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Summary record of the 2538th meeting

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45. Mr. SIMMA, endorsing all of Mr. Pellet's comments, said he thought that the Commission was within a hair's breadth of a solution. The protagonists of the notion of crime seemed willing to consider any proposals by their adversaries that took their concerns into account. The latter group would therefore do well to explore the consequences for them, in terms of responsibility, of the notions of *jus cogens* and *erga omnes* obligations and to make proposals to the other camp. The question of whether or not to keep article 19 could be settled afterwards.

46. Mr. ROSENSTOCK said that he found Mr. Simma's proposal to reverse the burden of proof somewhat curious: it was not for those, such as himself, who held that State crimes did not exist to prove the usefulness of a distinction that they challenged. It would be reasonable, in his view, to delete article 19 at once and work on part two of the draft articles, with the option of returning to part one if the advocates of the notion of crime made constructive proposals on the consequences of the distinction they upheld.

The meeting rose at 1 p.m.

2538th MEETING

Friday, 29 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, 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. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

State responsibility¹ (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. THIAM said that, notwithstanding the endeavours of the authors of article 19 (International crimes and international delicts), lawyers would continue to associate

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.

the word crime and the distinction between a crime and a delict with the field of criminal law. It was inappropriate to use such terms to denote a phenomenon that was unrelated to crime. He wondered what the consequences would be if, as had been suggested, the word crime was replaced by "serious breach of an international obligation". According to article 53 (Obligations for all States), when a State committed an international crime, other States must not recognize the situation thus created. Surely, the same applied to any breach of an international obligation. States were furthermore required to cooperate in withholding assistance from the perpetrator. Such consequences were, in his view, derisory. If a crime had been committed, commensurate action should be taken, but the risk then arose of encroaching on the area of responsibility of the Security Council, which was a political body.

2. He had not found a single Government comment in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) that was staunchly in favour of the notion of State crime. Most States expressed serious reservations on the grounds that the concept had no basis in international law. Some even viewed it as a threat to the Commission's work of codification. Under those circumstances, it might be advisable to abandon the idea entirely. Alternatively, as suggested by the Special Rapporteur, it could be taken up as a separate topic but that would require General Assembly approval and the appointment of a new special rapporteur.

3. While he understood that some members wished to take a revolutionary step comparable to that involved in the recognition of the individual as a subject of international criminal law, he feared they had little chance of success. Under article 4 of the draft Code of Crimes against the Peace and Security of Mankind,⁴ action could be taken to establish the criminal responsibility of a State where its agents had committed a crime. Such a State could be prosecuted on the grounds of international responsibility in the traditional sense of the term, but a State could not itself commit a crime.

4. Mr. MIKULKA asked Mr. Thiam whether, in his view, States were capable of committing a wrongful act that could jeopardize the fundamental interests of the international community as a whole and, if so, whether the consequences of such a wrongful act were comparable to the consequences of, for example, a breach of a trade agreement.

5. Mr. THIAM said that a State, as a legal person, could not be the direct perpetrator of a crime. It acted through its organs, consisting of natural persons, and bore responsibility for the consequences.

6. Mr. MIKULKA said that the adversaries of the ideas of the former Special Rapporteur, Mr. Roberto Ago, clearly felt a greater need to use the word crime than did their defenders. Would Mr. Thiam agree that certain norms of international law were essential for the purpose of safeguarding fundamental interests of the international community as a whole and that breaches of such norms had occurred?

⁴ See 2534th meeting, footnote 10.

7. Mr. THIAM said he agreed that some breaches of international law were worse than others, but it was the leaders of the States concerned who must be held criminally responsible. He had never heard of a single case of a State being directly prosecuted for a criminal act.

8. Mr. PELLET said that criminal responsibility was not the question at issue. The State was a legal person, but was not always transparent. Its leaders could be called to account only in certain cases, the cases that Mr. Thiam persisted in calling crimes. If the word “crime” was abandoned in favour of responsibility, the issue raised by Mr. Thiam would not arise, unless one rejected the idea that the State could be responsible at all, for it always acted through its agents.

9. He failed to see why a different approach was required in dealing with breaches of obligations of vital importance for the international community as a whole and breaches of other obligations.

10. Mr. ROSENSTOCK said that, while nobody doubted that some internationally wrongful acts were more serious violations of rights and obligations than others, the purpose of establishing a qualitative distinction between them was unclear. The history of the Commission demonstrated the futility of the exercise of concocting qualitative distinctions based on different notions of crime.

11. Mr. ECONOMIDES said that, while the notion of international State crime might have been considered revolutionary at the twenty-eighth session, in 1976, when article 19 was formulated,⁵ it was more pertinent today to speak in terms of evolution in the context of codification and progressive development of international law.

12. Mr. Thiam had drawn a distinction between international criminal law and the law of responsibility. He asked whether there was any rule that prevented certain elements of international criminal law from being used in the international law of responsibility if they could serve a useful purpose and were generally accepted. He saw no reason to adopt a rigid and uncompromising position on the matter.

13. Mr. THIAM said that the elements he had mentioned had a precise meaning in their context, which was that of criminal law. The advocates of the new approach should propose an acceptably precise new terminology. The terms suggested so far were unduly vague for legal purposes.

14. Mr. PAMBOU-TCHIVOUNDA said it was distressing to hear a denial of the international responsibility of the State. Whatever the act for which a State was held responsible, its originator was in all cases a State body or even a non-State body where individuals acted in a particular fashion while the State remained aloof, refraining from adopting the conduct required by law. It was currently argued that, in the case of crimes, specific State bodies must be targeted. It was, in his view, a curious approach to adopt. One might as well dismiss the idea of international State responsibility altogether. The words employed in legal disciplines derived their meaning from

a particular usage. They were not precise in themselves. The same applied, moreover, to all scientific disciplines.

15. Mr. THIAM said he had never denied the existence of international State responsibility. He had even proposed that a State whose organs had committed crimes should be held responsible for the consequences.

16. As to article 53, in his experience of international affairs, State solidarity did not work, for example in the case of sanctions. If the Commission held that certain internationally wrongful acts should entail more serious consequences than others, more serious penalties must be prescribed and that was a matter which fell within the competence of the Security Council.

17. Mr. LUKASHUK said that aggression had been officially recognized as a State crime and the Charter of the United Nations conferred special powers on the Security Council to deal with it. Moreover, aggression was such a serious breach of international law that it could be committed only by States and not by natural persons. The draft must therefore, in his view, address the question of extremely serious breaches of international law.

18. Mr. THIAM said that aggression was committed by persons acting on behalf of the State and using its resources. A State had never been tried for aggression, but the leaders of a State had been tried, for example, at Nürnberg.

19. Mr. MIKULKA said that, if the same argument had been used at Nürnberg, the criminals who were the target of the draft Code of Crimes against the Peace and Security of Mankind would never have been arraigned before an international criminal court. One of the defence arguments of the Nazi leaders was that the trial was unprecedented, but a decision had been taken to break with the past and to institute international criminal proceedings.

20. As an example of a State being tried for an internationally wrongful act that threatened the interests of the international community as a whole, one could cite the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought against Yugoslavia in ICJ.

21. Mr. THIAM said that Yugoslav leaders had been brought before the Court. A State as a legal person was never the defendant in legal proceedings.

22. Mr. ROSENSTOCK said that the case mentioned by Mr. Mikulka demonstrated conclusively that the State of Yugoslavia was being held responsible for an internationally wrongful act and was not in any meaningful sense being tried for a crime. The Convention on the Prevention and Punishment of the Crime of Genocide made it perfectly clear that a State's responsibility was civil. Even the plaintiff's pleadings made the same point.

23. He was pleased with the admission that any recognition of the notion of State crime would amount to a revolution. Personally, he was not prepared to be a party to that revolution and he was sure that not many States were willing either. However, the Special Rapporteur had indicated a way out of the impasse which would not do

⁵ See 2532nd meeting, footnote 17.

irreparable harm to those who dreamed of the day when States could be treated as criminals.

24. Mr. FERRARI BRAVO said he was in partial agreement with Mr. Rosenstock. In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina had invoked a provision in the Convention on the Prevention and Punishment of the Crime of Genocide in order to bring Yugoslavia before ICJ for allegedly having committed, or causing to commit, criminal acts. Bosnia and Herzegovina had not yet won the case, however, for the Court had ruled only on the issue of admissibility. It had acknowledged its own jurisdiction in the matter, but had indicated that it was not in a position to declare that the State of Yugoslavia was a criminal. One nonetheless sensed that the Court was somewhat uncomfortable with that position and considered that a criminal entity was involved.

25. Mr. ECONOMIDES, following up on Mr. Lukashuk's arguments, said that, as far as he was aware, whenever the Security Council took steps under Chapter VII of the Charter of the United Nations to restore the peace, those steps were taken against States, not against individuals.

26. Mr. THIAM pointed out that the Security Council was a political institution, whereas courts were judicial bodies. No comparison could be drawn between steps taken by the Council and penalties imposed by a court.

27. Mr. PELLET said that personally, he had no desire whatsoever to start a revolution. That was precisely why he believed the Commission should not speak of criminal responsibility of States. Even though such a possibility was left open under article 4 of the draft Code of Crimes against the Peace and Security of Mankind, the Commission should, in its work on State responsibility, studiously avoid any attempt at codification of the criminal responsibility of States. That should be left for the undoubtedly distant future.

28. The Convention on the Prevention and Punishment of the Crime of Genocide was not as unambiguous as Mr. Rosenstock suggested, but it did serve as a good example. The title of the Convention spoke of the "crime" of genocide, and the judgment of ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* clearly indicated that no offence under the Convention could not be attributed to a State. Quite simply, it very definitely was not a crime within the meaning of criminal law. Bosnia and Herzegovina had plainly said that it was not taking action on criminal grounds. Actually, proceedings were being brought in the Court against a State for crime and complicity in crime, but the proceedings were not penal in character. Everything Mr. Thiam had said related to a word, and not to a problem of substance.

29. Mr. ROSENSTOCK said that the Commission was continuing to go over the same terrain and that a way out of that impasse must be found.

30. Mr. RODRÍGUEZ CEDEÑO said that in any legal system, the responsibility regime was fundamental to the structure and functioning of the society to which it was

applied. The Commission had been considering the topic of responsibility since its eighth session, in 1956, when the first Special Rapporteur on the topic, Mr. García Amador, had taken up two issues that were fundamental to the Commission's work today: a broader approach than the classical notion of responsibility, which until then had been confined to damage caused to foreign persons and property; and the contemplation of various degrees within the internationally wrongful act.⁶

31. The current focus of the Commission's work was undoubtedly article 19, which made a distinction between international crimes and international delicts, and the matter should be carefully and realistically examined to find a viable way of moving forward, as the Commission had already done once before when, in order to get out of an impasse, it had decided to shift its study from the primary rules to the secondary rules. The Commission's discussion of the article must not be limited to codification but must also encompass progressive development of the relevant norms. While the elaboration of legal provisions responded to the imperatives of the society in which they were to be applied, it must also take into account the changes that occurred in the social environment in keeping with natural trends. International society was constantly changing, its structure improving, just as once-anarchic domestic societies had been better structured by application of the law. The concept of community, based on solidarity, was slowly gaining ground and must be taken into account in devising the legal provisions to regulate relations among States. The existence of varying degrees of international obligations and, consequently, of differing categories of internationally wrongful acts and the various consequences and regimes applicable to the violation of such international obligations, could not be ignored. The aim was not to characterize an obligation as one of result or of conduct, but to determine whether the obligations in question stemmed from a rule under an inter-subjective relationship or whether they were obligations essential to the protection of the international community as a whole.

32. Article 19 drew an unfortunate distinction between an international crime and an international delict of the State, when in fact the point at issue was the reparation of two categories of obligations and wrongful acts. Rather than place a breach of an international obligation in one of two categories, crimes or delicts, the aim should be to grade obligations from those affecting an inter-subjective relationship to those affecting the fundamental interests of the international community. A breach of a fundamental rule and a breach of a rule that was not fundamental had different legal consequences.

33. Acknowledging that distinction, the Commission should examine *erga omnes* rules in order to set out in different but balanced regimes within the draft the legal consequences of their violation. He was among those who believed that not all *erga omnes* norms were necessarily peremptory or fundamental to the existence of the international community, and that all *jus cogens* norms were by definition *erga omnes*. In any event, the Commission must carefully examine the interrelationship between

⁶ See 2536th meeting, footnote 5.

such norms when considering wrongful acts, and in particular, very serious wrongful acts.

34. The discussion of State crimes had nearly run its course. In his opinion, such crimes did exist, as was recognized in some of the doctrine and, he would venture to say, in international practice. Naturally, a clear distinction must be made between State responsibility and individual criminal responsibility, which fell into two separate contexts. The idea of criminalizing the State should be dismissed, for there was no way that international law could assimilate domestic-law concepts that applied solely to individuals.

35. Article I of the Convention on the Prevention and Punishment of the Crime of Genocide said that genocide was a crime under international law, which did not mean that they were crimes committed exclusively by State agents. In its judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court had indicated that article IX of the Convention did not exclude any form of State responsibility, nor was the responsibility of a State for acts of its organs excluded by article IV of the Convention, which contemplated the commission of an act of genocide by rulers or public officials (see page 616, paragraph 32). However, whether or not the term “crime” was accepted, the main thing was to distinguish among the various wrongful acts a State could commit in breach by violating various international obligations and, above all, to specify the legal consequences that the various categories of wrongful acts produced.

36. The draft articles did not resolve a number of issues in differentiating various degrees of wrongful acts. In the context of an inter-subjective relationship, it was for the injured State to take action, and the damage, the causal link and the necessary compensation or indemnification were constituent elements of the regime of responsibility. When the breach was of an essential norm, or of a higher degree, it was for the community to take action—direct harm need not have occurred and the penalty was the consequence of the breach.

37. The articles should draw a balanced distinction between the two categories of responsibility, and that would require a separate regime for breaches of a norm fundamental to the protection of the international community as a whole, but the draft, particularly articles 51 to 53, failed to make clear provision for such a regime. There were a number of other gaps, including who could raise the matter of a breach, what the machinery was for determining the existence of a serious breach and how and by whom the corresponding penalties would be established.

38. The Commission had been discussing whether internationally wrongful acts in the form of crimes of aggression, genocide, apartheid, terrorism or environmental damage could be imputed to States as well as to its rulers or officials, who were subject to individual criminal responsibility. Clearly, a State, although an abstract entity, could indeed commit very serious wrongful acts, which entailed such consequences as the specific sanctions laid down in numerous resolutions of the Security Council. The Commission had asked itself whether a sanction imposed on an abstract entity was a sanction

imposed on a people or, rather, a security measure required in the interests of the international community as a whole.

39. The Commission should continue to work on the task assigned to it by the General Assembly, taking into account the diversity or gradation of obligations, the diversity of wrongful acts and the necessary differentiation between legal regimes, and leaving behind the debate about crimes and delicts. The matter of breaches of essential norms and their legal consequences must in no way be eliminated from the draft. The regime of responsibility was a unified whole, although within it there was a diversity of obligations, wrongful acts, consequences and applicable regimes. Draft articles in a field such as responsibility that related solely to the violation of norms deriving from inter-subjective relations and failed to take account of fundamental or essential norms would not only be incomplete—they would also be incompatible with the Commission’s proper role of adviser to the General Assembly in the elaboration of international law by codification and progressive development. In short, he believed that it would be difficult to move forward with the draft without finding a solution to the problem raised in article 19.

40. Mr. MELESCANU said Mr. Rodríguez Cedeño had aptly summarized the situation currently facing the Commission. Some members believed that there were international crimes for which States were responsible, while others disagreed with that view. Both sides had adduced strong supporting arguments. There was no way the Commission could move ahead in discussing the issue and Mr. Rosenstock had suggested the best course of action: to create a more informal setting for further study of the matter. The Special Rapporteur should be asked to suggest a mechanism that would enable the Commission to make further progress in rectifying the impoverished state of international law, in which the term “wrongful acts” was used for a wide variety of actions that could be of greatly differing magnitude and content. The Commission should mainly be concerned with the legal consequences of such acts.

41. Mr. CRAWFORD (Special Rapporteur) said it was indeed his intention, when the time came to sum up the discussion, to propose such an approach to further discussion of the subject matter of article 19.

42. Mr. Sreenivasa RAO said that, as he and Mr. Rosenstock had both pointed out before, the Commission was going around in circles. Some members thought a case could be made for the existence of State crimes, in other words, of crimes of a very serious nature prompted by State policy, not by personal motives. Obviously, the Commission’s intention was in no sense to impose punishment upon a State in the way individuals were punished: for example, by bringing them before a court of law. The difference between States and individuals as wrongdoers was that individuals had *mens rea*, that is to say, personal motivation based on jealousy, greed, vengeance or other factors. States, however, compelled the individuals in their service to carry out policies. The individuals in question could well be acting very much against their will, at odds with their personal motivation and with no *mens rea*.

43. Mr. CANDIOTI said that the Special Rapporteur's impeccable analysis of the issues raised by article 19 and his first report (A/CN.4/490 and Add.1-7) had prompted a fruitful debate that shed light on many questions and provided the basis for choosing the road forward.

44. To his mind, in the current state of development of the international community, account had to be taken of the fact that, alongside common or ordinary breaches by States of international obligations, there were particularly serious wrongful acts which, owing to their magnitude, the extent of the interests affected and the nature of the rule that had been violated, were of special importance and merited special treatment. On the basis of the Charter of the United Nations and of international practice, treaty law had designated aggression, genocide, war crimes, crimes against the peace, crimes against humanity, apartheid and racial discrimination as particularly serious wrongful acts. As Mr. Ferrari Bravo had rightly pointed out, with the evolution of international law, particularly of international jurisprudence, acknowledgement of such wrongdoing by States as a particular category of wrongful acts was gradually taking shape. With the development of the international responsibility of individuals for such offences after Nürnberg, it would appear inconsistent at the current time to refuse to recognize the particularly solemn responsibility of States themselves for the same type of offences, although the nature of the responsibility and the consequences were necessarily different. Such an evolution was logical and desirable, since it moved in the direction of safeguarding the supreme values of mankind, international peace and justice. But like all major achievements in international law, before particularly serious wrongful acts were fully recognized and adequately covered, a long process of maturation must take place within the international community.

45. At the time it was drafted, article 19 had been an important step in addressing the problem, and the response by States had been positive. For a number of reasons, however, the Commission's subsequent efforts had not resulted in a satisfactory definition of particularly serious wrongful acts, nor had references to such acts in other parts of the draft contributed much to the definition of a specific and coherent legal regime. The penalistic connotation of the terminology used had only complicated the handling of the topic.

46. The Commission was therefore facing two basic tasks: to decide whether to continue considering the special category of particularly serious wrongful acts, which he believed it should; and, if it did, to define as clearly as possible the criteria to be used for identifying such acts and the specific rules on responsibility that would be applied to them. If anything should be preserved from article 19, it was the basic idea underlying the particular seriousness of such wrongful acts, namely, the breach of an international obligation essential for the protection of fundamental interests of the international community as a whole. That concept took account of the need to protect the greater interests of the international community as a whole.

47. The concept was linked with, but not identical to, the notions of *erga omnes* obligations and *jus cogens* obligations. The consequences of breaches of both types of obligations could currently be given closer attention. In

order to define a regime for such offences, basic elements must be developed such as attribution of the wrongful act, circumstances precluding wrongfulness, identification of the injured State, rights and obligations of other States, means of compensation, operation of self-help mechanisms, dispute settlement and the relationship between the general regime of responsibility and special regimes. The current draft articles on those matters would have to be reviewed to determine whether they should be reorganized or more rigorously reformulated.

48. That approach did not mean that international responsibility was to be criminalized, nor that the specific field of responsibility was to be confused with other institutions or regimes. He agreed with those who maintained that international responsibility was neither strictly civil nor criminal but rather *sui generis*. He likewise concluded that the content and consequences of international responsibility for particularly serious wrongful acts must be distinguished from the powers conferred by the Charter of the United Nations on the Security Council to maintain and restore international peace and security.

49. A number of the ideas advanced so far provided fertile ground for further progress in a realistic and positive, although not unduly ambitious, way. Mr. Hafner had proposed that the Special Rapporteur should draw up a schematic outline of the consequences of particularly serious wrongful acts, and the Special Rapporteur himself had suggested the establishment of a working group to study the obligation of solidarity, which was inadequately set forth in the draft. A number of members had pointed to the desirability of clarifying the link between breaches of *erga omnes* obligations, breaches of *jus cogens* obligations and particularly serious wrongful acts. In the comments and observations received from Governments on State responsibility, the Czech Republic had made a very interesting suggestion to the effect that provisions on the consequences of particularly serious wrongful acts should be divided into one or several separate sections. The Nordic countries had indicated that the division into categories of wrongful acts must be distinct and clear. At all events, he did not believe that the Commission could eliminate the category of particularly serious wrongful acts from the topic of responsibility. That would be a step backwards in the work of building a more just and more equitable international order.

50. Mr. GOCO noted that Rosalyn Higgins, a judge at ICJ, had written in her book,⁷ that the question of State responsibility had been on the Commission's agenda since the 1950s, but conclusion of work was nowhere in sight, the difficulties the Commission had had with the topic reflected the main different approaches, and it had been handled by a series of Special Rapporteurs, each with his own perspectives, and the work of each of them had been not so much a continuation of what had been done before as a great shift of direction. Actually, in his opinion the work that had been done was a collation of views on the subject and the Commission could currently reasonably be expected to complete the topic.

51. In its original form, State responsibility had referred only to the protection of aliens and their property. As a

⁷ R. Higgins, *Problems and Process: International Law and How We Use It* (New York, Oxford University Press, 1994), pp. 146-147.

general rule, a State was responsible for maintaining law and order within its territory and when acts of violence occurred therein, it could be said to be indirectly responsible. For a State to be responsible, there must be an act or omission in violation of international law that was imputable to the State and resulted in injury to the claimant State either directly or indirectly through harm to a national. Hence, a State was under an obligation to make reparation to another State for the failure to fulfil its primary obligation, that of affording, in accordance with international law, the proper protection of an alien who was a national of that other State.

52. Of course, a new meaning had been attached to State responsibility; it had much greater scope and content and had even ventured into areas never explored before. The current draft contained a compendium of new subjects which might all be regarded as relevant to the progressive development of international law.

53. The word “imputable”, according to an earlier assertion, was an essential element of State responsibility arising out of an act or omission in violation of international law and ascribable to the State. Chapter II of part one of the draft articles dealt with acts of the State under international law, but instead of the word “imputable”, it employed “attribution”. Thus, the conduct of State organs, of other entities empowered to exercise elements of government authority and of persons acting in fact on behalf of the State were regarded as acts of State. It was said that every breach of duty on the part of States must arise out of the act or omission of one or more organs of the State and the question of liability of the legal person was overlaid by categories of imputability.

54. Chapter II of part one of the draft articles was eminently important in relation to State responsibility and was also essential for a clearer understanding of article 19. The basic task was to establish when, under international law, it was the State which must be regarded as acting. What actions or omissions could, in principle, be considered to be the conduct of the State, and in what circumstances must it be attributable to the State as a subject of international law? In other words, Chapter II spoke of imputability and attribution. The commentary addressed his apprehensions about the subject of article 19, namely, a State could only act through acts or omissions of individuals or groups of individuals.

55. Earlier, a point had been made about individuals playing a role in terms of liability or guilt. The classical view was that States alone were the subjects of international law, and individuals could be no more than objects of international law. The opposite view held that individuals were to be regarded as subjects, and not merely objects, of international law. The middle ground, or modern view, maintained that, while States were usually the subject of international law, individuals had to some degree also become subjects of that law. For instance, the Nürnberg Tribunal had ruled that crimes “against international law are committed by men, not by abstract entities and only by punishing individuals who committed such crimes could the provisions of international law be enforced.”⁸

56. The “abstract entity” was of course the State of which the individual offenders, such as its officials, were subjects. Attributing a breach of an international obligation or the commission of an internationally wrongful act to a State automatically implicated the individuals who perpetrated those acts. It was an easy matter to cite examples in recent history of atrocities committed by State leaders. In wartime Germany, a community living close to a notorious concentration camp had not known what had been happening in the camp until the war had ended. The point was that, in some situations, State leaders committed acts at the highest level of authority and the vast majority of the population was not aware of what was taking place. The leaders, or certain bodies or entities within the State whose officials had committed heinous offences, must be held responsible for their acts, which were acts of State because they were imputable to the State. However, he could not imagine the condemnation of a State as criminal. History was replete with leaders who, vested with State authority, had brought shame upon their States.

57. As to the domestic analogy, the Special Rapporteur had cautioned that the term international crime should not lead to confusion with the term as applied in other international instruments or national legal systems, but had also asserted that it was difficult to dismiss the extensive international experience of crimes and their punishments so readily. It was true that, in proposing the category of State crimes, the Commission was entering into a largely uncharted area. But the appeal of the notion of international crimes, especially in the case of the most serious wrongful acts like genocide, could not be dissociated from general human experience. The underlying notion of a grave offence against the community as such, warranting moral and legal condemnation and punishment, must in some sense and to some degree be common to international crimes of States and to other forms of crimes. If it was not, then the notion of “crimes” and the term “crime” should be avoided. Moreover, many of the same problems arose in considering how to respond to offences against the community of States as a whole as arose in the context of general criminal law (first report, para. 75). In other words, international crimes could not be seen separately from domestic crimes.

58. Did article 19 deal with acts that constituted an international crime? If not, were they wrongful acts? The moment the notion of crime was introduced, matters took on a totally different character. The substantive requirements of the penal statute must make very plain exactly what offence was imputed; otherwise no one would submit to jurisdiction. Assuming that the language was precise, prosecution of a State would be similar to prosecution of an individual, yet who in the State would face the charges before an international tribunal? Obviously, the “domestic analogy” could not be dismissed.

59. He did not fully agree with the Special Rapporteur’s reasoning, in paragraphs 83 to 86 of his first report, about criminalizing State responsibility. In his view, there had been considerable success in prosecuting the perpetrators of such crimes in question, Nürnberg being the classic example. In the case of the Nürnberg Tribunal, some had argued that indictments had been issued against certain persons because they had lost the war. In reality, however, it was because they had violated principles so essential to

⁸ See 2532nd meeting, footnote 18.

the protection of the fundamental interests of the international community that their acts had to be regarded as crimes.

Cooperation with other bodies (*continued*)

[Agenda item 9]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

60. The CHAIRMAN welcomed Judge Schwebel, President of the International Court of Justice, who was visiting the Commission. Judge Schwebel, a former member of the Commission, had been its Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses. On behalf of the members of the Commission, he said he took great pleasure in extending him a warm welcome. His presence was a reminder of the personal links between the Court and the Commission and of the cross-fertilization between the two bodies.

61. Mr. SCHWEBEL (President of the International Court of Justice), expressing pleasure at once again being able to take part in the Commission's deliberations, said that he would give a brief account of the current range of work of ICJ. There were currently 10 cases pending before the Court, in marked contrast to the situation when he had left the Commission in 1980 to take a seat on the Court in early 1981, at which time the Court had had only one case before it.

62. One case currently was that of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.⁹ It concerned a boundary dispute, which might be called the "staple" of the Court's work, but it was unusual in that it involved both land and water. The case was of immense importance to the two States concerned. Unusually, the Court had issued two judgments pertaining to jurisdiction and admissibility.¹⁰ The case had quite extraordinary complications, and the substantive issues at stake were of great complexity and had given rise to lengthy pleadings.

63. Then there were a pair of cases, namely *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States of America)*,¹¹ in which the Court had declined to issue an order of provisional measures.¹² It had not upheld challenges to jurisdiction and admissibility.¹³ Obviously, the cases were of very broad interest to the international community, not only because they dealt with the construction of an important international convention designed to address acts of terrorism against international aircraft and concerned

allegations of international terrorism of the grossest kind, but also because they posed very significant issues of the relationship of the authority of the Court to that of the Security Council.

64. Fourth was the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*.¹⁴ The Islamic Republic of Iran alleged that the destruction of certain oil platforms in the Gulf by United States forces during the Iran-Iraq war had been unlawful. There again, there had been a challenge to jurisdiction, but once again the Court had upheld jurisdiction. The United States had raised counter-claims against Iran, alleging unlawful actions by Iran in destroying neutral commerce in the Gulf in the course of the Iran-Iraq war, since those actions had had an adverse impact on United States interests. The Court had accepted elements of those counter-claims.¹⁵ Hence, the Court had decided that it had jurisdiction for certain, but not all, claims of Iran, and for certain counter-claims of the United States.

65. Fifth was the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, brought by Bosnia and Herzegovina against Yugoslavia. The Court had issued two orders of provisional measures,¹⁶ upheld its jurisdiction in the matter and admitted counter-claims by Yugoslavia.¹⁷ The Government of Bosnia and Herzegovina alleged that Yugoslavia had promoted genocide in its territory; the Government of Yugoslavia alleged that the Bosnian side had promoted genocide of Serbs living in its territory. A disposition on the merits was currently awaited.

66. The sixth case before the Court involved a dispute over the *Land and Maritime Boundary between Cameroon and Nigeria*. The Government of Cameroon alleged that Nigerian forces had occupied parts of its territory at various points along the border. The Court had issued provisional measures,¹⁸ the matter had been taken up by the Security Council,¹⁹ and the Secretary-General had sent an investigation team to the region. Meanwhile, Nigeria had issued a challenge to the original Cameroonian application, which was currently being considered by the Court.

67. The seventh case, *Fisheries Jurisdiction (Spain v. Canada)*,²⁰ had been filed following the arrest of a Spanish fishing vessel just outside Canada's exclusive economic zone. The Court's jurisdiction had been challenged, and the matter was scheduled to be taken up in June 1998.

68. The eighth case, *Kasikili/Sedudu Island (Botswana/Namibia)*, was essentially a boundary dispute between Botswana and Namibia. The ninth case concerned the

¹⁴ See 2533rd meeting, footnote 7.

¹⁵ *Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 190.*

¹⁶ *Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 3; and ibid., Order of 13 September 1993, I.C.J. Reports 1993, p. 325.*

¹⁷ See 2532nd meeting, footnote 20.

¹⁸ *Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996, p. 13.*

¹⁹ See S/1996/150.

²⁰ *Order of 2 May 1995, I.C.J. Reports 1995, p. 87.*

⁹ *Order of 1 February 1996, I.C.J. Reports 1996, p. 6.*

¹⁰ *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112; and ibid., I.C.J. Reports 1995, p. 6.*

¹¹ *Order of 22 September 1995, I.C.J. Reports 1995, p. 282; and ibid., p. 285.*

¹² *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3; and ibid., p. 114.*

¹³ *Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 9; and ibid., p. 115.*

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.