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Summary record of the 2540th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

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

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

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

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

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

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

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

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

It was so agreed.

The meeting rose at 6.15 p.m.

2540th MEETING

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

Chairman: Mr. João BAENA SOARES

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

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

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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

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

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

[3] Ibid.

States, or the substantive penalties or procedural mechanisms that any such liability would entail.

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

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

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

2. Mr. HAFNER said that the Special Rapporteur deserved thanks for his proposal on further work in relation to article 19 (International crimes and international delicts). He could go along with the main thrust of the proposal, despite certain doubts in connection with paragraphs 3 and 4. It would appear that paragraph 3 established three categories of international obligations, namely, those which were essential, those which were non-derogable (*jus cogens*) and those which were owed not to individual States but to the international community as a whole (*erga omnes*), while paragraph 4 introduced the additional concept of "serious breaches" of those obligations. Recalling that Mr. Mikulka (2539th meeting) had proposed deletion of the word "serious" and that the Special Rapporteur had been seen to nod in agreement, he asked whether it would be the working group's task to deal with the consequences ensuing from all breaches of the three categories of international obligations listed in paragraph 3 or only with "serious" breaches. Further, was the list of criteria in paragraph 3 cumulative or alternative? In other words, was the working group to address the question of breaches of any one category of obligations or only of such acts as breached all three categories?

3. Mr. CRAWFORD (Special Rapporteur) pointed out that many of the suggestions made thus far could be discussed other than in the context of the Commission in plenary. The initial question, as he saw it, was whether the Commission was by and large satisfied with the proposed formulation based on a compromise. As for the second question, which concerned the precise nature of the proposed working group's work, he agreed with the point made by Mr. Simma (ibid.) that the working group's efforts would only be of an indicative nature and that it would be helpful if, in addition to the mandate set out in paragraph 4 of his proposal, the working group were to produce some preliminary reflections on other issues arising out of part one of the draft. As to Mr. Hafner's question, the notions of *jus cogens* and obligations *erga omnes*, although cognate, were not identical, the latter concept being perhaps narrower than some members had suggested. It would be for the working group to ask the relevant questions about different categories of obligations and, where necessary, to identify their potential consequences in the field of State responsibility.

4. Mr. LUKASHUK said that the proposal seemed to him to contain a sound idea for a compromise. However, besides rightly saying that State responsibility was not a matter of either criminal or civil law, the Commission should make it clear from the outset that it was speaking about responsibility under public international law. He saw no need to discuss the issue of criminal responsibility at the current stage, the concept of "crime" having been used to denote the most serious breaches simply because no better term had been available. Paragraph 3 was, in his opinion, unnecessary because not all serious breaches of international obligations were connected with the rules of *jus cogens*, and paragraph 5 could be dispensed with for the same reason. That would leave only the category of the most serious breaches, which was quite sufficient.

5. Mr. YAMADA said that he, too, welcomed the Special Rapporteur's proposal, which should not be seen as an invitation to either side to abandon its positions of principle but rather as a method of work or a working hypothesis designed to facilitate the second reading of the draft. That basic objective would not be achieved if members persisted in defending their own points of view. Leaving aside the drafting aspect, which could indeed be dealt with in the Drafting Committee, the proposal appeared to be based upon broad agreement within the Commission. Paragraph 1 established the basis for future work. Paragraph 2 was important in that it clearly indicated that the current exercise did not encompass the question of criminal liability. Paragraphs 3 and 4 constituted the key element of the proposal, and while he was somewhat apprehensive about the reference to *jus cogens* in paragraph 3, he was prepared to leave that question for discussion in the working group. The reference to article 19 in paragraph 4 was essential, although he was prepared to be flexible about the precise form of language employed. What mattered was to make it clear that the Commission did not propose to talk about article 19 until it completed the work outlined in paragraphs 3 and 4. Lastly, he had no difficulty in accepting the saving clause in paragraph 5.

6. Mr. BROWNLIE said that, having regrettably been unable to take part in the debate hitherto, he would state his views by way of comments on the Special Rapporteur's proposal, which he regarded as a move towards compromise that did not necessarily reflect the Special Rapporteur's own views. The harsh things he was about to say were therefore not addressed to the Special Rapporteur but, as it were, *urbi et orbi*. The proposal before the Commission appeared to create much greater problems than those arising from article 19 taken in isolation.

7. In the first place, the proposal encompassed the whole area of international public order, whereas the Commission's original mandate was, and had been for several decades, State responsibility, a fairly familiar category both in the doctrine and in the practice of tribunals and States. He did not believe that the mandate included *jus cogens* or obligations *erga omnes*, categories which were common to both State responsibility and the law of treaties. He was therefore a little surprised to see those

categories, even if one of them was apparently set aside, dealt with under the topic of State responsibility. However, that point was perhaps only organizational.

8. Paragraph 1 of the proposal, on the other hand, was so disturbing as to have brought him close to tears. He sometimes thought that, in addition to pursuing its task of codification of international law and the progressive development thereof, the Commission seemed to be in danger of inventing a third category, that of progressive deterioration of international law. State responsibility, like the law of treaties, was an important, useful and familiar category. In paragraph 1 of the proposal, if taken at its face value, it became a kind of *tertium quid* and was placed on a completely new normative plane, a step that would lead to enormous confusion, if not among professional international lawyers, then among the many non-professional users of their products. The proposition that the status of State responsibility should thus be placed on a curious "third plane" that was neither criminal nor civil seemed to him appalling. Together with many others, he had always thought that the field of State responsibility was essentially "civil", even if standards of conduct might vary and the process of reparation might sometimes have quasi-penal elements.

9. As for paragraph 4, his main objection to article 19 was not its content but, rather, its location. The article related to problems of crimes of State and for that reason stood outside the field of normal State responsibility. Lastly, if the Commission did not wish to appear negative in the eyes of the Sixth Committee, the proviso in paragraph 5 was sufficiently clear. For that reason, paragraph 5 was the only part of the proposal he liked.

10. Mr. CRAWFORD (Special Rapporteur) said that the proposition contained in paragraph 1 was to be found in the commentary to article 19[4] and had been affirmed by both opponents and supporters of that article. The proposal as a whole was being put forward in a spirit of compromise, but he personally would be happy if the Commission could agree that the field of State responsibility was indeed "civil". Obligations *erga omnes* could, he believed, still find their place in the area of State responsibility seen as "civil". However, the term implied an analogy to which some members were allergic.

11. As to Mr. Brownlie's reference to a supposed "third plane", the only plane envisaged in paragraph 1 was that of international law and its regular compartment of State responsibility. He was, of course, in agreement with Mr. Brownlie on the subject of crimes of State; the concept no doubt existed in embryo in relation to a very few rules, and there was a case for taking it up as a new topic. He would have no objection to deleting the words "that the field of State responsibility is neither 'criminal' nor 'civil'", from paragraph 1, in the hope of making progress. With regard to paragraph 3, he regretted that Mr. Brownlie had been absent from the previous meeting, at which he had made the point that the concept of *jus cogens* came from outside the field of State responsibility but could have consequences within it. The concept of obligations *erga omnes* had been defined by ICJ in the framework of State responsibility and was reflected in article 40 (Meaning of injured State) of the draft. In the light of the debate which had taken place, he very much doubted that the Commission as a whole would be persuaded to proceed by consensus on the basis of Mr. Brownlie's views.

12. Mr. LUKASHUK said that the view of State responsibility as a matter of civil responsibility, although well-known in British legal writings, was at variance with elementary logic and, as could be seen from many of the comments and observations received from Governments (A/CN.4/488 and Add.1-3), was firmly rejected by those who held public international law to represent a special system of law.

13. Mr. HE said that he appreciated the Special Rapporteur's coordinating efforts to deal with a difficult and complex issue and appealed to all members to help the Special Rapporteur accomplish the tremendous task facing him as the Commission was entering upon the critical second reading stage. For his part, he could accept the revised proposal and agreed that efforts should be concentrated on paragraph 3 and the idea of setting up a working group. The concept of international law should be separated from that of criminal responsibility under domestic law, since a State could not be punished by others without detriment to the principle of the sovereign equality of States. If the penal implications of the term were to be avoided, there was no reason why the term "crime" should be used at all in the law of State responsibility. To speak of breaches of obligations *erga omnes* would be more appropriate. Paragraph 5 was unnecessary, as it might create more problems than it would resolve.

14. Mr. GOCO said he commended the Special Rapporteur's proposal on article 19 as a compromise that reflected the Commission's deliberations on a highly controversial subject. He shared the view that it was an issue which should have been thrashed out by the Working Group before coming before the Commission.

15. If paragraph 1 was meant as an indication of sentiment to the Working Group, it could very well be discarded. Otherwise, he proposed deleting the phrase "is neither 'criminal' nor 'civil'", since it might be viewed as provocative. As paragraph 2 was premised on paragraph 1, it should also be deleted.

16. The word "principle", in paragraph 3, should be replaced by "premise" and the reference to *jus cogens* and *erga omnes* omitted, inasmuch as it opened up a wide area of discussion and tied the Commission's hands in the process. The reference to article 19 in paragraph 4 should be deleted and the remainder of the sentence modified in the light of his proposed amendment to paragraph 3. Lastly, he would delete the reference to the existence or non-existence of "international" crimes of States in paragraph 5.

17. Mr. GALICKI said that the Special Rapporteur's proposal was a reasonable compromise which incorporated the main elements of the discussion and made a valiant effort to find common ground among sharply conflicting views.

18. Paragraph 1 was particularly constructive. Although he acknowledged the existence of dissenting views such

[4] See 2532nd meeting, footnote 17.

as those of Mr. Brownlie, he agreed with the Special Rapporteur's finding that the Commission had already identified and emphasized the specific character of State responsibility. Paragraph 2 followed on logically from paragraph 1.

19. In his view, article 19 was the worst enemy of the concept of crimes of State. With all due esteem for his predecessors who had drafted the article, he could not help concluding that its structure, whatever its substance, was outmoded. An even more serious objection was that, while paragraph 2 of article 19 treated every breach of an essential international obligation as a crime, paragraph 3 placed only serious breaches in that category.

20. Paragraphs 3 and 4 of the proposal were particularly commendable for differentiating between two issues likely to have implications for State responsibility: the characteristics of obligations and the characteristics of breaches of those obligations. It was an approach that would prove far more profitable than arguing about terminology. The Commission could salvage the substantive ideas underlying article 19 while discarding its structure.

21. Mr. SIMMA said that, with reference to Mr. Brownlie's anguished response to the proposal, he, on his part, would be driven to tears if State responsibility was designated a civil responsibility. Although State responsibility owed a great deal to civil responsibility and was somewhat similar in structure, the entire premise of the draft articles was based on something radically different, namely a structure that he termed objective and which Mr. Pellet had referred to orally and in a number of publications. The former Special Rapporteur, Mr. Roberto Ago, had been credited with a stroke of genius when he had "emancipated" State responsibility from the even more civil pattern that had then prevailed.

22. He would agree to deletion of the phrase "that the field of State responsibility is neither 'criminal' nor 'civil'" in paragraph 1, since it only added to the confusion.

23. Mr. PELLET said he thought the Special Rapporteur's statement that *jus cogens* did not form part of the concept of responsibility was unsound. Responsibility consisted of breaches of rules which could fall under such headings as peremptory, *erga omnes*, customary or treaty-based, the last two having been wisely dismissed as unimportant by the Commission. While *erga omnes* obligations had not been referred to by name in the draft articles, article 40 had nevertheless touched on the problem. The same applied to *jus cogens*. It seemed reasonable to address the question of whether breaches of such rules had specific consequences—indeed, paragraph 3 of the proposal seemed to go no further than that—and it would be regrettable if the matter was shelved.

24. Mr. Brownlie's statement had taken the Commission back to square one, as though the discussion which had generated the spirit of compromise reflected in the Special Rapporteur's text had never taken place. Acceptance of Mr. Brownlie's position would constitute not so much a progressive deterioration of international law as an absolute regression. All the recent advances would be undermined and all that was needed was a challenge to article 1 (Responsibility of a State for its internationally wrongful acts) of the draft in order to bring back the good old days when international law was perceived as a mere bundle of bilateral relations.

25. When interrupted at the previous meeting by what he viewed as a regrettable procedural manoeuvre, he had been trying to make proposals in a constructive spirit to improve a text which, on the whole, seemed to be sound. After being denied the opportunity to speak, he had listened to, and wholeheartedly supported, a number of suggestions made by Mr. Mikulka, who had not been impolitely censured by Mr. Rosenstock. He had been particularly taken by the proposal to omit the reference to article 19 in paragraph 4. For the purposes of a calm discussion in the Working Group as to whether article 19 would ultimately be retained or deleted, the best course would be to say nothing at all in the proposal. He also agreed with the suggestion to delete the expression "serious breaches", which, as noted by Mr. Hafner, had been the source of much confusion. The Working Group should address the question of whether certain breaches of obligations—whether *erga omnes*, *jus cogens* or breaches which by their nature were particularly serious—had specific consequences. Afterwards it would be seen whether the concept of crime was to be kept or rejected.

26. He also fully supported Mr. Mikulka's proposal to replace the words "existence or non-existence of 'international' crimes of States" in paragraph 5 by a reference to the "characterization" as crimes of breaches of the obligations mentioned in paragraph 3. The point at issue was not whether a thing existed or not, but whether it was to be called a crime.

27. He would not participate in the Working Group, because it was not for Mr. Rosenstock to decide on the membership of a working group of the Commission and allocate the right to speak. However, he reserved the right to respond to whatever emerged and to propose amendments if necessary.

28. Mr. ADDO said he commended the Special Rapporteur on his success in reconciling entrenched positions and making the seemingly impossible possible. Although he was unhappy with the phrase "neither 'criminal' nor 'civil'", he was prepared to go along with it in order to move the discussions forward. He was comforted, on the other hand, by the phrase "that the draft articles cover the whole field of internationally wrongful acts". Paragraph 2 was acceptable as a corollary of paragraph 1. Again, he was somewhat hesitant to accept the reference to *jus cogens* and *erga omnes* principles in paragraph 3, but assumed that the matter would be fully discussed in the Working Group and he was therefore prepared to let it stand. He had no objection to paragraphs 4 and 5.

29. Mr. PAMBOU-TCHIVOUNDA said he was thankful to the Special Rapporteur for coming up with a compromise text that would allow the Commission to resolve the deadlock created by a head-on collision of two opposing schools of thought. The dialectics of conflict should create the conditions for reaching a new synthesis. There was nothing to be gained from an obstinate adhering to entrenched positions.

30. It had already been acknowledged that the title "State responsibility" was itself one of the causes of the existing deadlock. Accordingly, paragraph 1 of the Special Rapporteur's proposal should be redrafted to read: "The draft articles on the international responsibility of States arising from an internationally wrongful act cover the entire set of acts—actions or omissions—attributable to States". That would make clear from the outset what the subject of the draft articles was and would obviate the need for paragraph 2. Paragraph 5 should also be deleted, as it added very little, and paragraphs 3 and 4, which contained the essence of the Special Rapporteur's conclusions, should be rewritten to lend greater precision to the description of *jus cogens* and *erga omnes* obligations and of serious breaches of such obligations.

31. The proposals in paragraphs 3 and 4 were aimed at getting away from the binary structure of article 19, namely, the distinction between crimes and delicts. The disturbing thing for both sides in the Commission, or rather, for those who opposed the idea of State crimes, as it posed no difficulty for those in favour of that idea, was how to take account of the spectre of unlawfulness. A formulation was needed that would break through the terminological problems in article 19 yet preserve the conceptual underpinnings. He would therefore propose that paragraphs 3 and 4 of the Special Rapporteur's proposal be combined to read:

> "The draft articles should incorporate in the regime of the international responsibility of States, on the one hand, a series of provisions defining the basis and purpose of specific internationally wrongful acts that affect—or potentially affect—the interests of the international community of States as a whole and, on the other hand, a second series of provisions organizing the machinery to respond to breaches of such acts."

32. The paragraph would continue with a second sentence, to read: "This task will require the establishment of an appropriate structure (working group) to perform it in implementation of the Commission's mandate."

33. That proposed amendment was offered with a view to removing a number of ambiguities in paragraphs 3 and 4. For example, it was not a matter of fully "reflecting" the consequences of certain principles in the draft articles, but rather, of ordering the way the international community acted and reacted. The comments made by Mr. Ferrari Bravo had been directed along those very lines. Even if the distinction between crimes and delicts was no longer preserved and no reference to crimes was made, the concerns set out in paragraphs 2 and 3 of article 19, which the Special Rapporteur had attempted to reflect in paragraphs 3 and 4 of his proposal, must be preserved.

34. Paragraph 4 of the proposal introduced the extraneous and contentious notion of serious breaches of *jus cogens/erga omnes* obligations. But that subject was more than problematic. Where was one to place the threshold between breaches of obligations and "serious" breaches of them?

35. To sum up, therefore, his proposal contained, in paragraph 1, a statement of the nature of State responsibility and of the objective pursued by the draft articles. Paragraph 2 outlined the content of the future draft article and specified the structure and direction for the Commission's work on it.

36. Mr. ROSENSTOCK said that Mr. Pellet had been both rude and incorrect in commenting that he had been trying to impose upon the Commission a certain membership of the Working Group. He had simply been trying to avert a point-by-point debate on the Special Rapporteur's proposal, in response to a plea made by the Special Rapporteur himself, but had subsequently abandoned that effort as he had received no support. He remained convinced, however, that the current discussion of how to pursue the discussion on the proposal was not very useful.

37. He himself was not greatly enamoured of the proposal. For the reasons cited by Mr. Brownlie, he did not like paragraph 1, although he could accept Mr. Simma's variation thereon. He had no strong feelings as to whether paragraph 2 should be retained or not, although in his opinion it served no purpose. Paragraph 3 was fundamentally flawed: to regard *jus cogens* obligations in the context of State responsibility as anything other than a subset of *erga omnes* obligations was a serious and potentially totally unacceptable error.

38. He was appalled at the objections to proceeding with the Special Rapporteur's proposal as a working hypothesis and to taking account of serious breaches in place of article 19. The objections showed a lack of good faith on the part of those who preferred article 19 but expected others to proceed on the assumption of a qualitative distinction while they retained their original position. He was indifferent to the fate of paragraph 5, which made no great difference one way or the other.

39. The discussion should not be pursued in the current form, either in the Commission or in a working group. The Special Rapporteur had heard all he needed to hear of the various views and should currently go back to the drafting board and produce a new formulation before the session was resumed in New York. As things stood, the Commission was uselessly debating the Special Rapporteur's expressed intentions: let him put those intentions into tangible form, and then the Commission could look at them.

40. Mr. CRAWFORD (Special Rapporteur) said he partly agreed with Mr. Rosenstock. His proposal had been intended to enable a working group to assist him in doing the drafting work strongly recommended by Mr. Rosenstock. A significant number of members of the Commission—more than half of those who had expressed their views—did not believe in a qualitative distinction between crimes and delicts in the field of State responsibility. Other members, however, strongly believed in it. The working group was to help him delve into the implications of such a distinction and, on the basis of that discussion, he would draft proposals which he hoped would prove broadly acceptable. His proposal had been termed a working hypothesis and that was a reasonable description. He had already received a great amount of assistance from the Working Group chaired by Mr. Simma. At the second reading stage, it was not the personal views of particular special rapporteurs that needed to be brought into the discussion, but rather, proposals that could command wide

support and were faithful to the sources and the doctrine. Mr. Mikulka had made a number of very useful suggestions in writing. If the Commission agreed, the Working Group could be convened and he could summarize the proposals before it with a view to making progress. In particular, the aim should be to work out collectively the implications of the distinction or distinctions to be made between crimes and delicts.

41. Mr. AL-BAHARNA said that the Special Rapporteur's proposal should be amended in some ways. The phrase "that the field of State responsibility is neither 'criminal' nor 'civil' and" should be deleted from paragraph 1. The whole of paragraph 2 should be deleted. The phrase "to the international community as a whole (*erga omnes*)", in paragraph 3, should be replaced by "they represent the interests of the international community as a whole.". In paragraph 4, the phrase "in place of article 19" should be omitted and paragraph 5 in its entirety should be deleted.

42. If the Commission was to take a decision to delete article 19, he would object, as it was a political decision going far beyond the Commission's mandate, which for the past 30 years had been to codify the whole corpus of State responsibility in the field of general international law. Responsibility for internationally wrongful acts certainly included the category of international crimes. The Commission had no specific mandate to delete article 19 and should seek a mandate to do so in the form of a resolution by the General Assembly. As he had already proposed, the Commission should specifically address to the General Assembly a question about deleting article 19 from the body of work on the topic of State responsibility.

43. Mr. CRAWFORD (Special Rapporteur) said that, if Mr. Al-Baharna wanted a vote, he could have one on the deletion of article 19. His suggestion was partisan and unacceptable. The Commission was trying to find a way to move forward in a spirit of compromise. What the Commission had done in the draft articles on first reading it could redo, change, amend, alter or add to on second reading. It did not take detailed instructions on that process from the Sixth Committee, but certainly listened to it, and would continue to do so.

44. The CHAIRMAN said that he was not in favour of having a vote.

45. Mr. PELLET said the Special Rapporteur had made two suggestions. The first was that his proposal should be redrafted in a working group; that did not seem to be necessary any more and in that connection he agreed with Mr. Rosenstock, for such a course would be pointless. The Special Rapporteur's other suggestion was contained in paragraph 4: a working group to be convened on the matters set out in paragraph 3, that is to say, on breaches of *erga omnes*, *jus cogens* and other obligations. He endorsed that idea and would join such a working group, for a different issue was involved. If the Commission decided to proceed in that manner, when would it do so? It seemed somewhat premature to start on the work that morning. Also, had the afternoon meeting of the Working Group on the long-term programme of work been cancelled?

46. The CHAIRMAN said that it was no longer possible to convene the Working Group on the long-term programme of work in the afternoon; Mr. Brownlie had requested another date.

47. Mr. SIMMA said he shared Mr. Pellet's concern, because it was not clear what the task of the proposed working group should be. He had thought it would be to revise the working method for dealing with article 19, but according to Mr. Rosenstock, that could be done by the Special Rapporteur himself, who had heard many comments by members. On the other hand, it would make sense for the working group to take up the various points and redraft the statement currently before the Commission. If the working group was to meet immediately and go into problems of obligations *erga omnes*, *jus cogens* and so on, he agreed with Mr. Pellet that such a course would be premature. In fact, paragraph 4 expressly stated that such would be the task of a working group to be convened in the second part of the session in New York. The substantive work on developing an alternative to article 19 should not be started in the current part of the session. Members needed enough time to prepare for what was a very difficult task.

48. Mr. CRAWFORD (Special Rapporteur) said he had assumed that, in the light of the discussions, an open-ended working group would produce a statement on the comments made. There was no need to come back for detailed instructions or to redraft the text in plenary. He respected Mr. Simma's opinion that the working group might not be in a position to make substantive progress until the second part of the session in New York, although he would regret that. He was in a position to give guidance to the Working Group in the meantime. It was worth noting that in the previous quinquennium substantial progress had often been made in working groups even on issues which seemed to be deadlocked in plenary. Although he did not think that the Working Group could complete its work at the current session, he saw no reason why it should not begin, namely by deciding on where the debate currently stood and seeking to embark upon the substantive work.

49. Mr. Sreenivasa RAO said the problem was that the proposal created a certain mandate and set a firm tone. Further discussion should indeed take place in a working group. The matter the working group was being asked to settle was whether, as part of the study of State responsibility, the Commission needed to focus on *erga omnes* and *jus cogens* obligations and to see whether or not they would entail certain consequences in the field of State responsibility. The point had been made that it might be worth while to look into that question, and the group might even provide a solution to the bigger problem of how to deal with article 19.

50. Mr. GOCO said he endorsed the proposal to refer the matter to a working group.

51. Mr. CRAWFORD (Special Rapporteur) said that it would be difficult and probably unproductive to seek agreement on the proposal he had circulated. Since the text was designed not as a decision by the Commission to replace article 19 but as a working hypothesis, agreement on it would not have taken the Commission very far. Clearly, the Commission was not in a position to take a definitive decision on article 19. He was opposed to a vote, which would be divisive. There seemed to be con-

siderable agreement that it would be constructive for a working group, and not the Commission, to consider what the implications would be in the draft articles of the notions he had tried to describe in paragraph 3 of the proposal.

52. The idea was that the Working Group chaired by Mr. Simma would have its mandate marginally extended to consider, currently at the Geneva, and later at the second part of the session in New York, what those implications might be. That would help him in producing his second report, which would examine the matter, *inter alia*, in the context of article 40, because there was the major question of what the terms of article 40 were to be. The Commission should first take note of all the views expressed, which the Working Group would take into account, and the Working Group should start that afternoon by considering the essential question identified in paragraph 3, on the understanding that progress could be made on the basis of the working hypothesis, without prejudice to the views expressed in the Commission about whether to retain article 19. The Commission would revert to the question in due course in the light of the results of the Working Group's work, the consideration of his second report, article 40, and so forth. In the meantime, it would proceed, first, with the work on part one and, secondly, with the work of the Working Group chaired by Mr. Simma, which would engage in the process generally indicated in paragraph 3. There appeared to be broad consensus in favour of such a course.

53. The CHAIRMAN said that it was his understanding that the Special Rapporteur's proposal was acceptable to the Commission.

54. Mr. PELLET said that he warmly supported the Special Rapporteur's proposal, but there was one small point of concern. The Working Group would basically be considering paragraph 3. At the same time, the intention was to discuss the articles in part one. The two exercises would inevitably overlap somewhat. He had always considered that article 19 was actually the cherry on the cake, but that no effort had been made, not even in part one, to give thought to its potential implications. However, if the Commission discussed obligations *erga omnes*, exceptionally serious violations or breaches of the rules of *jus cogens*, he was not sure that, for example, the provisions on circumstances precluding wrongfulness could be examined without addressing those various types of violation. The most logical approach would be to begin with the results of the Working Group's work and then see how to take them into account, including in the drafting of article 1. He asked the Special Rapporteur how he intended to deal with that problem, on the understanding that members could pose questions when they thought that a problem arose. He did not want to be told later that he did not have the right to raise certain points in plenary because it was being treated in the Working Group: problems would then be forgotten, causing a disastrous mess like the one in part two and in the absurd articles on the consequences of crimes. It was important to deal with everything at the same time.

55. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Pellet that it was possible and even probable that basic distinctions between categories of norms rather than more, edible. In any event, it was clear that article 19 was an add-on and had been so treated in part two. It was unlikely the Commission would finish with chapter II (The "act of the State" under international law) at the current session, although it might be able to start chapter III (Breach of an international obligation) of part one. It certainly would not reach chapter V (Circumstances precluding wrongfulness), which would need to be examined, because that was an area in which notions of *jus cogens* would have an impact. However, it was not the only area, and he would refer, in introducing the chapters, to distinctions which might need to be drawn, for example in connection with article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity). He hoped that that was precisely what the Working Group chaired by Mr. Simma would begin by doing and that it would repeat, in respect of the implications of those notions, the useful task it had already performed in providing him with an initial idea of views in the Commission on problems in other draft articles.

56. Mr. SIMMA said he agreed with both Mr. Pellet and Mr. Crawford in their description of how they saw the work of the Working Group, namely, that in exploring the implications of the concepts contained in paragraph 3 of the Special Rapporteur's proposal, it was important to bear in mind the possible impact on the provisions of part one.

The meeting rose at 12.45 p.m.

2541st MEETING

Thursday, 4 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, 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. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,[1] A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. PELLET (Special Rapporteur), introducing the report on reservations to treaties (A/CN.4/491 and

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