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Summary record of the 2532nd meeting

Topic:
State responsibility

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2532nd MEETING

Tuesday, 19 May 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

State responsibility[1] (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

1. The CHAIRMAN invited the Special Rapporteur on the topic of State responsibility to introduce the introduction to his first report (A/CN.4/490 and Add.1-7).

2. Mr. CRAWFORD (Special Rapporteur) paid tribute to previous Special Rapporteurs for their work on a difficult topic, expressed gratitude to the Commission for entrusting the second reading of the draft to him and said his comments would first focus on the introductory issues dealt with in his first report. When the debate on those issues was concluded, he would introduce the parts of the report on international crimes. A provisional bibliography had been circulated for the information of members; he would be grateful for any suggestions for additional items for the bibliography, especially in languages other than English.

3. The report before the Commission, which contained a brief outline of the history of the Commission's work on State responsibility, discussed certain general issues. The first concerned the distinction between primary and secondary rules of State responsibility, a distinction that had formed the basis of the work on the topic since 1963. A former Special Rapporteur, Mr. Roberto Ago, had stated that secondary rules concerned

> the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility

and that

> it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper.[4]

That distinction was absolutely essential for the completion of the Commission's task.

4. The purpose of the secondary rules, as represented by and large in the draft articles on State responsibility, was to lay down the framework within which the primary rules would have effect in situations involving a breach. It was a coherent distinction, even though it might be difficult to draw in particular cases and even though some of the draft articles might be thought to stray slightly into the realm of primary obligations. It was important to note in that regard that article 37 (*Lex specialis*), of part two of the draft articles, did allow for the possibility that the general rules would be derogated from or subject to some special regime. Leaving questions of *jus cogens* to one side, that seemed to him to be equally true of the rules stated in part one. In a sense, therefore, the draft articles operated as a residual set of rules.

5. In his view, any lengthy general debate on the distinction between primary and secondary rules would not be helpful but it was important to keep the distinction in mind in looking at particular articles. It would, however, be possible to assess whether the Commission had been able to develop a coherent distinction only when it had considered the draft articles as a whole. There were one or two that appeared to transgress the limit—article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) for one—but there might well be good reasons for including it notwithstanding the fact that it appeared to lay down, at least in part, a primary rule. Nevertheless, the Commission's aim should be the one set out at its fifteenth session, in 1963, namely, to lay down the general framework within which the primary, positive, substantive rules of international law would operate in the context of responsibility.[5]

6. The second general issue was whether the draft was sufficiently broad in scope. The comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) so far focused more on things which the draft articles did deal with and should not, rather than on things which they did not deal with. Comparatively few suggestions had been made on the actual question of scope. One was that the articles on reparation, in particular with respect to the payment of interest, required further development. There was certainly something in that suggestion and the matter should be taken up at the next session.

7. Two matters in particular probably required further elaboration. The first was obligations *erga omnes*, to which the Government of Germany had referred in the comments and observations received from Governments. At the current time, the draft dealt with the concept rather inadequately, in particular in article 40 (Meaning 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.

[4] *Yearbook . . . 1970,* vol. II, p. 178, document A/CN.4/233, para. 7.

[5] *Yearbook . . . 1963*, vol. II, p. 228, document A/5509, annex I, para. 6.

injured State), paragraph 3. It was certainly a point to which the Commission must revert. The second matter related to the so-called joint action of States or to what was known in some legal systems as joint and several liability. Although some of the articles did deal with the issue, they did so rather haphazardly; the question would certainly have to be reviewed in the light of developments. However, with the exception of the provisions on State crimes, part one of the draft represented a marvellous achievement for its time. Some of the provisions were over-refined or might be seen on close scrutiny to be unnecessary, but the main purpose of the second reading of part one was to ensure that the many developments since the 1970s were properly taken into account.

8. The next issue of a general character concerned the relationship between the draft articles and other rules of international law. One of the suggestions made by a number of Governments was that article 37 should be made into a general principle and that the draft articles as they stood did not fully reflect the notion that they operated in a residual way. The proposal seemed in principle to be valid, except possibly as to issues of responsibility arising out of obligations of a *jus cogens* character. The Commission might therefore wish to discuss the draft articles throughout, on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

9. Two areas of the draft had been singled out as debatable in the comments and observations received from Governments: the detailed provisions on countermeasures and those on dispute settlement. He mentioned the matter, first, to record that the issues involved were still very much alive but also to urge the Commission to adhere to the timetable it had laid down at its forty-seventh session for completion of its consideration of the draft.[6] In that regard, he would point out that the working group had conducted an initial review of the whole of part one, save for article 19 (International crimes and international delicts), and Mr. Simma would give a brief account of the working group's work before he himself introduced chapter II, sections A and B, of the report. According to its timetable, the Commission was to give detailed consideration to countermeasures in a working group at the fifty-first session at which time it would inevitably have to consider carefully the form the draft articles would take. He therefore trusted that it would not spend an excessive amount of time on the form of the draft articles at the current session and that it would not spend any time at all on the questions of countermeasures and dispute settlement.

10. The last general issue concerned the eventual form of the draft articles. The Commission did not generally decide on that until it had completed consideration of the draft, though, admittedly, in some contexts, such as reservations to treaties and nationality in relation to the succession of States, the decision had been made earlier. The draft on State responsibility had, however, been drafted as a neutral set of articles, designed neither to be a convention nor even a declaration but simply as an attempt to strike a balance between codification and progressive development in the field of secondary rules. His own preference would be to maintain that position for another year at least. He accepted that it would be necessary for the Commission to take a position on the ultimate form of the draft articles when the issue of dispute settlement was decided.

11. It might well be possible to decide on questions of dispute settlement as they related to countermeasures when the Commission took up the matter of countermeasures at the fifty-first session, independently of the question of the form of the draft articles. One might well take the position that, if dispute settlement procedures were attached specifically to the taking of countermeasures, such a course would not work for a number of reasons. But one might also take the opposite position, when a more general decision would arise. It certainly would arise in the context of part three, because the provisions on dispute settlement could not stand in a declaration. They could only do so in a convention, and the Commission would have to take a firm view in that regard. Again, a convention on State responsibility, without any provision for dispute settlement, might be favoured, or the issue of dispute settlement could be left to a subsequent diplomatic conference. He would prefer to leave the matter aside at the current session, as it would take up a lot of time. A number of comments and observations received from Governments and other sources which advocated a non-convention form for the draft were clearly influenced by the substance of the existing articles with which the authors of those comments disagreed, often strongly. Only after the Commission had reviewed substance and made decisions on key questions would it be possible to approach the question objectively. As had been seen with the draft statute for an international criminal court,[7] there had been a very significant change in State attitudes to the idea of a criminal court as it became clear that at least some progress had been made.

12. A further reason for not taking a decision at the current time was that it might have the undesirable tendency of detracting from the importance of the Commission's debate on the substance of the draft articles. The Commission should make the draft articles as good and generally acceptable as possible, without adopting the "soft option" of a declaration, although in the end and for reasons pointed out by some Governments, the wisest course might be to opt for a declaration or some other non-treaty form. It was interesting to recall that, at one stage in the development of the 1969 Vienna Convention, it had been argued that the law of treaties should take the form not of a convention but of a restatement of the law or of a declaration.[8] Yet history had shown that Waldock's view on the subject had been wiser than Fitzmaurice's, for the inclusion of the draft articles on the law of treaties as a convention had done more to clarify and consolidate the rules on the law of treaties than any declaration could have.

13. True, the climate of the 1990s differed from that of the 1960s, but the Commission should nonetheless wait until the general attitude of States to the subject—a subject as vital in its way as that of the law of treaties—had become clear and until the Commission's own approach

[6] See *Yearbook . . . 1997*, vol. II (Part Two), p. 58, para. 161.

[7] See *Yearbook . . . 1994*, vol. II (Part Two), p. 26, para. 91.

[8] See *Yearbook . . . 1959*, vol. II, p. 91, document A/4169, para. 18.

to some of the controversial issues had been clarified. In that regard, the Government of Austria's proposal contained in the comments and observations received from Governments for a bifurcated text, in the sense of a draft declaration of principles for more immediate adoption, followed by a more detailed draft convention, was certainly a possibility, although he feared that the Governments which opposed a convention would still oppose it even under a bifurcated approach. On the other hand, in other fields draft declarations had certainly been adopted as precursors of conventions, so the idea was not to be ruled out. He would, however, ask that, for the current session at least, the Commission should proceed on the basis of the single text in part one, seeking to develop it and making any necessary excisions, and that it should approach the question of the form of the text possibly at the fifty-first session, in a working group in which the various options could be thrashed out. There was a great risk at the second reading stage of talking about generalities rather than about specifics.

14. The time had however come to get the draft articles in part one into good shape. He was not implying they were in bad shape, but it had to be acknowledged that they had been adopted in the very different legal and political environment of the late 1960s and of the 1970s, since when there had been a great deal of development in the field of State responsibility proper and in other areas such as international criminal law. A rethinking of some of the draft articles was obviously required. The Commission had never engaged in such a rethinking, as it had adopted the deliberate policy of not reopening any part of part one after its adoption at its thirty-second session, in 1980[9] which meant that close on 20 years had elapsed since the articles had last been considered. The time had come to focus on them. The Commission should concentrate on the specifics for the time being and the generalities would take care of themselves.

15. Mr. PELLET, commenting on the eventual form of the draft, said that he was not altogether persuaded by the Special Rapporteur's argument in favour of putting off until tomorrow what could be done today. That seemed to be a common theme throughout the first report. For instance, it was as though crimes should be placed in the freezer in the hope that the question would ripen into maturity; but, it was not by putting fruit or flowers in the freezer that one made them ripen or blossom. And the same applied to the final form of the draft articles, which the Special Rapporteur wanted to leave in cold storage but which would have to be dealt with one day.

16. The statement in the first sentence of paragraph 41 of the report was not entirely correct for, in point of fact, the Commission nearly always took a position, by way of a recommendation, on the form its drafts should take. Admittedly, it usually did so when it had concluded its consideration of a particular issue, but as it had already reflected on the question of State responsibility for some 30 years, it should surely have reached that stage by the current time. It also seemed a little odd to suggest that the Commission would be incapable of taking a position on the matter at the current session but that it might have a sudden flash of inspiration in the next year or two. That did not mean he believed the Commission must at all costs take a decision on the form of a draft in advance but, in the current instance, he felt there was a fundamental reason which militated in favour of the Commission's taking an immediate interest in the matter.

17. Contrary to what was stated in section D.5 of the introduction to the report, he did not think that the problem of the form of the draft was linked to the question of dispute settlement. If provision for dispute settlement had to be made then obviously that could be done only by incorporating a suitable mechanism for the purpose in a draft conventional instrument. Such mechanism could, however, also be either the subject of a more general treaty on State responsibility or it could take the form of a protocol, perhaps optional, to a treaty on responsibility, or even of an autonomous instrument providing for dispute settlement in the matter of responsibility without any need for the main draft to be conventional in nature. It was quite conceivable to offer States a dispute settlement mechanism in the matter of State responsibility in order to apply customary law, with the assistance guided by the draft that would be adopted.

18. Clearly, therefore, it was not the problem of dispute settlement that concerned him. Rather, the question of the form of the draft articles seemed to be linked far more to another question raised by the Special Rapporteur, namely, that of the issues excluded from or insufficiently developed in the draft articles and more generally the varyingly precise and varyingly operational character of the draft adopted on first reading. At the fifty-second session of the General Assembly, he had been struck by the seeming contradictions in the statements made in the Sixth Committee: the draft articles had often been criticized, on the one hand, for being too short and not sufficiently precise, and on the other, for being unduly detailed and fussy. Both criticisms were justified to some extent and he shared the Special Rapporteur's analysis of the matter.

19. The Special Rapporteur should address himself to certain points in the draft. Leaving aside part three, which was no more than an exercise in style and devoid of any interest, in his view, part one of the draft was rather too detailed, particularly in relation to attribution and the various categories of obligations breached. Yet it remained silent on important issues, some of which had come to the fore after the first reading, such as responsibility deriving from joint action of States—or what the Anglo-Saxons termed joint and several liability. On that score, he agreed fully with the Special Rapporteur that there was a gap in the draft. Conversely, part two was unbelievably superficial. It completely ignored such essential, and technical, questions as the calculation of interest and was far too general to answer the needs of States. Again, he welcomed the Special Rapporteur's remarks in that connection.

20. One possible solution would be to restore the balance between the two parts by pruning back part one and giving more weight to the totally superficial part two. But, as the Special Rapporteur had recalled, Austria had put forward a proposal in the Sixth Committee,[10] one which he personally found very attractive, which should be given the most careful consideration, but which he did not

[9] *Yearbook . . . 1980*, vol. II (Part Two), pp. 26-63.

interpret in quite the same way as did the Special Rapporteur. While he agreed that the core of the Austrian proposal was that not one but two instruments should be prepared, it seemed to him that neither of those instruments need necessarily take the form of a convention, though they would in any case take the form of draft articles. What was interesting about the proposal was that it might allow for the possibility of preparing a general declaration that restricted itself to setting forth the essential principles of the law of State responsibility, together with another instrument that would serve as the most detailed possible guide to practice, based on the enormous volume of work done by the Commission on the topic up until the end of the 1970s, and intended to meet the specific needs of States, and especially of the smaller and poorer States, that were often technically ill-equipped to deal with the complex problems posed by State responsibility.

21. The Austrian proposal was thus extremely interesting and called for a serious debate that should not be postponed. The Special Rapporteur's proposal that the Commission should consider the draft articles in part one at the current session but postpone consideration of the form they should take until the next session seemed to him illogical. For, if the Austrian proposal was taken up, the Commission would either have to review the drafting of the articles or else it would have to do its work twice over, first dealing with the draft articles, and then separating out the basic principles to be set forth in the declaration, before reverting thereafter to consideration of the more detailed aspects of the topic—an approach that was not practical. He had no doubt that to adopt a solution along the lines of the one proposed by Austria would involve a very considerable volume of work. Nonetheless, the Special Rapporteur was pre-eminently qualified to bring such work to a speedy and successful conclusion.

22. Mr. SIMMA asked whether Mr. Hafner was in a position to provide any hints as to the meaning of the Austrian proposal, which did not necessarily yield the interpretation that Mr. Pellet had just proposed.

23. Mr. HAFNER said he was not the author of the proposal in question, and was thus not in a position to make an authoritative interpretation of its meaning. He admitted that the wording of the proposal was not entirely clear, and it had been his intention to obtain further information, which he would then impart to the Commission, together with his own personal interpretation of the proposal. His own interpretation would have the same standing as that of any other member of the Commission.

24. Mr. PELLET said it was bad practice to call upon members of the Commission to provide orthodox interpretations of pronouncements by the States of which they were nationals. He thus welcomed Mr. Hafner's response to Mr. Simma's proposal. Regardless of whether his own interpretation of the Austrian proposal was the correct one, his position was that he wished the Commission to draw a distinction between a declaration of principles and a guide to practice.

25. Mr. KATEKA urged the Commission to heed the Special Rapporteur's wise appeal that it should refrain from entering into a debate on the form of the draft articles. Mr. Pellet had just made some very interesting proposals. However, the topic of State responsibility was so extensive that the Commission could ill afford to waste valuable time discussing the procedural question of what form the draft articles should take. In his view, it would in any case not be possible to settle that question in advance.

26. Mr. FERRARI BRAVO said he wondered how a former Special Rapporteur, Mr. Roberto Ago, who had first drafted the articles on State responsibility almost 30 years ago, would have reacted to the current debate. More than likely, with his acute sense of practicalities Mr. Ago would have accepted the need for the Commission to engage in the current debate before it proceeded further. Following Mr. Ago's departure, the Commission had struck out in different directions in its consideration of the topic over the years. It must therefore give careful consideration to its future course of action and, above all, seek the reactions of Governments in that regard. It must not wait another year before consulting with States, but must instead present them with options concerning the general scope of the draft; its possible outcome; the question of settlement of disputes (one on which he had always found the draft articles to be curiously deficient); and concerning the crucial question of crimes—to which the Commission would be reverting shortly. Whether one liked the fact or not, those questions existed—as was witnessed by the volumes produced in honour of Mr. Ago,[11] with their wealth of material concerning those problems, and by the copious bibliography contained in the annex to the first report of the Special Rapporteur. The highly influential draft articles of the former Special Rapporteur, Mr. Ago,[12] had already contributed enormously to the evolution of State practice on the question, and that influence should not be eliminated by a decision of some members of the Commission not to deal with the problem of crimes.

27. Mr. CRAWFORD (Special Rapporteur), speaking on a point of order, said he had not yet introduced the subject of crimes. The subject under debate was the form of the draft articles.

28. Mr. FERRARI BRAVO said he had referred to the question of crimes purely as an example. He supported some aspects of Mr. Pellet's proposal. The Commission should debate the scope of the draft articles and, taking account of the views of those Governments that had transmitted their comments and observations on the topic, should submit various options, including the option concerning crimes; it would be ridiculous to defer consideration of such an important aspect until the next session. The Commission also owed it to Mr. Ago's memory to hold a serious debate on the topic.

29. Mr. CRAWFORD (Special Rapporteur) said there seemed to be some confusion: he was certainly not in any way opposed to elaborating on the Austrian proposal, with the assistance of Mr. Hafner, who was at least a distant blood relative of a proposal whose paternity

[10] See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 23rd meeting.

[11] *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vols. I-IV (Milan, Giuffrè, 1987).

[12] See *Yearbook . . . 1980*, vol. II (Part Two), p. 30, paras. 33-34.

remained unclear and which, for a moment, appeared to have been adopted by Mr. Pellet. Nor was he opposed to requesting the opinion of Governments on all questions, including the question of crimes, as the Commission would indeed be doing throughout the exercise. It was quite obvious that the Commission must take careful account of the views of Governments. Thus far, views on many of the issues had been received from 20 Governments, and were set forth in the comments and observations received from Governments.

30. If the Commission took account only of the views already received, very probably it would decide that the draft articles should take the form of a declaration rather than of a convention—although even the comments and observations received from Governments already included differing views. However, while bearing in mind Governments' views, the Commission must at the same time reach its own conclusion, if possible by consensus, as to what course should be taken. That conclusion should be submitted as a provisional view to the Sixth Committee, and the Commission should take very careful heed of the reactions thereto, with a view to coming up with a set of draft articles that would achieve all that Mr. Pellet, and indeed he himself, desired.

31. He was unsure of the precise meaning of the Austrian proposal. He had rather assumed that it advocated an initial draft declaration followed by a convention, which would perhaps go into more detail and include the option of dispute settlement provisions. He might, however, have misinterpreted its intention.

32. He had also been giving careful thought to the way in which the very rich material contained in the commentaries could be best displayed. One possible solution would be to prepare a two-tier commentary, consisting of a first, more general and explanatory part, and a second, more detailed part. Mr. Pellet had rightly pointed out the contrast between parts one and two, a contrast that was equally apparent in the commentaries. Important questions of form thus arose. But the Commission was not putting off—nor should it put off—the critical question, which affected the whole of the draft articles, of what should be done about multilateral obligations. That was precisely the issue that had to be resolved in the context of crimes and then developed. He did not see how any Government could sensibly think that the text might take the form of a convention until the Commission had reconsidered that issue, as he hoped it would do shortly. Thereafter, the Commission plainly needed to tell Governments its views, to listen to their views, and to respond accordingly.

33. As to the other questions of principle, the process during the current session would involve an assessment of the general principles in part one, whether or not the Austrian proposal was adopted; together with a detailed discussion of imputability (arts. 5 to 15), which raised important questions of principle. If the Commission managed to deal with those two tasks in plenary and in the Drafting Committee, it would have done well. Those questions would have to be contained in a statement of principle and also in a convention. There might be a need for some differentiation, but he saw no need to make that differentiation at the current session. He was perfectly happy with the proposal he inferred from the statements by Mr. Pellet and Mr. Ferrari Bravo: that the Commission should specifically ask the Sixth Committee about the Austrian option once it had clarified the nature of that option, and that at the next session it should attend to any consensus that emerged, either from its own discussions or from those in the Sixth Committee. But he did not think the Commission needed to reach that decision at the current session.

34. Mr. PAMBOU-TCHIVOUNDA said he was surprised that the Special Rapporteur expected much input from a debate on a report consisting of four parts, of which he had presented only the introduction. That being the case, the Chairman should perhaps consider instructing members of the Commission to confine their remarks to the introduction, with a view to enhancing the subsequent debate on the questions of substance.

35. He fully endorsed Mr. Pellet's comment regarding the imbalance between parts one and two of the draft. That judgement could be seen as a reflection on the Commission as a whole, for its treatment in part two of the approach mapped out by the former Special Rapporteur, Mr. Ago, in part one was not salutary. Part two needed further development, to take account of the substantive achievements to be found in part one.

36. He also wondered whether the Commission could afford to defer consideration of the ultimate form of the draft articles. Nation States remained all-powerful, yet there was a discernible trend towards the integration of international society and he wondered whether a "form" that did not correspond to the traditional mode of law-making would be at the service of that trend, or whether it would instead have the opposite effect. Since the law of State responsibility was founded on the general international law and international customary law that the Commission was called upon to formalize, he feared that if it were to do so in an instrument whose nature, scope and authority were unclear, the result might be a weakening of that law, to the extent that it could no longer legitimately be called law.

37. The CHAIRMAN, responding to Mr. Pambou-Tchivounda's remark directed to the Chair, said that at the start of the meeting he had announced that the Commission would be considering the introduction to the report. It was currently engaged in a "mini-debate" on the statements by the Special Rapporteur and Mr. Pellet.

38. Mr. SIMMA said he did not share the view expressed by Mr. Ferrari Bravo. The mere fact that the draft articles had been before the Commission for 25 or 30 years did not mean that they were graven in stone, or that the Commission should eschew a fresh approach. To elaborate on Mr. Pellet's metaphors, one might say that some of the articles in part one—such as article 19—had not merely been placed in cold storage, but were laid out on a mortuary slab. During consideration of part one in the working group, the Special Rapporteur had drawn a careful distinction between the provisions that were and the provisions that were not hallowed by State practice. That was the correct approach. The Commission would create a problem for itself, were it to decide to eliminate provisions on which some international judgement or

arbitral award had already been based, but no lack of respect for the jurisprudence was detectable in anything the Special Rapporteur had written or said on the topic.

39. A problem arose with regard to Mr. Pellet's second point, concerning the final form of the draft articles. The first articles in part one, in particular, were currently formulated in a way that members schooled in the Anglo-Saxon system found extremely formalistic and empty, so much so that the literature tended to advocate focusing on the commentaries, where, it claimed, the substance of the articles was to be found. If, later in the session, the Drafting Committee decided to retain the current wording of the articles of part one, that course of action would prejudice the question of the final form. The Drafting Committee should thus keep that problem in mind. However, he agreed with the Special Rapporteur that a final decision on the form could be deferred until the fifty-first session, but not later than that.

40. Mr. ROSENSTOCK said he endorsed almost everything Mr. Simma had said. The Commission was not engaged in a *memento mori* exercise: it was considering in what ways, if at all, part one needed to be altered. The question thus arose whether a decision as to the form of the draft articles needed to be taken at the current juncture. Though in some respects the articles had obviously been drafted with a convention in mind, he did not think any issues would arise in connection with part one that would force the Commission to take such a decision at the current session. The next session would be an appropriate time to take a decision, and in the meantime Governments could be asked to comment on the question in writing and in the Sixth Committee.

41. His understanding of the Austrian proposal had been that the Commission should prepare two products and leave it to the General Assembly to choose between them. If that understanding was correct, the Commission might in some sense prejudice the outcome by not acting immediately. Notwithstanding, it should recognize that a decision needed to be taken at some point as to the final form the instrument should take, but that next year would probably be the most appropriate time to take such a decision. Meanwhile, it should get on with the task of working its way through the articles of part one.

42. Mr. MIKULKA said he agreed with Mr. Pellet that the proposal to develop two products in succession, first a declaration and then a convention, was attractive. Like Mr. Rosenstock, however, he did not think the question had to be resolved at the current time. The Commission could do the work it needed to do on part one on the understanding that, before taking a final decision on the form, it would ask Governments what they thought of the idea of a declaration, to be followed by a convention. It would not, in any case, be the first time such an approach had been used: for the same thing had been done with the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,[13] which had rapidly been followed by the adoption of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies whose content was nearly identical.

43. When the Commission had begun work on the topic, the preparation of a convention had seemed the most logical course. Since then, however, experience had shown that other options might be equally viable, and the ratification of some conventions had dragged on for many years, casting doubt on the advisability of choosing that form of instrument. Due consideration should therefore be given to elaborating a document which, while not having binding force, was nonetheless authoritative—for example, because it had been adopted by the General Assembly.

44. Mr. AL-KHASAWNEH said that, while he shared Mr. Ferrari Bravo's deep respect for Mr. Ago's immense contribution to international law, he too could not help remembering the previous Special Rapporteur, Mr. Arangio-Ruiz, and his passion for justice. His own remembrances of things past, however, took him back to a situation with a strong resemblance to the work on State responsibility: the adoption of the 1969 Vienna Convention. Last-minute attempts to incorporate a minimalist approach that would have changed the content of the Convention had been countered by acts of leadership and foresight.

45. The Commission should heed the Special Rapporteur's advice and not take a decision about the final form of the draft articles. Such a decision would be premature, for substantive and policy reasons. The substantive reason was that choosing one of the options—a declaration or convention—in advance would automatically eliminate the other option. The policy reason was that the guidance given by Governments was by no means clear: too few comments and observations had been received in writing, and the debates in the Sixth Committee had by no means been conclusive. Hence there was ample room for the Commission to draw its own conclusions. The project was arguably the most important in the Commission's history and a decision on the final form should not be taken lightly.

46. Mr. HAFNER said that increased communication between the Commission and States was deemed desirable in order to enable the positions of States to be reflected accurately in the Commission's work. That was all the more true when no guidance seemed to be forthcoming from the comments and observations received from Governments, as in the current instance. He therefore suggested that, since the proposal made by Austria was the subject of some confusion, he should be given the task of addressing an official request for clarification to the Austrian authorities on behalf of the Commission.

47. The CHAIRMAN said the proposal was a good one, but he thought the request to the Austrian authorities should come from him.

48. Mr. MIKULKA said that, in fact, neither the Chairman nor any other member of the Commission was entitled to address questions directly to States: it was through the General Assembly that contact must be established.

[13] General Assembly resolution 1962 (XVIII).

49. Mr. LUKASHUK said he agreed with Mr. Mikulka. It was for the Commission itself, not the Austrian Government, to resolve the matter.

50. Mr. HE said the exchange of views on the final form of the work on part one had been very enlightening. Many possibilities were open and a number of interesting proposals had been made, especially the Austrian proposal, with the idea of drafting first a declaration and then a convention, as in the case of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. All the options should be considered in the light of the main problems still to be settled, including that of international crimes of States, which was the crux of State responsibility. It would be premature to make a decision at the current session: the question should be referred to States for their views and for clarification by Austria of its proposal.

51. Mr. CRAWFORD (Special Rapporteur) said Mr. Pambou-Tchivounda had been right to point out that his first report was preliminary in nature and that the substantive debate should be pursued. In particular, the debate on crimes should in no way be truncated: Mr. Ferrari Bravo could rest assured of that.

52. Mr. LUKASHUK said the Special Rapporteur had prepared a thorough report clearly outlining the main stages of the future work on State responsibility. He had thus discharged his task with responsibility. In that context the term meant "positive responsibility", that is to say responsibility to fulfil a duty in good faith. Such responsibility is typical on moral grounds. For the law, "negative responsibility" is typical, that is to say responsibility for the breach of the law. It was the latter responsibility that the draft articles addressed.

53. In view of the many connotations of responsibility, the title of the topic was imprecise. It might have been acceptable in the early years of the Commission's work, but at the current time a more juridically precise formulation should be found. The responsibility of States could arise under domestic or international law or on moral or political grounds, but the comments and observations received from Governments had emphasized that the special kind of responsibility involved is the subject matter, that is to say responsibility under international law. That should be reflected in the title of the topic, which should be: State responsibility under international law.

54. As to the ultimate form of the future instrument, he did not agree with those who advocated deciding the matter at a later date. The form would govern both its structure and its content. A declaration was crafted in one way, a convention in quite another. In view of the scepticism expressed by Governments about the likelihood of a convention being adopted in the near future, it might be better to adopt a compromise solution, something that was neither a convention nor a declaration: a code of State responsibility under international law. A code would resemble a declaration by the General Assembly in the extent to which it was binding, but would be like a convention in its content.

55. The fact that responsibility was not covered in international law had often been seen as a sign of the primitive state of international law. Yet the need for a law of State responsibility was so pressing that international courts had already taken into consideration the draft articles as proof of the existence of rules of customary law. Many legal textbooks also referred to the law of State responsibility as being a distinct branch of international law, based on the Commission's draft articles. Expediting the work on the draft articles was of the utmost importance in the formation of that new branch of the law and would have an impact on the work on other topics being considered by the Commission, including international liability and diplomatic protection. Georges Scelle, speaking before the Commission in 1949, had said essentially the same thing.[14]

56. More importantly, however, lacunae in the general law of responsibility meant that States, in establishing primary rules in specific fields, had been forced to accompany them with a whole set of specific secondary rules. The result was the creation of quasi-autonomous legal regimes on responsibility. Mr. Simma had drawn attention to that problem in 1985.[15] Special rules on responsibility had been established in such new fields as the law of outer space and environmental law. Those phenomena had been reflected in the practice of ICJ, which had stated, in its judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*, that "The rules of diplomatic law, in short, constitute a self-contained regime . . ." (see paragraph 86).

57. The problem thus arose of fragmentation in the law of international responsibility, and consequently, of the elimination of contradictions between the general law of responsibility and the special regimes. By no means did he regard the development of special regimes as a purely negative phenomenon; on the contrary, it was perfectly natural, but the challenge was to find them a place in the general law of international responsibility. The Commission had used the term "self-contained regime" in connection with draft article 37, but the previous Special Rapporteur, Mr. Arangio-Ruiz, in his relatively thorough analysis of the concept, had perhaps been unduly critical of such regimes.

58. Nowhere in the draft—neither in the articles nor in the commentary—was there a sufficiently precise definition of responsibility under international law, yet it was absolutely indispensable to the overall structure. He believed that such responsibility should be understood to be the secondary, protective legal relationship that automatically arose, irrespective of the will of the parties, whenever a breach of international law was committed. On the strength of such relationships, a party was entitled to demand an end to the breach and to request—and receive—compensation for any damage it had suffered. Countermeasures were not part of responsibility, but came into play if the offending party did not act in conformity with its responsibility. The element of will was present in countermeasures, whereas it was not present in responsibility: the State that was entitled to take countermeasures decided on its own whether to do so or not.

59. Many legal experts had a fairly vague notion of responsibility, construing it as the whole set of negative

[14] *Yearbook . . . 1949*, 6th meeting, pp. 49-50, para. 32.

[15] B. Simma, "Self-contained regimes", *Netherlands Yearbook of International Law* (The Hague, Martinus Nijhoff, 1985), vol. XVI (1985), pp. 111 et seq.

consequences arising from breaches of the law, including countermeasures. The Austrian Foreign Minister, Mr. Marschik, in a recently published essay, stated that countermeasures were a cornerstone of State responsibility.[16] Yet countermeasures were a specific institution that was separate from, though closely linked to, responsibility, in that it was intended to ensure that responsibility was fulfilled. Countermeasures should therefore be treated in a separate chapter if they were to be covered in the draft.

60. Mr. CRAWFORD (Special Rapporteur), responding to those comments, said it was true that there was no general definitions clause in the draft articles, though implicit definitions, including that of responsibility, were craftily concealed in many places. The tables contained in chap-ter II of the report would address terminological questions. The word "responsibility" was at the current time too deeply entrenched in the draft and in the doctrine to be changed, but he agreed that it needed clarification, something that could perhaps be done in the commentary. Countermeasures were certainly a major issue and would be considered at the Commission's next session.

61. Lastly, the discussion of the introduction to his first report had pointed to the need for clarification of the Austrian proposal and, subsequently, for informal discussions on how to deal with it. The substance of the topic needed to be fleshed out at the current time, on the understanding that, for the next session, he would propose a procedure for addressing the form it would take.

62. Introducing chapter I of his first report, he said that, while many provisions of part one of the draft had to some extent become part of international law, having been referred to in decisions and in the literature, article 19 had not. It had given rise to a very contentious debate among jurists and neither they nor States agreed as to what should be done with it.

63. Moreover, there had been no case in practice of the application of article 19, which was quite unlike the situation with respect to article 5 (Attribution to the State of the conduct of its organs) or article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) or many others in part one. Hence the need to review the question. Anyone who had participated in the debates during the last quinquennium on the consequences of crimes was only too well aware of that. The Commission had not had a full-scale debate on the subject for 20 years, and it was time that it did.

64. Article 19 had been included in the draft at the twenty-eighth session, in 1976, and had not been reconsidered since.[17] Some provisions of the article could be disposed of quite rapidly. Article 19, paragraph 1, was a statement to the effect that it did not matter what the subject matter of the obligation was: if there was a breach of the obligation, then that was a wrongful act. That was unquestioned and was already clear from article 1 (Responsibility of a State for its internationally wrongful acts). Article 19, paragraph 4, defined residually an international delict as anything that was not a crime. Its fate therefore depended on paragraphs 2 and 3.

65. Paragraph 2 defined an international crime as an internationally wrongful act which resulted from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole. The definition was circular, but it had a good precedent for so being: article 53 of the 1969 Vienna Convention was too, although that had not been taken as a reason for deleting it. There were other ways of defining crimes, however, and there were great problems with the way of defining crimes chosen by article 19, paragraph 2. The difficulty had been manifest in the Commission's own attempt, in paragraph 3, to provide clarification. In his view, paragraph 3 was one of the worst paragraphs in part one. Not only did it fail to define crimes, but it wrapped the notion of crimes in so many qualifications and so much obscurity and contradicted paragraph 2 to such an extent that it brought the whole enterprise into disrepute. Paragraph 3 applied "subject to paragraph 2"; it applied only "on the basis of the rules of international law in force". On what other basis would it apply? It was purely indicative ("may result"); it was not exclusive (*inter alia*). But then it went on to provide a series of examples which, because of those qualifications, were not examples at all. It was simply not possible to know from paragraph 3 what, if anything, was a crime. Moreover, paragraph 3 introduced a new criterion for crimes that was not contained in paragraph 2. Paragraph 2 defined as a crime a breach of an international obligation that was essential for the protection of fundamental interests of the community, a definition that was extraordinarily general. But the paragraph proceeded to say "that its breach is recognized as a crime", thereby shifting the focus away from the obligation to the breach. The reference to recognition that a breach was a crime implied that the international community reserved the right, after a crime had been committed, to decide that the particular violation should be treated as a crime. That might not be the proper interpretation of paragraph 2 if it stood alone, but as soon as reference was made to paragraph 3, that interpretation became virtually compelling, because paragraph 3 said only that a crime "may result" from a serious breach of an international obligation, such as, in subparagraph (*a*), an aggression, if it was serious enough. How was it possible to know whether it was serious enough? The international community would have to wait and see. Consequently, article 19 did not offer a definition of crime, but a system for *ex post* labelling of breaches as serious. Obviously, only serious norms, norms which were fundamental to the community as a whole, could give rise to crimes, but it was quite a different matter to say that only serious breaches of those norms could give rise to crimes. In that respect, paragraph 3 contradicted paragraph 2 on a matter of fundamental importance.

66. The usual way in which legal systems defined crimes was to attach special consequences to them, which were described as criminal. The crime itself was labelled, the perpetrator was labelled, and the consequences were

[16] A. Marschik, "Too much order? The impact of special secondary norms on the unity and efficacy of the international legal system", *European Journal of International Law*, vol. 9 (1998), No. 1, pp. 212-239, at p. 221.

[17] For the text of article 19 adopted by the Commission at its twenty-eighth session and the commentary thereto, see *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 et seq.

special. The draft articles failed entirely to attach distinctive consequences to crimes.

67. The Commission had been well aware, at its twenty-eighth session, in 1976, that the article was a controversial move, and it had sought to qualify what it had done in the commentary. The qualification had been built upon in a footnote to draft article 40, which said that the term "crime" was used for consistency with article 19 and that it had, however, been noted that alternative phrases such as "an international wrongful act of a serious nature" could be substituted for the term "crime", thus avoiding the penal implication of the term. Consequently, the idea was expressed that when the draft articles spoke of crimes, the Commission was not actually talking about crimes in the ordinary meaning of that word, but in some special sense. It was as if the Commission said that delicts were everything that was not a crime, and crimes were everything that was not a delict. It might be true, but it was unhelpful.

68. The comments and observations received from Governments on what he would call, for simplicity's sake, State crimes, because the term used in the draft articles, "international crimes", currently had a well-established meaning that was quite different, were analysed in chapter I.B. Clearly, a number of Governments were vehemently opposed to the notion of crimes, regarding it as capable of destroying the draft as a whole. Other Governments took a more nuanced view. One of the more thoughtful attempts to resolve the problem was in a remark by the Czech Republic to the effect that there was a distinction made in international law in the seriousness of breaches. But that could be reflected in a number of ways, and the term "crime" might be inapposite. Other Governments, while supporting the distinction, argued that the draft articles were unsatisfactory because they made no difference out of the distinction, that having announced the distinction with much fanfare in article 19, there was then no procession, just a small cleaning-up operation at the end of part two. That justified criticism had been made by Mongolia with respect to the procedural implications of crime, by Mexico in a rather neutral fashion, by Italy and by Argentina. The significant thing about those comments, on which he had sought to draw some conclusions in paragraph 54, was that, as far as he could see, no Government commenting on article 19 found the draft satisfactory. They either wanted a much more developed distinction between crimes and delicts or no distinction at all. No Government was of the view that the Commission had struck a satisfactory balance. In that respect, he was in entire agreement.

69. Chapter I of his first report discussed the question of what existing international law had to say about the issue of crimes. Mr. Ferrari Bravo had wisely commented that, regardless of whether or not it liked particular provisions of the draft articles, the Commission should not change them if they had been incorporated into the structure and pattern of legal thinking and adopted in decisions or State practice. But, as he tried to explain in paragraphs 55 and the following, it was not the case that article 19 had been so adopted. It was true that in the period between the world wars, following the disastrous war-guilt clause in the Treaty of Versailles, which so far was the nearest the international community had come to the criminalization of a State, a number of writers had sought to develop the notion of international crimes of State as a meaningful term. Hence, there had been a certain doctrinal tradition, albeit not very widespread. The orthodox view had been expressed at the Nürnberg Tribunal in the well-known statement that crimes "against international law are committed by men, not by abstract entities".[18] The established view had been that only by punishing individuals who committed such crimes could the provisions of international law be enforced. It had been on that basis that a deliberate decision had been taken in 1945 at Nürnberg to punish individuals, or at least to punish persons for membership of certain organizations, but not to treat the defeated States as criminals. It had been a far-sighted decision which had stood in sharp contrast to the attempts made at the end of the First World War, and the world was a better place because that decision had been taken.

70. The position in 1976 had not changed. There had been considerable discussion of crimes in some of the literature, but even the step forward made at Nürnberg had been to some extent reversed in practice: there had been little or no development in the area of international criminal trials of individuals at the international level, but rather the diffusion of certain crimes which could be tried by State courts against individuals under systems essentially of judicial cooperation. The Convention on the Prevention and Punishment of the Crime of Genocide had of course been an important exception. At the level of principle, it envisaged the international trial of individuals for the crime of genocide, but not State crime. Article IX of the Convention, addressing State responsibility, had been expressly proposed on the understanding that it did not involve the criminal responsibility of States. Hence, despite the rhetoric of crime in relation to States and attempts made, with very little success, to define the crime of aggression, which, of all acts contrary to international law, had the greatest possibility of being described as the crime of a State at that time, since aggression could only be committed by a State, in 1976 there had simply been no significant practice in support of the notion of State crime. That was implicit in the commentary to article 19, which referred to three judicial authorities in favour of the proposition of crime. Two were decisions on countermeasures, which related to acts which were not crimes on any count, and one was the ICJ dictum in the *Barcelona Traction* case (see paragraph 33), in which it had been perfectly clear that the Court had not been making a distinction between crimes and delicts, but between obligations whose breach was of interest to the international community as a whole, and those which were not.

71. That distinction, that is to say, between obligations *erga omnes* and other obligations, had become part of international law. It passed Mr. Ferrari Bravo's test: it had been repeatedly referred to by the Court in later decisions. But it was significant that ICJ, in dealing with obligations *erga omnes*, and whether or not one liked all the individual decisions in question, had sought to incorporate such obligations within the framework of general international law. It had done so, for example, on the issue of admissibility in the case concerning *East Timor (Portugal* v.

[18] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nürnberg, 1948), vol. XXII, p. 466.

Australia),[19] and in the context of counter-claims in the recent order in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[20] It had not treated those matters as a separate corpus. On the contrary, it had sought to make the notion of obligations *erga omnes* part of general international law. To his mind, that was the appropriate strategy. Whatever the Commission might say about the way in which the draft articles dealt with those obligations—and in his view they did so inadequately—they did not mark out a distinction between crimes and delicts. Many breaches of obligations *erga omnes* were not crimes as "defined" by article 19 or, indeed, anywhere else.

72. That had been the position in 1976. There had been no judicial authority or generally accepted practice in the post-war period in favour of the distinction. There had been a notion of crimes which had been used, at least at the level of labelling, in relation to aggression, but the Security Council had always been extremely reticent in applying that notion, nor did it need it under Chapter VII of the Charter of the United Nations.

73. As to decisions and practice since 1976, article 19 had given rise to enormous debate in the literature, yet academic literature by itself did not make international law. The question was what did the primary sources say, that is to say, treaties, decisions and State practice? He had analysed decisions in paragraph 57 of the report, including those which made it clear that the doctrine of punitive damages was not part of general international law. If that was the case, then there was no crime. It would be possible to envisage a broader use of punitive damages than simply in relation to crime. Some legal systems also applied punitive or exemplary damages in respect of egregious wrongs other than crimes. What it was not possible to conceive of was a system of crimes that did not allow for something like punitive damages, and especially one in which the notion of crimes was integrated into what might be described as a civil procedural model, which was the case with article 19. To exclude the possibility of punitive damages was to make crimes toothless, as indeed they were in the draft articles.

74. In the recent decision on the issue of a subpoena in the Appeals Chamber of the International Tribunal for the Former Yugoslavia, the Chamber had gone out of its way to make it clear that under current international law, States by definition could not be the subject of criminal sanctions akin to those provided for in national criminal justice systems.[21] It was true that the Appeals Chamber had been careful to add the qualifying words, but the substance of its decision had been to exclude the possibility of judicial penalties, properly so-called, in respect of State conduct. Admittedly, the issue in that case had been somewhat removed from the question of crimes: whether a Government could be required, under threat of some form of penalty, to produce evidence of the criminal conduct of its officials. But it had not been unrelated to the question of crimes. If its officials had, as part of a governmental scheme, engaged in the crime of genocide, one would then say that the State itself had engaged in the crime. Nonetheless, the Tribunal had gone to great lengths to rule out the possibility of what it had called criminal sanctions.

75. Hence, the position in terms of judicial practice since 1976 was that ICJ had sought to integrate the notion of obligations *erga omnes* into the framework of general international law, and it had certainly affirmed that concept on enough occasions to justify saying that it had definitively arrived. The Court had been much more reticent, incidentally, about *jus cogens*. It had said nothing whatsoever about crimes and it had given no credence to the notion that there was a separate category of crimes within the field of State responsibility, nor had any other tribunal.

76. Obviously, there had been an enormous number of changes in State practice since 1976, tied in especially with the increasing activity of the Security Council under Chapter VII of the Charter of the United Nations. Another important development, itself associated with the work of the Council, had been the extension of procedures for trying and punishing individuals for crimes under international law, which, it was to be hoped, would lead to a satisfactory statute for an international criminal court. However, those developments did not themselves support the entrenchment of article 19 in the draft articles. As for the Council, the first point to make was that it had never, as far as he knew, used the term "international crime" in relation to a State in the sense of article 19. It had certainly used the term on many occasions in relation to the acts of State officials or persons associated with States. It had continued to be extraordinarily reticent in using the term "aggression". The second point was that, like it or not, the draft articles on State responsibility would never achieve the status of the Charter. The Commission was not in a position to affect the powers of the Council under Chapter VII textually, and it should not try to do so because it would bring the exercise into disrepute. The Commission must—in the only course open to it—engage in the codification and progressive development of the law of State responsibility, leaving the position of the Council to be decided by other means.

77. The third point to make about the Security Council's practice was that the Council had been very uneven in its condemnation of conduct that would have been criminal if the concept of State crimes had existed. It had done nothing to combat the State-sponsored genocide in Cambodia. It had not appropriately condemned outright acts of aggression in that period. More recently, of course, it had taken much more vigorous action, in particular in relation to Kuwait and also, though after an unseemly pause, with regard to Rwanda. Nevertheless, there had been a considerable measure of uncertainty, and the international community had not addressed those situations by criminalizing the States concerned. To criminalize Cambodia for the genocide would have been to punish the victims, and that point had been very much present in the minds of those agonizing about what to do. Instead, the international community had chosen other, and hopefully

[19] *Judgment, I.C.J. Reports 1995*, p. 90, in particular, p. 102, para. 29.

[20] *Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, in particular, p. 258, para. 35.

[21] Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor* v. *Tihomir Blaskic*, case No. IT-95-14-PT, Appeals Chamber, 29 October 1997, para. 25.

more constructive, means to restore the situation in that country after a period of time.

78. Thus, although there had been a substantial development of international criminal law in respect of individuals, there had been no development whatever of the notion of State crimes.

79. He had already referred to developments since 1976 in relation to peremptory norms of international law and obligations *erga omnes*. Whatever the position might have been before, the fact was that there currently was a hierarchy of substantive norms in international law; it was generally recognized that those concepts existed. The old bilateral forms of responsibility, while still present and important, were not the only ones. Indeed, one of the main criticisms to be levelled against the provisions on State crimes was that they distracted attention from the more important task of making sense of different categories of obligation within the framework of responsibility. For example, article 19 treated a State crime as more or less the only case of a breach of an obligation *erga omnes*. Yet the literature was unanimous in treating obligations *erga omnes* as a much broader category than State crimes, even assuming that the latter category existed.

80. Hence, significant development had taken place. To be sure, one or two Governments continued to oppose the notion of obligations *erga omnes*, but they were currently rather isolated and the Commission, having repeatedly endorsed that concept, could not change course at the current time. There were certain norms, perhaps few in number, that were non-derogable. There were other norms, a broader category, which gave rise to legitimate international concern. The Commission should seek to ensure that the consequences of those categories of norms were carefully spelled out in the draft articles. But that was not the same thing and, indeed, was almost the opposite, of adopting a distinction between crimes and delicts. It was possible and desirable to define more systematically the consequences of obligations *erga omnes* and of norms of *jus cogens* without adopting any distinction between crimes and delicts.

81. The Commission, in adopting article 19 at the twenty-eighth session, in 1976, had taken what might be described as a monastic vow—it had said that it would resist all temptations to say what the distinction meant; it had kept that vow very successfully, and as he would show, the Commission more recently had had little success in spelling out those consequences.

The meeting rose at 1 p.m.

2533rd MEETING

Wednesday, 20 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, 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. Mr. CRAWFORD (Special Rapporteur), introducing chapter I.E of his first report (A/CN.4/490 and Add.1-7), said he had sought (2532nd meeting), to demonstrate that, although there was a limited degree of practice supporting the notion of State crime in the particular context of aggression, there was nothing very decisive about it. In particular, article 19 of part one of the draft (International crimes and international delicts)[4] had not been followed in practice, nor indeed by the Commission in elaborating anything that could be described as a proper regime of crimes. And the fact that it had taken a decision at its twenty-eighth session, in 1976, which it had regarded at the time as potentially progressive, did not mean that that decision was irrevocable or really progressive. The Commission was therefore confronted with a choice.

2. Five possible approaches were identified in paragraph 70 of his first report, bearing in mind certain constraints that were structural both to the international community and to the Commission. In particular, it was not possible to force on the Security Council a system of crimes which would, in important respects, qualify the existing provisions of the Charter of the United Nations; and the Commission had to complete its consideration of the topic during the current quinquennium, for, otherwise, it would do serious damage to its standing in the Sixth Committee. But there was another important issue, namely, the issue of the so-called domestic analogy or, rather, the question whether, in using the word "crime", the Commission meant what it said. That word had a general connotation both in English and in other languages. It meant a distinctive wrongful act which attracted the condemnation of the international community as a whole and which was different in quality and in consequences from other forms of wrongdoing. In all the legal systems of which he knew, crimes attracted special consequences and were subject to special procedures. They were not treated as part of a continuum of the law of obligations,

[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 2532nd meeting, footnote 17.