity which helped produce the harm. Accordingly, he welcomed the text of article C, notwithstanding the fact that it referred to "harm caused by an activity referred to in article 1", which currently covered all activities which involved "a risk of causing significant transboundary harm". That concept was too restrictive; in any event, that was the first time that the Commission unambiguously asserted its intention to move towards its ultimate goal, the regulation of liability.

28. Turning to the tenth report of the Special Rapporteur, he agreed that it was necessary to consider both the liability of the operator and the liability of the State, but he could not agree that the State should be liable only for its failure to comply with the obligations of prevention, as was stipulated in draft article 5. If that were the case, there would be no need for a special provision and the matter could be regulated by the rules pertaining to State responsibility. Although he could agree that only a unitary notion of liability existed, based on harm, liability would arise when substantial transboundary harm occurred, entailing the obligation of reparation, which would be the responsibility of the operator or the State, according to what was determined.

29. As to the articles suggested, in article 21 there was a choice between two alternatives, the second of which provided that the State would have no liability at all. He could not imagine that the Commission could reach such a conclusion after so many years of debate.

30. The tenth report dealt next with the responsibility of the operator, which was aptly called civil liability. The relevant articles were well drafted, although further consideration should perhaps be given to whether they also could be applied to situations in which the State was either an operator or a victim of harm.

31. Draft article H might run counter to the principle that the process of ascertaining the causal link should be based entirely on objective evidence. Draft article I raised delicate and complex issues relating to the enforceability of judgements and those issues required much closer scrutiny.

32. In a separate section, the Special Rapporteur provided a competent analysis of the procedural channels which might be used for the enforcement of liability, which was a difficult issue because the injured party could be individuals or

entities, in particular, the State, and the channels applicable to one were not always suitable for the others.

33. Lastly, the Special Rapporteur seemed to have some sympathy for solutions considered in other instruments: domestic courts assisted by technical advisory bodies, or claims commissions. Given the variety of situations which might arise, additional machinery might prove necessary. In any event, the question of procedures required further study.

34. Mr. HE (China) said that the Commission had encountered considerable difficulty in drafting the articles in part two of the draft articles on State responsibility concerning the legal consequences of acts characterized as crimes. The problem lay in the fact that the proposed articles were based on the widely challenged concept of "State crimes". Since the validity of the concept was extremely controversial, it might be wise to defer their consideration until the second reading, when they could be considered in conjunction with article 19 of part one, which had been adopted on first reading.

35. Theoretically, in the light of the maxim societas delinquere non potest, it would be difficult to transplant the concept of crime to the realm of State responsibility. In view of the fact that the international community comprised sovereign States which were on an equal footing and that there was no supranational judicial organ, it would be impossible to apply criminal law.

36. In international practice, the Nürnberg and Tokyo military tribunals had tried individuals who, as State leaders, had been responsible for having planned and led crimes against the peace and security of mankind. Consequently, it was the individual rather than the State that should bear criminal responsibility, although the State should not be immune to responsibility for providing compensation for the damages caused. The same considerations applied to the international tribunals established with respect to the former Yugoslavia and Rwanda, and to the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. Accordingly, a "State crime" did not exist in contemporary international practice.

37. Nevertheless, the possibility of establishing that concept should continue to be explored in the process of the progressive development of international law. The Special Rapporteur proposed, in draft article 19, that the General Assembly, the Security Council and the International Court of Justice should combine their respective functions to determine the existence of a State crime. It must therefore be asked what the nature would be of the assessment to be made by the Security Council and the General Assembly. If the Council and the Assembly were asked to exercise a de facto judicial function, that would contravene the relevant provisions of the Charter. If, on the contrary, the assessment was of a political nature, it would affect the mandates and practice of the United Nations bodies responsible for maintaining peace and security, in accordance with the Charter. Furthermore, paragraph 3 of draft article 19 was contrary to Articles 18 and 27 of the Charter.

38. In the case of the International Court of Justice, its compulsory jurisdiction was based on the principle of voluntary acceptance by States.

However, paragraph 5 of draft article 19 was incompatible with the principle and its adoption would make it necessary to amend the Statute of the Court. Furthermore, the Court lacked the necessary technical means to handle a criminal litigation and determine the existence of a State crime.

39. The draft articles in part three of the draft, relating to the settlement of disputes, had three features. Firstly, by covering almost all the mechanisms envisaged in the Charter, they could offer more options to the parties to the dispute. Secondly, arbitration could be resorted to only with the consent of the parties, except in the case of a State which had been subjected to countermeasures. Thirdly, the International Court of Justice would be competent to decide on the validity of an arbitral award only at the request of the parties concerned when the validity had been challenged and the parties had not agreed on another tribunal.

40. Lastly, with regard to the difficulties encountered concerning part two of the draft articles, the Commission should not resolve the matter simply by a majority vote. The Commission should engage in patient and thorough consultations in order to find a viable solution acceptable to most States.

41. Mr. MIKAELSEN (Denmark), speaking on behalf of the Nordic countries on the question of State responsibility, welcomed the fact that the International Law Commission had approved draft articles 1 to 7, relating to settlement of disputes, given the possible impact of part three of the draft on the provisions concerning countermeasures. The incorporation of a compulsory dispute settlement procedure might obviate the necessity for special provisions concerning countermeasures.

42. However, the imperfections of contemporary international society, which had not succeeded in establishing an effective centralized system of law enforcement, had obliged the Commission to accept the use of countermeasures. Therefore, instead of a general clause on mandatory dispute settlement applicable to the entire draft, the Commission had suggested the more limited approach set forth in article 5, paragraph 2. The Nordic countries welcomed that approach, however limited it might be.

43. It should be noted, however, that according to that paragraph, only the State against which countermeasures had been taken would be entitled to request mandatory arbitration. A certain imbalance would thus be created between the rights of the States in litigation, a question which was regulated in article 12 of the chapter on countermeasures. The impact of article 5 on article 12 would still need to be considered closely.

44. As to the draft articles proposed by the Special Rapporteur on the consequences of crimes and the settlement of disputes with respect to crimes (arts. 15 to 20 in part two and art. 7 in part three), the Nordic countries agreed in principle with the idea of distinguishing between international delicts and international crimes and spelling out in the convention the legal consequences of a crime committed by a State.

45. However, the Nordic countries were deeply concerned about the system introduced in article 19 since, although the final decision would be left to the

International Court of Justice, by introducing the political element inherent in decisions of the General Assembly or the Security Council, an unfortunate mixture of competences between the judicial and political bodies of the United Nations would ensue. It would be preferable to concentrate on the role assigned to the Court under the proposed scheme.

46. Mr. ODEVALL (Sweden), speaking on behalf of the Nordic countries on the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that modern international law relating to the theory of liability for such acts had gained ground rapidly. The intensification of activities which might involve extreme danger had made it increasingly necessary to establish mechanisms capable of preventing extraterritorial damage or of compensating for it when it occurred.

47. The general principles on liability had been largely incorporated into international treaty and customary law. The conferences held in Stockholm in 1972 and in Rio de Janeiro in 1992 had demonstrated clearly the existence of an opinio iuris on the question of State liability and had given an impetus to the codification process.

48. The Special Rapporteur's eleventh report focused on the role of harm. The articles elaborated by the Commission reflected general principles and served as comments on selected provisions adopted previously. Thus, article A reaffirmed principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. Article B established the basic principle of prevention, which was fundamental in that context. Article C was still in an embryonic stage and should be further elaborated. Article D complied fully with the objectives set forth in principles 13 and 27 of the Rio Declaration regarding cooperation in good faith among States.

49. The Nordic countries felt that the Commission should elaborate a declaration of principles and formulate more specific rules. The main purpose should be to prevent damage and provide reparation when damage had occurred. It was therefore particularly important to develop a framework for guaranteeing the protection of innocent victims from the consequences of transboundary harm.

50. Ms. ŠKRK (Slovenia) said that the slow progress on the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on State responsibility was due to the fact that both drafts concerned matters related to a sphere of international law which, during the past 50 years, had been dealt with almost exclusively in the Security Council on the basis of political rather than legal considerations. The future Code would have to complement the future system of an international criminal jurisdiction and promote the unification of domestic criminal law and practice concerning the prosecution of perpetrators of the most serious crimes against international law. The Code should therefore take the form of a multilateral treaty and should be harmonized with the statute of the future international criminal court

51. Although Slovenia had not opposed the longer list of crimes initially proposed for inclusion in the draft, it realized that the restriction ratione materiae of the Code was a key issue and that attention must be focused on six crimes: aggression, genocide, crimes against humanity, war crimes,

international terrorism and illicit traffic in narcotic drugs. Her delegation felt that the proposed new definition of aggression had the advantage that determination of the existence of a crime no longer depended on a decision of the Security Council, but it found unconvincing the Special Rapporteur's argument for omitting several paragraphs of the definition of aggression contained in General Assembly resolution 3314 (XXIX). However, it supported the text of draft article 19, including paragraph 2, under which attempted genocide would give rise to criminal responsibility.

52. With regard to the new text of draft article 21, Slovenia felt that the original intention to include in a single group both crimes against humanity as recognized by customary law on the basis of the Charter of the Nürnberg Tribunal, which applied only in time of war, and systematic and massive violations of human rights, represented an attempt to further the progressive development of international law. However, in the statutes of the criminal tribunals for the former Yugoslavia and Rwanda and in the draft statute of an international criminal court, crimes against humanity were defined as part of customary law in their original meaning on the basis of the Charter of the Nürnberg Tribunal, and the Special Rapporteur should observe that practice.

53. Slovenia regretted the Special Rapporteur's reluctance to consider the 1977 Protocols to the Geneva Conventions of 1949 as a part of positive international law. Over two thirds of the nations of the world were parties to those protocols, which was evidence of the existence of a general practice. Slovenia supported the inclusion of international terrorism and illicit traffic in narcotic drugs in the Code and agreed with the Special Rapporteur's proposal that the crime of apartheid should be replaced by a crime of racial discrimination of corresponding gravity. On the other hand, it felt that the Commission should not be too hasty in omitting colonial domination and other forms of alien domination from the draft under study and that, in any case, the draft should include the crime of wilful and severe damage to the environment among crimes against the peace and security of mankind. The Commission should also try to specify penalties for each crime, precluding the death penalty. Last, Slovenia felt that the principle of non-applicability of statutory limitations for war crimes was an integral part of the general principles of criminal law and should therefore be included among the general provisions of the draft Code.

54. Turning to chapter IV of the Commission's report on State responsibility, she said that the debate had focused on the distinction between the concepts of State crimes and international delicts and on the consequences of internationally wrongful acts which were characterized as crimes. However, her delegation felt that the Commission had far more serious legal problems to overcome with regard to State responsibility, such as the question of an injured State.

55. It was obvious that the consequences of a crime might not affect all States in the same manner. In some cases, the notion of an injured State might encompass States directly affected by the crime and other States that might suffer less evident consequences of it. The question of legal interest in a case of crime should be dealt with more precisely, for it raised the question of locus standi when the matter was brought before an international judicial body.

In principle, legal action taken against the State responsible for a crime and any countermeasures must not have a punitive character, but must be aimed at the effective cessation of the wrongful conduct and guarantee that it would not be repeated.

56. The General Assembly and the Security Council, as political organs, could not be involved in the implementation of the special legal consequences deriving from crimes.

57. As for part two of the draft relating to the content, forms and degrees of international responsibility, her delegation felt, for the moment, that the draft articles on proportionality and prohibited countermeasures were satisfactory.

58. Regarding the draft articles in part three, relating to the settlement of disputes, special attention should be paid to the possibility that a State against which countermeasures had been taken might unilaterally submit a dispute to an arbitral tribunal, since the question affected the balance of interests between the injured State and the State that had committed the wrongful act. Inasmuch as such a provision favoured the peaceful settlement of disputes, it should not be regarded as favouring the interests of the wrongdoing State. If, in an arbitration proceeding, one of the parties challenged the validity of the arbitral award, that challenge should be elaborated in greater detail.

59. Mr. MOMTAZ (Islamic Republic of Iran), replying to those members of the International Law Commission who had denied the possibility of distinguishing between international crimes and international delicts, said that the distinction was based on the Charter of the United Nations, Chapter VII of which instituted a special regime for dealing with violations of the obligation not to resort to force, an obligation that was distinguished by its gravity from other international obligations. That distinction was also to be found in the practice of the International Court of Justice, and specifically in the 1970 decision concerning the Barcelona Traction case and in the 1986 decision regarding military and paramilitary activities in and against Nicaragua.

60. It must be determined before which body and on what legal basis a State might be accused of an international crime. The fact that the General Assembly, the Security Council and the International Court of Justice played a role in the proposed procedure was an advantage, for those international organs were sufficiently representative. Nevertheless, the choice of the two main political organs of the United Nations entailed a number of difficulties. Attributing new powers to them would require revision of the Charter. Nevertheless, most acts that might be classified as crimes were sufficiently grave to constitute an unquestionable threat to peace and therefore fell within the competence of those two organs, especially the Security Council. Actually, the main drawback was that both those organs were subject to political fluctuations and, as had already occurred, might adopt a complacent attitude with regard to very serious wrongful acts, especially in the case of the Council, whose members, having the right of veto, were assured full immunity.

61. Given the importance of the rights infringed upon when fundamental norms of the international community were violated, it was in the interest of all States

to be protected. A mechanism would have to be conceived that would enable States to have unilateral recourse to the International Court of Justice with a view to determining whether a crime had been committed and defending the general interest. Use might be made of the formula of the Vienna Convention on the Law of Treaties, whereby States parties to a dispute regarding the application or interpretation of a norm of jus cogens could have unilateral recourse to the Court, especially where such norms and the international obligations whose breach constituted an international crime were very similar. As it was in the interest, legally speaking, of the international community that norms should be respected, an arbitration clause might be included, which would in fact transform the action into a genuine popular public action.

62. Should States accept the compulsory jurisdiction of the Court for characterizing wrongful acts as international crimes, the Court must take the necessary steps to minimize the duration of the judicial process.

63. Once a wrongful act had been characterized as a State crime, its possible legal consequences must be determined. To the extent that it was accepted that the perpetration of such acts was harmful to all States, the author State would obviously be responsible vis-à-vis all the others. For that reason, the Special Rapporteur had considered that all States were injured, though he had recognized that that might create a chaotic situation owing to a multiplicity of claims. Therefore, a distinction must be made between directly and indirectly injured States, the right to compensation being recognized only in the case of those having suffered material damage. It would be dangerous and contrary to international law to permit all States to apply countermeasures. In any event, in order to determine the legal consequences of acts characterized as crimes, the Commission must define the concept of "injured State" and amend article 5 accordingly.

64. An effort must be made not to proceed by analogy with internal law, for enormous difficulties would result if it were stipulated that a State responsible for an international delict need only compensate for the damage, whereas a State responsible for an international crime would incur a penalty. Even if it were accepted that a State which committed a crime incurred criminal responsibility, the penalties should be in keeping with the nature of that collective entity known as the State. It was inconceivable that the consequences of a crime should jeopardize the territorial integrity or political independence of the State which had committed the crime.

65. The draft articles on the settlement of disputes ran counter to the principle of free choice of means of peaceful settlement embodied in Article 33 of the Charter and in General Assembly resolutions such as the Manila Declaration on the Peaceful Settlement of International Disputes, under which it was for States to agree upon pacific means suited to the circumstances and the nature of the dispute. It would be preferable to include the responsibilities connected with the draft articles in an optional protocol on compulsory dispute settlement, to be annexed to the proposed convention.

66. The decision, reflected in article 4, to combine conciliation with fact-finding was correct, for separating the two functions might delay final settlement of the dispute. However, the commentary to that article made no

mention of the principle that the receiving State must grant its consent to fact-finding missions. Indeed, such missions might create difficulties rather than providing solutions, for a dispute could not be settled by means of an inquiry carried out against the will of a State. Undoubtedly, States would refuse fact-finding missions only on exceptional grounds.

67. Lastly, referring to article 1 of the Annex to the draft articles, which provided for the drawing up of a list of conciliators, he recalled that the Secretary-General, at the request of the General Assembly, had on many occasions prepared such lists, which had never been used because the extremely varied nature of the disputes rendered it virtually impossible to select in advance the experts who should make up conciliation commissions.

The meeting rose at 1.10 p.m.