Document:-
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Summary record of the 2539th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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Vienna Convention on Consular Relations (Paraguay v. *United States of America)*.[21] Days before the scheduled execution of a Paraguayan national in the United States, the Paraguayan Government had filed a request for provisional measures including a stay of execution, so that the merits of the Paraguayan case could be heard while the accused was still alive. The Paraguayan Government had contended that the accused had never been apprised of his right to consult with a Paraguayan consul. Thereupon, both parties to the dispute and the Court itself had acted with extraordinary speed in view of the imminent nature of the execution. The Court had issued an order of interim measures of protection stating that the accused should not be executed until the merits of the application had been assessed. However, the United States Supreme Court and the State Governor had refused a stay of execution, and the accused had been duly executed. The Paraguayan Government was continuing to press its case, which was due to be heard in 1999.

69. The last of the cases currently before the Court was the case concerning the *Gabčíkovo-Nagymaros Project*. It had been determined that, should the litigating States be unable to resolve their differences, they should have further recourse to the Court. It appeared that the matter had not been fully resolved and further legal proceedings were therefore anticipated.

70. While the Court generally welcomed its expanded caseload, the additional work had inevitably led to increasingly lengthy delays in hearing cases. On average, States could currently expect to wait about four years between initial filing and final judgment. Such delays had understandably given rise to a certain restiveness both inside and outside the Court. The basic problem was that the resources at the Court's disposal had not increased in line with the demand for its services. The translation services and archives department were the same size as they had been in the early 1980s. Unlike the judges of ad hoc tribunals established by the United Nations, the judges at the Court did not have clerks, nor was there a corps in the Registry designed to assist them individually. The legal staff numbered no more than six in all. ACABQ and the General Assembly had found themselves unable to increase, and indeed in recent years had cut the resources allocated to the Court.

71. On the other hand, the Court itself had taken a number of steps to expedite its procedures. On an experimental basis, for example, judges would not be required to submit individual notes in certain phases of cases concerning jurisdiction and admissibility, thereby saving their time and that of the translators. States were being encouraged to submit their pleadings consecutively rather than simultaneously, thus encouraging them to disclose as much information as soon as possible rather than constantly waiting to see what evidence the other party would adduce. States were also being urged to curb the proliferation of annexes to pleadings which tended to absorb a disproportionate amount of translation time. The Court had also adopted a more liberal policy with regard to accepting documentation after final written pleadings had been filed.

72. Mr. LUKASHUK asked whether the Court was able to make use of draft articles adopted by the Commission.

73. Mr. SCHWEBEL (President of the International Court of Justice) said that, over the years, the Court had habitually attached considerable importance to the conventions elaborated by the Commission. Draft articles were, of course, only drafts and therefore could not be accorded the same weight, but in cases where the parties to a dispute agreed that certain draft articles were an authoritative statement of the law on a particular point, the Court naturally gave relevant weight to them.

74. Mr. AL-KHASAWNEH asked whether litigating States might not be asked to make some contribution to the cost of processing and translating the Court's voluminous documentation.

75. Mr. SCHWEBEL (President of the International Court of Justice) said that the possibility of shifting the burden of translation onto litigating States had been broached a few years previously, at the lowest point of the financial crisis in the United Nations. The Court had felt that such a request would place an undue and unfair burden on certain developing States whose official language was neither English nor French, which were the working languages of the Court. Current practice was to welcome but not to solicit translations. Further budget cuts would have an extremely deleterious effect on the Court's work. When pressed on the issue, ACABQ had not been particularly encouraging with regard to the Court's financial plight, but at the same time the Court had noted that the United Nations had managed to find sufficient resources to finance more recently established judicial bodies.

The meeting rose at 1.15 p.m.

2539th MEETING

Tuesday, 2 June 1998, at 3.05 p.m.

Chairman: Mr. João BAENA SOARES

Later: Mr. Igor Ivanovich LUKASHUK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

[21] *Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GOCO said it was not enough merely to assert that States could commit crimes under international law and the intention of article 19 (International crimes and international delicts) was not to transplant criminal law into the international domain, but, rather, to attach graver consequences to violations which constituted international crimes and which could not be reduced to a bilateral relationship between the injured State and the wrongdoing State. It was unnecessary to turn article 19 into a penal provision and, consequently, all its elements with criminal connotations could be deleted without ill-effect.

2. In paragraph 89 of his first report (A/CN.4/490 and Add.1-7), the Special Rapporteur referred to corporate criminal responsibility. The possibility of applying that notion to the conduct of States should be examined. He endorsed the remarks contained in paragraph 93 of the report and supported the recommendation in paragraph 95 that article 19 and articles 51 to 53 should be deleted from the draft articles. He also agreed that a regime of State responsibility in the proper sense of the term should incorporate the five elements listed in paragraph 85.

3. With regard to the definition of crime, he joined previous speakers who had expressed concern about the woolliness and inadequacy of the wording of article 19, which a seasoned defence counsel could turn to account with little effort. If the Commission discarded the notion of State crimes and replaced it by that of serious wrongful acts, it could develop the topic of responsibility without having to define the penalties associated with a criminal offence. While it was true that an internationally wrongful act could be aggravated by the circumstances mentioned in article 19, paragraphs 2 and 3, the comments and observations received from Governments (A/CN.4/488 and Add.1-3), on the matter were instructive. One State, the Czech Republic, in its comments under part two, chapter IV, of the draft articles, for example, held that the idea of treating as a crime the breach of an obligation essential for the protection of fundamental interests of the international community was a political rather than a legal assessment. Another, Italy, viewed article 19 as positive in that it proposed criteria for determining what constituted wrongful acts without giving rise to a "crystallization" of international crimes. Yet another, Ireland, in its comments under article 19, maintained that there was no clear evidence that the State responsibility flowing from a prohibited act of aggression had been recognized by the international community as pertaining to a particular category designated as "criminal" and that it could not be inferred from the Definition of Aggression adopted by the General Assembly[4] that an act of aggression constituted a crime. What the General Assembly had had in mind in adopting article 5, paragraph 2, of the Definition was the role of the United Nations, particularly the Security Council, in the maintenance of international peace and security. According to the Government of Ireland, the reliance on evidence of obligations *erga omnes* to support the existence of a category of international criminal responsibility of States was misplaced and it should be noted that nowhere in the judgment of ICJ in the *Barcelona Traction* case did it draw a link between a breach of an obligation *erga omnes* and the attribution of criminal responsibility to a State. However that might be, the comments by Ireland were, in his view, highly persuasive in respect of article 19.

4. Mr. AL-BAHARNA said that he totally disagreed with the Special Rapporteur's conclusions under his recommendation in paragraphs 94 and 95 of his first report. The concept of "international crimes" had been part of article 19 since its unanimous adoption by the Commission, on first reading, in 1976.[5] It had been recognized in textbooks of authority which cited the existence of different regimes of State responsibility for internationally wrongful acts and had gained support in State practice, at least with regard to crimes such as aggression or genocide. Furthermore, the Special Rapporteur had himself acknowledged in paragraph 90 of his report that a number of States continued to support the distinction between crimes and delicts formulated in article 19 and indicated in paragraph 44 of the report that a majority of States that had spoken in the Sixth Committee on the subject in the period 1976-1980 supported the distinction between crimes and delicts and an even larger majority thought that the degree of seriousness of wrongful acts should be taken into account. Paragraph 45 also confirmed that, following the adoption of parts two and three of the draft articles, all Governments that had commented had dealt with the issue of international crimes. As noted by the Special Rapporteur, a wide range of views existed, both among States and in the literature, but the conclusion to be drawn was that the issue of international crimes of States was still alive. Referring to paragraphs (43), (46), (47), (51), (54) and (56) of the commentary to article 19, he drew attention to the Commission's conclusion that it would be disappointing the hopes placed in its work if it prepared a draft convention which made no reference to the regime of responsibility applicable to the breach of the most essential international obligations and expressed the view that today's Commission would be wrong to ignore the developments that had taken place over the past quarter of a century with respect to international crimes of States. It could not reject what had been achieved in good faith and through hard work on account of differences of opinion about the expression "international crime", although it had gained recognition in legal textbooks, in State practice and, to some extent, in legal decisions. Of course, some States were opposed to the notion of international crime and would be happy to see article 19 deleted, since they believed that the Security Council and the proposed international criminal court could concern themselves with such acts. The Council, in particular, was

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.

[4] See 2534th meeting, footnote 6.

[5] See 2532nd meeting, footnote 17.

authorized under Chapter VII of the Charter of the United Nations to deal with situations that constituted a threat to or breach of the peace, such as acts of aggression and other criminal acts mentioned in article 19, paragraph 2. That was true, but the Council dealt with the political aspects of such crimes and it was for the regime of State responsibility to find legal and juridical solutions. Besides, Council practice had been inconsistent in dealing with such situations and, by exercising the right of veto, the permanent members of the Council had frequently prevented the international community from taking effective measures against States involved in the commission of international crimes, as indicated by the Special Rapporteur in paragraph 59 of his report. The establishment of a regime applicable to international crimes in no way encroached on the Charter or the special regime of measures that the Charter provided for in certain situations.

5. Noting that the Special Rapporteur envisaged five possible approaches to the question of State criminal responsibility in paragraph 70 of his first report, he said that the Special Rapporteur went too far when he deemed the draft articles, as adopted on first reading, inadequate for the reasons given in paragraph 85. The authors of article 19 had not intended to go into the complexities of what the Special Rapporteur referred to as "criminalizing" State responsibility. They had simply wished to spell out in simple and general legal terms the notion of "international crime" in the context of the regime of internationally wrongful acts. The commentary to article 19 stated clearly what was meant by "international crime". The idea was not to establish a "code of crimes", since States and their organs were not subject to legal prosecution, and he saw the logic of the Commission's view expressed in paragraph (60) of the commentary to article 19, since the purpose of that article was not to establish a comprehensive definition of crimes of aggression or genocide or a clear-cut definition of the two categories of internationally wrongful acts, namely, international crimes and international delicts. As noted in paragraph (61) of the commentary to article 19, the Commission had therefore decided to follow the system adopted in the first instance by itself and subsequently by the United Nations Conference on the Law of Treaties[6] for determining the "peremptory" norms of international law, a system which consisted in giving only a basic criterion for determining international obligations. Article 19, paragraph 2, served a useful purpose in that it provided an objective criterion for the definition of an international crime, which would entail more serious legal consequences when the "community as a whole" subjectively recognized it as such. The paragraph would therefore remain inoperative in the absence of such a subjective assessment. But the recognition in question, which need not be unanimous, could be backed up by a General Assembly resolution expressing concern at and condemning the act in question. In other words, it was a collective political decision that initiated the judicial proceedings against the wrongdoing State. The legal consequences stipulated in articles 51 to 53 would then become applicable with full rigour. The proceedings would eventually be referred to ICJ, which would have to decide whether an international crime had in fact been committed.

[6] See 2526th meeting, footnote 17.

6. He was quite satisfied with article 19, which he viewed as the product of a reasonable and progressive effort of codification of the notion of an internationally wrongful act in the form either of a delict or of a crime. In that spirit, he urged his colleagues to resist the temptation to delete the article, as they had been invited to do by the Special Rapporteur. It constituted, in his view, the golden rule of State responsibility. With its accompanying commentary, it was a mine of modern and progressive legal ideas about what State responsibility should be in the future, even though it had been written over 20 years earlier.

7. Frankly, he did not see why the notion of international crime was considered as taboo and scared Government representatives in the Sixth Committee. The jurists of the Commission should have their own idea of what form the progressive development of international law should take and stick to the course that had been courageously embarked on in 1976. Otherwise, they would look as though they were swimming against the tide of history and the development of international law. A Special Rapporteur often tried to please everyone, but then found he had no option but to water down his text for the sake of compromise, but at the expense of quality. To that end, he would strive to produce a "minimalist" text that a simple majority of members could approve. That was the Commission's approach today to any set of draft articles. The members of the Commission at its twenty-eighth session, in 1976, doubtless more courageous and "progressive", had adopted, unanimously and without much ado, the article that certain members currently wished to consign to the grave.

8. With regard to the consequences of international crimes dealt with in article 40 (Meaning of injured State), paragraph 3, and articles 51 to 53, the Special Rapporteur recommended the reconsideration of the paragraph and the deletion of the three articles in line with his suggestions in paragraphs 91 to 93 of his first report about "decriminalizing" State responsibility. He criticized those provisions as being inadequate to address the question of legal consequences. But assuming that article 19 was retained, they seemed acceptable, even with the inadequacies to which the Special Rapporteur had drawn attention. He found it unlikely that the Commission, which believed in compromise and the minimalist approach, would be able to improve on the articles which had been adopted in 1976 after heated discussion, not unanimously, but by a simple majority vote. They represented a compromise, and any further compromise would be made at the expense of quality.

9. Concluding that portion of his statement, he said he was convinced that article 19, chapters I to III of part two and part three, on the settlement of disputes, which had been submitted to the General Assembly at the forty-eighth session, in 1996, were the best provisions available in the circumstances and that it would be useless, if not disastrous, to reopen the discussion on them.

10. If the international crime of a State, which the Special Rapporteur rightly called the crime that dare not speak its name, was looked at closely, it would be seen that the legal consequences did not involve any penal sanctions. Even the Special Rapporteur, who was very

critical of article 19, paragraph 2, admitted at the end of paragraph 51 of his first report that the consequences attached to international crimes were rather minimal. It was quite clear from parts two and three of the draft articles that the consequences attached to an international crime, as referred to in articles 41 to 53, were mostly civil. In addition, articles 51 to 53 specified the obligations arising from the consequences of international crime. Those obligations did not involve penal sanctions, all the more so as there was yet no competent court of law which could impose such sanctions. The idea behind the concept of international crimes of States was that it should be a deterrent, in the sense used in the nuclear field, against certain adventurous States. He hoped he had been able to show that the concept of international crime as defined in article 19 was really harmless, despite its disturbing name. But it was no less real for all that and any regime of State responsibility devoid of that legal device would have no meaning and would be going against history. Article 19 in fact represented a valuable historical achievement which should not be thrown away.

11. His view was that there was no need to codify State responsibility in respect of international delicts, because the literature and legal materials on the subject were abundant, whether in the form of customary law, case law, arbitral awards, treaties or the findings of commissions. The fact that the Commission had not been able to finish its work on international delicts in the past 30 years had not stopped ICJ and other courts from delivering judgements and decisions on claims between States. The true challenge before the Commission was thus that of codifying responsibility for international crimes: it was the challenge of the century.

12. Before taking any decision about article 19, the Commission should seek a new mandate from the General Assembly to authorize it to do so. At the least, the Commission should authorize the Special Rapporteur to provide a questionnaire to the delegates in the Sixth Committee to seek the views of their Governments on three basic questions: was the Commission authorized to delete article 19, and if so, to what extent? Should article 19 be redrafted in a form that would cover only international delicts? If so, how should the Commission deal with internationally wrongful acts arising from the commission of an international crime?

13. Mr. CRAWFORD (Special Rapporteur), summing up the debate on the topic, said that the draft articles were unsatisfactory on nearly all accounts in their treatment of what could be described as the broad field of multilateral obligations. There was a consensus in the Commission that the topic was not limited to merely bilateral responsibility, although that was included. It was also clear that the original vision that the Commission had had in formulating article 19 had not been realized. As pointed out in paragraph 67 of his first report, at that time, it had specifically excluded the "least common denominator" approach to international crimes, but in fact that was the approach that had been adopted. Among the eloquent spokesmen for the fundamental distinction between international crimes and international delicts embodied in article 19, paragraph 2, none had denied that that had been a *détournement* of intentions.

14. That was why the Commission of today, which had the responsibility of considering the draft articles on second reading, was facing a serious problem with the differences of opinion on article 19. It would be unconstructive for both sides to maintain that one half of the Commission should prevail over the other. The disagreement among members was obvious and an indicative vote would not only be very undesirable, but would not solve the problem. He understood Mr. Al-Baharna's concern over what he had described as the continual adoption of compromise solutions. But one could respond that that was inevitable in a deliberative body like the Commission. The compromise solution that the Commission had adopted on the international criminal court had not done badly. It was thus clear that, when operating under its normal procedures, namely, using working groups and the Drafting Committee, the Commission could produce constructive solutions which could be the platform for further discussion by States.

15. The exceptionally rich debate on the topic had shown the complexity of the problems raised by article 19 and the reality of the issues raised by paragraph 2. To illustrate above all the complexity of the concept of State crime, he mentioned the case when a single act could be considered a crime if committed by one State, but a delict if committed by another because the two would be affected by its consequences to different degrees. As to the difficulties raised by paragraph 2, only perhaps one member of the Commission had indicated that the draft articles should be reduced to strictly bilateral responsibilities. On the contrary, most members had affirmed that there were obligations to the international community and that their manifestations within the field of international responsibility should be duly reflected in the draft articles. The draft had inherited from the "least common denominator" solution the defect of treating the multilateral forms of responsibility effectively as bilateral forms: article 40, paragraph 3, converted the so-called multilateral obligation into a series of bilateral obligations, and that created a severe problem, not just in theory, but also in practice, by authorizing injured States—States that were injured in a general sense and that were not the primary States concerned—to adopt unilateral approaches. The previous Special Rapporteur had been stymied by that issue after three years of work, and that was what had led to his resignation. Neither the Commission nor the Working Group which it had established and which he himself had chaired had found a solution to the massive procedural difficulty that would exist if individual States were authorized to represent community interests without any form of control.

16. In sum, it would appear that the members of the Commission were in agreement on five major points that he would outline one by one. The first was the distinction between international crimes and international delicts, which satisfied no one and had been subjected to much criticism. Many members had said that the term "crime" had given rise to confusion: it was obviously contaminated by its connotations in respect of penal sanctions. But the Commission appeared to be ready to envisage ways of solving the problem other than that of establishing a categorical distinction between crimes and delicts.

17. The second point on which there was agreement was the relevance of the established categories of *jus cogens* and obligations *erga omnes*, it being agreed that the first category was narrower than the second. It must be recalled that when ICJ had formulated the idea of obligations *erga omnes* in its judgment in the *Barcelona Traction* case, the Court had thought that it was talking about a fundamental distinction and about very important norms. The examples it had given in its famous dictum had in fact been examples of norms that would currently be regarded as norms of *jus cogens*. The Court had certainly not been seeking to make the existence of obligations *erga omnes* dependent on the existence of multilateral instruments: the fact that a treaty was a multilateral instrument did not mean that its provisions applied *erga omnes*. Those two modern concepts in the area of the obligations of States were assuredly part of the progressive development of the law and had important implications within the field of State responsibility.

18. The third point on which there seemed to be general agreement in the Commission was precisely that the draft articles as they stood did not do sufficient justice to those fundamental concepts—particularly in article 40, which would certainly have to be redrafted. A further question was whether, within the field of obligations *erga omnes* and norms of *jus cogens*, a further distinction should be drawn between serious and less serious breaches. That distinction certainly made sense in relation to obligations *erga omnes*. The usefulness of such a distinction was less clear in respect of norms of *jus cogens*, for which there was the problem of the threshold beyond which a situation constituted genocide, for example, as opposed to a crime against humanity. But it was very hard to say that international law drew a further distinction within each of those categories between serious crimes against humanity and serious genocide. Article 19, paragraph 3, was a source of confusion in that regard.

19. The fourth element which had emerged from the discussions was an awareness that the draft articles created significant difficulties of implementation. There was the problem to which he had already referred, that of dispute settlement, and the one, much discussed at the previous sessions of the Commission, of the relationship between the directly injured State and other States, which needed further reflection. Another problem which had indirectly appeared, but which was no less essential, had to do with the fact that, with respect to most breaches of fundamental norms, the primary victims were usually not other States, but populations. That was the case not only with breaches of norms relating to genocide or basic rules concerning the right to self-determination of peoples, but also with aggression, which obviously involved an inter-State situation. Thus, without going so far as to say that the Commission should deal only with crimes committed against populations or groups of people, it was clear that that was a fundamental element which inevitably raised the serious question of representation and exacerbated the problem of distinguishing between directly and less directly injured States.

20. Given those difficulties of implementation, which must not be underestimated, the general regime of State responsibility was to some extent residual in that field, and not just in relation to the most obvious cases of aggression. It was true that, in respect of collective obligations of a fundamental character, the rules of State responsibility might actually have negative and not merely positive effects as to the application of measures of enforcement. If the existence of a collective interest was recognized, the problem was in ensuring that the enforcement measures applied retained a collective character, which article 40 could be criticized for not doing. Hence, the Commission should reconsider those problems, taking into account the proposal by a number of members for the adoption of a more differentiated regime, for example, between cessation and reparation in connection with the rights of injured States.

21. The fifth point on which general agreement had emerged between the two groups of members who had expressed views in the discussion was the idea that, at the current stage of the development of international law, State crimes should not be envisaged as a distinct penal entity. Both sides had endorsed the proposal which the Commission had itself approved in 1976, namely, that State responsibility was in some sense a unified field, notwithstanding the fact that a distinction was made within it between obligations of interest to the international community as a whole and obligations of interest to one or several States. Leaving him with his firm conviction that in future, the international system might well come up with a genuine form of corporate criminal liability, most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach, developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the future international criminal court, acting in complementarity with State courts, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole.

22. Concluding on the utopian project of a genuine criminalization of State conduct, he stressed that it was not merely a question of labelling and that, if the Commission must return to it in the future, it must attach genuine consequences through genuine procedures.

23. With a view to enabling the Commission to overcome the difficulties which it was facing and to complete its work of codification and progressive development in the general law of State responsibility in the foreseeable future, taking full account of the obligations owed to the international community as a whole, he said he was submitting five proposals to the Commission as a basis for discussion.

24. The first proposal read:

> "The Commission should proceed with its second reading of the draft articles on State responsibility on the basis that the field of State responsibility is neither 'criminal' nor 'civil' and that the draft articles cover the whole field of internationally wrongful acts."

The last part of the sentence did not mean that the purpose of the draft articles was to regulate the field of internationally wrongful acts in all its aspects; other instruments would deal in more detail with certain aspects of State responsibility and the draft itself contained a *lex specialis*

article (art. 37), as well as a saving clause concerning the Charter of the United Nations.

25. The second proposal read:

> "On that basis, the draft articles should not seek to address the issue of the possible criminal liability of States or the penalties or procedures that any such liability would entail."

That proposal amounted to setting aside the penalization of State conduct, in the strong sense of the term.

26. The third proposal read:

> "On the other hand, the draft articles need fully to reflect the consequences within the field of State responsibility of the basic principle that certain international obligations are essential, are non-derogable (*jus cogens*) and are owed not to individual States, but to the international community as a whole (*erga omnes*)."

He noted that those obligations and their character stemmed from general international law, which justified the Commission taking that into account in the field of State responsibility and envisaging only aspects, notably effects, of relevance to the subject.

27. The fourth proposal read:

> "Consequently, in the course of the second reading, the Commission will, in place of article 19, seek systematically to take account of serious breaches of the obligations referred to in paragraph 3 above. In the first instance, this could be done through a working group to be convened in New York in the second part of the session."

That proposal emanated from recognition of the fact that the Commission could not adopt a distinction between crimes and delicts by consensus; hence the idea that it should proceed instead to spell out systematically the consequences and fundamental obligations referred to in the third proposal.

28. The fifth proposal read:

> "Consideration would be given to a suitable saving clause, making it clear that the draft articles are without prejudice to the existence or non-existence of 'international' crimes of States."

29. In the absence of an agreement on the five proposals, which could be amended, the Commission would not be able to make progress, given the impasse into which the distinction between crimes and delicts had led it. He suggested that the five proposals should be referred to an open-ended working group to decide on the exact wording.

Mr. Lukashuk took the Chair.

30. Mr. FERRARI BRAVO said that the proposals had to be drafted as simply as possible because at issue was merely a draft mandate for a working group. That prompted him to request the deletion in the first proposal of the phrase beginning with the words "on the basis that", as well as the entire second proposal. On the other hand, the third proposal, which focused on consequences, was at the crux of the problem and must be retained. The fourth proposal was acceptable, provided that the phrase "in place of article 19" was deleted; retaining it would be tantamount to prejudging the results of the working group which that proposal would create. Consideration of the fifth proposal should be postponed.

31. Mr. ECONOMIDES thanked the Special Rapporteur for his efforts to find a generally acceptable solution. However, he thought that the proposed text was not a compromise at all, but rather a "first-class burial" of the concept of "State crime". That was what clearly emerged from the fifth proposal, which entirely ruled out that notion for the time being, although it had been at the heart of the discussion and divided the Commission, giving rise to two currents of thought with a more or less equal number of supporters. Only one current of thought was being taken into account. Likewise, article 19 of the draft had been removed from play by the fourth proposal.

32. The third proposal broadened the scope of the topic: it was no longer a question of essential obligations alone which jeopardized the fundamental interests of the international community as a whole, but all international obligations—obligations *erga omnes*—which created commitments towards the international community as a whole. In so doing, the risk was great of trivializing really essential obligations by blurring all distinctions. Lastly, the first and second proposals were completely superfluous and should be deleted.

33. In view of the discussion which had taken place on the subject, a good compromise would be to take the third proposal as a starting point and to create a working group to consider the consequences in the field of State responsibility which flowed from obligations *erga omnes*, but also, and above all, obligations designed to protect the fundamental interests of the international community. Article 19 and the notion of "international crime"—or any other expression which might be retained to replace the word "crime", which seemed to give rise to much criticism in the Commission—would be left aside for the moment and possibly returned to later if the working group was unable to produce any results.

34. Mr. CRAWFORD (Special Rapporteur) said that the words "in place of article 19" in the fourth proposal were indeed intended in the sense given them by Mr. Economides. Unlike the latter, however, he considered the first proposal important because it reflected the position adopted by the Commission in 1976.

35. Mr. PELLET said that, not being a member of the working group, he would refer to the Special Rapporteur's proposals in some detail. They were, he though, very reasonable, at least in spirit. In that regard, he did not subscribe to Mr. Economides' analysis, although he shared the latter's concerns as to substance.

36. He could not help noting that, with the proposals under consideration, the Special Rapporteur was in reality joining the supporters of the concept of State crimes in considering that the concept of "international crimes of States" existed in international law and that it was penal. He himself did not rule out the possibility, but did not interpret article 19 in that way and preferred to reserve his

position on that point. It was through the fifth proposal that the Special Rapporteur was trying to have his "criminalistic" approach to State crime confirmed by the Commission. His own view was that such a position was mistaken and he hoped that the Commission would not confirm it or, if it felt it had to do so, that it would specify that the draft articles were without prejudice to the possible criminal responsibility of States, which would be additional to international responsibility. It was clearly understood that the topic under consideration was the international responsibility of the State, which was neither criminal nor civil. Accordingly, an expression such as "in the penal sense of the term" ought to be added after the words "to the existence or non-existence of 'international crimes of States'" in the Special Rapporteur's fifth proposal.

37. Referring to the first proposal, he suggested that the words "within the meaning of the present draft articles" should be added after the words "on the basis that the field of State responsibility is neither 'criminal' nor 'civil'", implying that, outside the context of the draft, it would be possible to imagine the criminal responsibility of States, as the Commission had done in article 5 of the draft Code of Crimes against the Peace and Security of Mankind.[7] With regard to the second proposal, he said that he failed to understand the exact meaning of the word "penalties". If it meant criminal penalties, he could accept the proposal. In that connection, he reminded Mr. Ferrari Bravo that the previous Special Rapporteur had fought to get the Commission to deal with the question of penalties. In the circumstances, it would be better to state clearly that the Commission did not intend to set up any system or international criminal mechanisms, as the previous Special Rapporteur, Mr. Arangio-Ruiz, had proposed.

38. His position on the third proposal was closer to that of the Special Rapporteur than to that of Mr. Economides. He believed that it was useful and important to speak of the three concentric circles constituted by obligations *erga omnes*, obligations deriving from a peremptory norm of international law (*jus cogens*) and, obligations so essential for the protection of the international community as a whole that their breaches were characterized by the latter as crimes, although the word "crime" could be abandoned. Those three categories were reflected in the Special Rapporteur's third proposal, but in an order which he did not consider satisfactory. The proposal was nonetheless an improvement over the existing draft articles, which dealt only with the third category of obligations. Lastly, he endorsed Mr. Ferrari Bravo's and Mr. Economides' comments on the fourth proposal. He reserved the right to come back to the question once the working group had taken a decision.

39. Mr. ROSENSTOCK thought that the Special Rapporteur's proposals should be approached with an open mind. It would, however, be unadvisable to proceed on the basis of the deletion of the words "in place of article 19". It should not be forgotten that the majority of the Commission's members were in favour of deleting article 19 and that only a minority wanted it to be maintained. Reaching agreement in plenary would not be easy and the Commission might have to resort to a vote.

[7] See 2534th meeting, footnote 10.

40. He had no strong views on the first and fifth proposals and could not see the point of the criticism of the first proposal.

41. The problem was to find a solution to the questions arising mainly as a result of the third proposal that would be neither radically incompatible with the fact that the Commission was dealing with secondary rules, not with primary rules, nor totally unacceptable to those who thought that work on the topic formed part of a continuum in the field of State responsibility for wrongful acts and was not concerned with qualitative distinctions. Obligations *erga omnes*, for example, did not involve qualitative distinctions, but differences in terms of scope.

42. Mr. Sreenivasa RAO said that no compromise should be prejudicial to the convictions of those who claimed that article 19 reflected a valid concept, even if its text needed redrafting to become applicable in practice.

43. The Special Rapporteur's third and fourth proposals caused him some concern. He had understood that the working group would explore possible links between obligations *erga omnes* and obligations deriving from a peremptory norm of international law (*jus cogens*), as well as the possible relationship between breaches of those obligations and the concept of crime as such. The second proposal was confusing and he hoped that, if the working group succeeded in identifying the consequences of breaches of obligations *erga omnes* and obligations deriving from a peremptory norm of international law (*jus cogens*), it would also explore the possibility of applying those consequences to the wider category of obligations essential for the protection of the interests of the international community as a whole, not those of individual States.

44. The working group should not be given a mandate there and then to undertake a study along the lines indicated in the Special Rapporteur's third and fourth proposals, as that would cancel out article 19.

45. Mr. DUGARD said that he completely shared the previous speaker's views. The work of the working group would largely depend on the interpretation given to the fifth proposal and, in that connection, he noted that the Special Rapporteur had said he would not be averse to considering whether a special study of State crimes should be undertaken. The Commission might make a recommendation to that effect to the Sixth Committee.

46. Mr. SIMMA said that he supported the Special Rapporteur's proposals. He had no problems with the first and second ones. He understood the third and fourth, which were the essential ones, to mean that first the working group and then, of course, the Special Rapporteur would have to explore the possibility of elaborating a concept that would replace the idea underlying article 19. If those efforts failed, the debate on article 19 would have to be reopened and the Commission would probably end up taking a vote. That would undoubtedly mean the end of article 19, something he would not be sorry about.

47. Given the pressure of time, the working group would only be able to give preliminary consideration to the concept to be elaborated and the task of hammering it out would ultimately fall to the Special Rapporteur.

48. Mr. MIKULKA said that the Special Rapporteur's proposals were a step forward towards a compromise that might finally be acceptable to all. Like Mr. Simma, he thought that the third and fourth constituted the hard core of the proposals. In the third one, it might be more logical to change the order in which the obligations were listed by referring first to obligations owed not to individual States, but to the international community as a whole (*erga omnes*), then to non-derogable obligations (*jus cogens*) and then to essential international obligations and to spell out that what was meant were international obligations for the protection of the fundamental interests of the international community. He could accept the third proposal with those amendments. He could also accept the fourth proposal subject to the deletion of the word "serious" because the Commission would have to take account of all breaches of the obligations referred to in the third proposal.

49. The first proposal was, in his view, justified, as it recalled that the Commission was abiding by the concept it had chosen, namely, that international responsibility was *sui generis* and had nothing to do with the distinctions that existed in internal law. Moreover, the proposal stated that the draft articles covered the whole field of internationally wrongful acts. The second proposal was confusing and could simply be dropped. The fifth proposal should refer to breaches of certain obligations mentioned in the third proposal being qualified as crimes rather than to "the existence or non-existence of 'international crimes of States'".

50. With those changes, the Special Rapporteur's proposals could serve as a basis for compromise.

51. Mr. AL-KHASAWNEH said that a compromise worthy of the name had to be without prejudice to the views expressed in the Commission, which were a reflection not of geographical or ideological divisions, but of deep-seated concerns and convictions.

52. With regard to the Special Rapporteur's proposals, he thought that the fifth, which gave the impression that the question of "crimes" was already settled, was not very useful. He also agreed with Mr. Ferrari Bravo's point that it was not necessary to say that State responsibility was neither "criminal" nor "civil", even if that was only a restatement of the position adopted by the Commission in 1976.

53. The third and fourth proposals were the most important and he understood them in the same way as Mr. Simma. In order to achieve a true compromise, it was necessary to elaborate a new concept and see where it could lead. In the meanwhile, the Commission could not start from the assumption that article 19 would be deleted; nothing in the replies received from Governments or in statements made in the Commission warranted that deletion and, besides, such a step would require a formal decision by the General Assembly.

54. The Special Rapporteur's proposals were, on the whole, good even if they did not reflect his own feelings and some points required redrafting for the sake of clarity. The Commission had to arrive at a compromise; its reputation was at stake.

55. After a procedural discussion in which Messrs CRAWFORD (Special Rapporteur), GOCO, HAFNER, MELESCANU and SIMMA took part, the CHAIRMAN suggested that the discussion on the Special Rapporteur's proposals should be continued the next day, first in the Commission in plenary and then in the working group chaired by Mr. Simma.

It was so agreed.

The meeting rose at 6.15 p.m.

2540th MEETING

Wednesday, 3 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members to consider a revised version of the proposal submitted by the Special Rapporteur (2539th meeting), reading:

"1. The Commission should proceed with its second reading of the draft articles on State responsibility on the basis that the field of State responsibility is neither 'criminal' nor 'civil', and that the draft articles cover the whole field of internationally wrongful acts.

"2. On that basis, the draft articles should not seek to address the issue of the possible criminal liability of

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.