Document:-
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Summary record of the 1365th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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entitled "Breach of an international obligation". In the report on the work of its twenty-seventh session, the Commission had promised to the General Assembly that it would take up at the present session a series of important articles dealing with the breach of an international obligation.[6] Chapter III of the draft articles on State responsibility was therefore eagerly awaited.

32. In his view, the contents of chapter III were of the greatest importance for smaller nations which, unlike the powerful ones, could not afford to breach their obligations. It was therefore natural that small nations should wish to examine carefully the contents of chapter III before considering acceptance of the whole draft.

33. The wording of the article could, of course, be improved. The Special Rapporteur himself had mentioned the possibility of replacing the term "source" by the term "origin" and the concept of "régimes of responsibility" by that of "types" or "forms" of responsibility. Drafting changes of that kind would serve to allay certain fears; the same was true of the definition of "régime of responsibility" which the Special Rapporteur had said he was prepared to introduce at a later stage if required.

34. In conclusion, he accepted the substance of article 16, which dealt with the specific notion of breach and which did not overstep the boundaries of the subject under discussion.

35. Mr. TSURUOKA said he wished to thank the Special Rapporteur for having introduced article 16 with his customary clarity. The article would manifestly be very useful, as it would dispel any doubt which might linger, if not in State practice and international jurisprudence at least in the doctrine, concerning the source of the international obligation breached. The two principles stated in article 16 simply reflected a usage. They were well established and as such in the right place at the beginning of chapter III. The question was not one which called for any progressive development of international law.

36. In order to make the idea expressed in paragraph 1 clearer, he would suggest the insertion of the words "kind of" between the words "regardless of the" and the word "source". Paragraph 2 might be worded in the terms which the Special Rapporteur had used in introducing it, namely: "The origin of the international obligation breached has no incidence on the régime of responsibility applicable". In addition, the commentary should state that the régime of responsibility applicable did not vary according to the source of the international obligation breached but according to the content of the obligation.

37. Mr. CALLE Y CALLE said that, with his customary lucidity, the Special Rapporteur had explained that the task before the Commission was to determine whether or not the source of an international obligation had an incidence on the characterization of the internationally wrongful act and the kind of responsibility and had indicated that, although different sources were mentioned in the Statute of the International Court of Justice and in certain conventions, it would not be advisable for the Commission to follow a similar course. It was true that no distinction was to be found in the jurisprudence, but it did refer sometimes to general rules of law or sometimes to norms recognized by civilized nations. Consequently, it was essential to employ a term that was sufficiently comprehensive to embrace references of that kind. In the present attempt at codification, the Commission should be careful not to introduce distinctions such as those employed in the work of the 1930 Hague Conference for example.

38. However, it was imperative to make distinctions according to the content of the obligation, for there was undeniably a hierarchy of importance among the rules. Unfortunately, States which breached their international obligations took no account of the character of the obligation. He was therefore convinced of the necessity for a rule which stated clearly that the non-observance of an international obligation, regardless of the origin or source of the obligation, entailed responsibility, and which specified, as a general rule of law, that difference of sources did not, in itself, justify the application of a different régime with regard to the obligation to make reparation. Such a rule was necessary as an introduction to the articles which would deal with the content of obligations, for the existence of a legal order was the essential basis of State responsibility. A precise definition of legal obligations would avoid the present confusion with regard to "duties" and vague "commitments", which were regarded by some nations as obligatory but by others as having no binding force.

The meeting rose at 1 p.m.

1365th MEETING

Monday, 10 May 1976 at 3.15 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 16 (Source of the international obligation breached)[1] (*continued*)

1. Mr. HAMBRO said that, while he entirely agreed with the underlying basis of article 16, he felt that para-

[6] *Ibid.*, p. 58, document A/10010/Rev.1, para. 49.

[1] For text, see 1364th meeting, para. 1.

graph 2 tended to complicate the text, without adding anything new to it. He agreed with Mr. Yasseen that, in the French version of article 16, the word "*déplorée*" was more a literary than a legal term.

2. Mr. USHAKOV said that paragraph 1 of the article consisted of two parts. The first stated that the breach by a State of an international obligation incumbent upon it was an internationally wrongful act. Since the concept of an internationally wrongful act was defined in article 3 and all the articles of chapter II concerned the "act of the State" according to international law, it seemed logical to specify at the beginning of chapter III the conditions under which the breach by a State of an international obligation incumbent upon it occurred. That could be done in a paragraph in article 16 preceding the present paragraph 1, or in a separate article preceding article 16. The new provision might read:

> A breach of an international obligation of a State occurs when the act of that State is found to be contrary to its international obligation.

Only after the inclusion of such a provision would it be appropriate to state, as in the second part of paragraph 1, that the wrongful character of the act of the State did not depend on the source of the obligation breached.

3. As he had said earlier (1361st meeting), he was not in favour of using the term "source". The writers did not agree on the meaning to be attributed to that term, which could be applied equally to a formal source and a material source. He suggested that paragraph 1 be redrafted to read:

> The wrongful character of the act of the State did not depend on the legal character of the obligation breached.

4. Paragraph 2 of article 16 dealt with the régime of responsibility applicable. That provision seemed unnecessary, since the question of the applicable régime of responsibility would come within the scope of the second part of the draft, dealing with the content, form and degrees of international responsibility. Moreover, the term "régime of responsibility" was unsatisfactory and would have to be defined if the Commission was going to use it. It would therefore be better to replace it by the term "legal consequences". Paragraphs 1 and 2 of the proposed article might then be combined to read:

> The wrongful character and legal consequences of the act of the State do not depend on the legal character of the obligation breached.

That provision would merely express in different words the idea at present embodied in the article under consideration. He would not, however, oppose the retention of paragraph 2.

5. Mr. TAMMES said that, at the present stage, the formulation of rules like those contained in article 16 was useful in shaping the Commission's thoughts. Although the rules in question were not controversial and the Special Rapporteur had produced convincing arguments for placing them in a separate article, it might be possible, later on, to consider combining them with the provisions of article 3 (*b*).

6. The term "source" was not completely satisfactory; it was rarely found in international instruments and no need had been experienced to employ it in what was regarded as the most authoritative statement of the sources of international law, namely, Article 38, paragraph 1 of the Statute of the International Court of Justice. It led to confusion, since it was not clear whether formal sources or material sources were meant. If the latter, then the rule set out in paragraph 1 of article 16 was not true, because it did matter very much in practice whether an international obligation was rooted in the legal or in the moral order. Similarly, the term "origin", which had been suggested as an alternative, was not sufficiently precise, since it could easily refer to the historical origin of international rights and obligations. Consequently, it would be better to replace the last part of paragraph 1 with a more neutral phrase, such as "regardless of the manner in which the international obligation has come into existence".

7. Again, it was essential to incorporate into the wording of article 16 a reference to the Charter of the United Nations in order to safeguard the primacy of the principles of international law embodied in the Charter, as compared with any other source. Such a reference had been included in, for example, article 30 of the Vienna Convention on the Law of Treaties,[2] where the application of successive treaties relating to the same subject-matter fell under the provisions of Article 103 of the Charter. Accordingly, it was apparent that, by reason not only of its material but also of its formal eminence, the Charter occupied a special place among the sources of international law. It was thus not possible to state, as in draft article 16, that the source was irrelevant, for if the source of the international obligation breached lay in an instrument other than the Charter, the breach might be justified by the fact that it was an act in accordance with the Charter. For the Commission, which was an organ of the United Nations, the Charter had a universal character. The Special Rapporteur had pointed out (A/CN.4/291 and Add.1-2, para. 14) that, in the context of a particular treaty concluded between them, some States might well provide for a special régime of responsibility for the breach of obligations for which the treaty made specific provision; obviously, if such a breach occurred, the perpetrator would be subject to the special régime established by the treaty in question, but that had nothing whatsoever to do with the problem under consideration.

8. Mr. ŠAHOVIĆ said that the presence of article 16 was entirely justified as an introductory provision of chapter III. Its purpose was to state that the formal source of the international obligation breached had no incidence on the wrongful character of the act constituted by the breach of the obligation. Having settled that problem, the Special Rapporteur had considered whether the diversity of sources of international obligations should not have at least some influence on the determination

[2] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

of different régimes of responsibility. In his written introductory comments on article 16 (*ibid.*, para. 13), he had pointed out that the former problem logically involved the latter, but it appeared from his explanations and his proposed text for the article that he had preferred not to specify whether article 16 was meant to refer more particularly to formal sources or to material sources. In the light of the comments by Mr. Hambro and Mr. Ushakov, he doubted whether paragraph 2 could be retained in its present form. He would suggest that the idea it expressed be included in paragraph 1, with the emphasis on the formal aspect only.

9. The commentary to article 16 should reflect the ideas expressed at the previous meeting by Mr. Yasseen on the subject of the international responsibility of States in contractual matters. Those ideas were particularly important at a time when States were trying to establish a new international economic order.

10. The term "source" was certainly ambiguous. It should perhaps be made clear that what the Commission had in mind was formal sources.

11. Finally, he wondered whether it was appropriate to recognize, in paragraph 2, the existence of more than one régime of responsibility, or whether it would not be better to refer only to a general régime of responsibility governed by the universal legal order. Since the Commission was required to codify the rules of general international law, it would be better to avoid speaking of more than one régime of responsibility.

12. Mr. MARTÍNEZ MORENO said that article 16 was useful not only for reasons of clarity but also because, as other speakers had pointed out, it helped to ensure that the draft had a harmonious and integrated structure. Furthermore, it was clear from the jurisprudence—the *Barcelona Traction Company* case, for example—that the problem of sources should be analysed.

13. Schwarzenberger, like the Conference for the Codification of International Law (The Hague 1930), had spoken of three main sources: treaty, custom and general principles of law. But other writers, C. F. Amerasinghe for instance, maintained that the sources of an obligation giving rise to responsibility were coextensive with the sources of international law in general (A/CN.4/291 and Add.1-2, foot-note 46). It would be remembered that Mr. García Amador also had referred specifically to the question of sources.

14. In his view, the term "source" was not wholly satisfactory, but it was better than the alternatives that had been suggested. At the same time, while he could accept the wording of paragraph 1 of article 16, there were a number of matters that needed to be further clarified in the commentary. At the 1362nd meeting he had pointed out in connexion with the reference to "analogy" in the report (*ibid.*, foot-note 22) that something recognized as valid in internal law was not necessarily valid in international law. Great care must be exercised before admitting that international responsibility could be incurred through the breach of an obligation analogous to something regarded as an authentic obligation of the State committing the breach. Again, while it was true that Article 38 of the Statute of the International Court of Justice did not employ the word "source", it had nevertheless given rise to analyses of the general doctrine of sources in terms of that article. The Commission could not accept the idea that doctrine could give rise to obligations that might be breached, although doctrine might of course constitute custom.

15. He too had felt some hesitation regarding the expression "different régime of responsibility", in paragraph 2 of the article, but again, it was better than any of the alternatives suggested. The best course would be to discuss those suggestions in the commentary and thereby dispel any doubts that might arise in connexion with the expression used by the Special Rapporteur.

16. Mr. SETTE CÂMARA said that the Special Rapporteur had clearly demonstrated that neither treaties, customary law, jurisprudence nor earlier attempts at codification had ever sought to categorize types of responsibility on the basis of the source of the obligation involved. Even the few writers who acknowledged the necessity for a distinction between sources similar to that which existed in internal law were not emphatic. For instance, O'Connell, who favoured the distinction between the "tort situation" and the "contract situation", recognized that contracts governed by international law were not treaties and thus could not be utilized to vest jurisdiction in matters arising out of treaties.[3] In other words, "contract situations" had to be dealt with by internal law.

17. Only a false analogy with internal law (which distinguished between régimes of liabilities according to the source of the obligation), could cause the Commission to do the same in the field of international law. It was also important to bear in mind the comment in the report (*ibid.*, foot-note 11) that régimes of liability for civil wrongs were differentiated on the basis of determination of burden of proof, forms of reparation, types of judicial action to which recourse might be had, and so forth. The Special Rapporteur also stated, that the possible application to internationally wrongful acts of different régimes of responsibility, based on the difference in the source of the obligation breached, should not be taken into account unless general international law so provided (*ibid.*, para. 14), and had then gone on to show that general international law made no provision in that respect. Indeed, the Special Rapporteur's entire examination of the subject, including judicial and arbitral decisions and the work of the 1930 Hague Conference, revealed that at no time had there been any acceptance of the idea of categorizing régimes of responsibility according to the source of the obligation. It was surprising, therefore, to read (*ibid.*, para. 29) that the Commission could only question whether or not it was advisable to promote changes in the existing state of international law through the introduction of differentiation of régimes of responsibility, when the report itself made it very clear that such a course was not advisable.

[3] D. P. O'Connell, *International Law*, 2nd. ed. (London, Stevens, 1970), vol. II, pp. 962, 976 and 978.

18. If any doubt did exist, it was whether an article on the general lines of article 16 was necessary at all, since nothing in the earlier articles would allow for different régimes of responsibility applicable to treaty law and international customary law, by analogy with objective law and contractual obligations in internal law. However, convincing arguments had been advanced for an explicit wording that would avoid tendentious interpretations. Moreover, article 16 might prove necessary, since the draft was to incorporate a categorization of régimes of responsibility, but of responsibility in terms of the content and not the source of the obligation. It might even be more useful to adopt an affirmative rather than a negative approach and to state that the application of different régimes of responsibility could result only from the content of the obligation breached.

19. For the moment, however, he could accept the text proposed by the Special Rapporteur, subject to some minor changes. The title was not appropriate, since the text of the article neither dealt with nor defined the source of the international obligation breached. On the contrary, it ruled out consideration of the source of the obligation, either to establish the existence of the internationally wrongful act or to justify the application of different régimes of responsibility. The title should therefore read something like "Different types of responsibility".

20. The concept of "source" had given rise to a great deal of controversy in international law, and he was accordingly pleased with the Special Rapporteur's suggestion (1364th meeting) that the term might be replaced by the word "origin". Likewise, it would be advisable to use, instead of the word "régime", the simpler word "type" or "form". The Drafting Committee could fruitfully discuss the constructive suggestions made by previous speakers. While he had no objection to including a reference to the Charter of the United Nations, it would probably be better to do that later, in the articles devoted to types of responsibility.

21. Mr. KEARNEY said that, like nearly all the speakers who had participated in the debate so far, he agreed that there was some measure of usefulness in article 16. That usefulness, however, was not imperative; paragraph 1 of the article at least was already implicit in article 3. At a later stage, the contents of article 16, when they were agreed upon, might perhaps be merged with those of article 3.

22. The problem raised by Mr. Ushakov with regard to the wording of paragraph 1 seemed to relate essentially to the French version and to the civil law terminology used in that version. As far as the English version was concerned, he would urge strongly that the expression "breach of an obligation" be retained because it was a clear and often-used expression based on normal common law terminology.

23. With regard to the term "source", he agreed that it involved some element of ambiguity, but all the suggestions so far made failed to remove that ambiguity. The use of the term "origin" would raise the question of the distinction between material and formal origin, the dividing line between which was not necessarily the same in all legal systems. As to the suggestion put forward by Mr. Tammes,[4] it raised the question whether the proviso should be "regardless of the manner in which the obligation came into existence" or "regardless of the manner in which the obligation became incumbent on the State committing the breach", or possibly a combination of both those aspects. The Drafting Committee would be called upon to deal with that problem in due course, but for his part he would suggest that the reference to "source" be retained if no better expression could be found which was valid for all the language versions.

24. As for paragraph 2, its provisions had some utility but it did not seem to him logical to have them in article 16, because they referred to a very different concept from that of the source of the obligation mentioned in paragraph 1. The Special Rapporteur's commentaries to paragraph 2 discussed at considerable length the League of Nations' codification efforts and indicated that the replies received to the questionnaire then sent out to Governments showed general adherence to one theory on the subject of régimes of responsibility, namely, that of reparation. It should be remembered, however, that at the time, only international responsibility for injuries to foreigners was being discussed. Actually, it was only article 18 which shed light on the meaning of the expression "different régimes of responsibility". Paragraph 2 of article 16 was clearly connected with article 18 and possibly with other articles which would come later.

25. With regard to the point raised by Mr. Tammes concerning the Charter of the United Nations, there were strong differences of opinion, possibly based on political considerations, on the question whether the Charter was in itself a source of law. The affirmative view was not very widely accepted. In any case, article 16 did not appear to be the best place for a provision on that point.

26. He was somewhat concerned at the analogies drawn between private and public law in the commentaries to article 16. Some of those analogies were based on civil law concepts. In particular, it did not appear appropriate to import into international law as an analogy the private law antithesis between tort law and contract law as affecting the range of private law application. It seemed to him that the field of status law—diplomatic law was a good example—played as prominent a part in analogical reasoning for international law purposes. On the whole, he thought that the commentaries would be improved by eliminating the reference to private law concepts, unless the subject was explored in much greater detail.

27. Mr. USTOR said that he shared the view of Mr. Sette Câmara that the title should be altered and would himself suggest that it be replaced by the wording originally put forward for that title in the Commission's report on the work of its twenty-seventh session: "Irrelevance of the source of the international obligation

[4] See para. 6 above.

breached to the existence of an internationally wrongful act".[5] The language used in that title was much closer to the intended purpose of article 16.

28. In his remarks during the discussion on the preliminary considerations,[6] he had commented that article 16 was no more than an elaboration of article 3 (*b*), as the Special Rapporteur himself had stated in his commentary. It had not been his intention thereby to suggest the deletion of article 16, since that article was very useful, particularly in relation to article 18. He agreed with Mr. Kearney that it was article 18 which expressed the idea that the content of the obligation determined the régime or grade of responsibility, or the different kinds or types of responsibility.

29. Article 16 specified that the breach of any international obligation constituted an internationally wrongful act, but it did not explain what was meant by an "international obligation". The Special Rapporteur's commentaries, however did give examples of certain obligations which did not constitute "international obligations". One example given was that of obligations undertaken by a State under a contract entered into with a foreign individual or a corporation. Clearly, contracts of that kind were governed by the internal law of a State and fell outside the present topic. The Special Rapporteur, however, stated at one point in his commentary that the breach by a State of its obligations under a contract entered into with another State did not constitute the breach of an international obligation, since the contract was not governed by international law (A/CN.4/291 and Add.1-2, para. 15).

30. Personally, he would hesitate to accept that view. It was true that, in article 2 of the 1969 Vienna Convention on the Law of Treaties, the term "treaty" was defined as an international agreement concluded between States in written form "and governed by international law", so that in the rare case in which two States concluded a contract governed by domestic private law, such a contract would not constitute a "treaty" for the purpose of the application of the Vienna Convention. Nevertheless, in the event of the breach of an obligation arising from such a contract, it could not be said that no international obligation had been violated. He would take the example of a receiving State which undertook to place a house at the disposal of a sending State for use as that State's embassy, stipulating in the agreement that the transaction was governed by the private law of the receiving State. As he saw it, if the receiving State failed to fulfil that contract for political reasons, the sending State could protest, even though the contract did not constitute a "treaty" for the purposes of the Vienna Convention. The problem which would arise following such a protest pertained to the topic of State responsibility. If a State undertook to perform something for the benefit of another State, the failure to fulfil that undertaking would constitute the breach of an international obligation, even if the whole agreement were governed by the internal law of a State.

31. That being so, the question arose whether some definition of "international obligation" should be included in the present draft. Such a definition would, among other things, make it clear that the reference was to a legal obligation and not to a moral obligation or to an obligation of comity. The commentary to article 16 should also cover that point.

32. Mr. CALLE Y CALLE said that, in his brief remarks at the previous meeting, he had pointed out that, since an enumeration of sources was contained in other instruments, it was sufficient in article 16 to speak of sources in general terms and not make any distinction between various sources.

33. One of the instruments which he had had in mind was the United Nations Charter itself, which, in its preamble, affirmed the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from "treaties and other sources of international law" could be maintained. The purpose of that passage of the preamble of the Charter was to cover all the rules of conduct incumbent upon States, whether derived from a treaty or from any other source of international law. Any failure by a State to observe such conduct entailed its international responsibility.

34. In the light of the use of the term "source" in the Charter and in other instruments, it was important to retain it in article 16. Any attempt to replace it by a reference to the "origin" or the "nature" of the obligation would lead to difficulties and ambiguities.

35. Lastly, he favoured the suggestion to replace the present title by the wording "Irrelevance of the source of the international obligation breached to the existence of an internationally wrongful act".

36. Mr. REUTER, referring to the terminology of article 16, said it was essential to use the word "source" and to use it alone, without qualification. The meaning of article 16 seemed quite clear. In his opinion, the article should be kept very concise, or it should be deleted, as a text containing too many explanations would not be suitable for expressing the very simple and very cogent idea the Special Rapporteur wished to convey.

37. What was the exact scope of article 16? It might be considered a very simple, slightly tautological, article confined to stating that the general régime of responsibility—as explained in the subsequent articles—did not involve distinctions based on the source of the obligation breached. That would mean that, if a distinction had to be made according to the source of the obligation, such a distinction would not be part of the general régime of responsibility and would have to be considered at a later stage. In fact, in a case involving reparation, the breach of an obligation might conceivably have special consequences when the source of the obligation lay in a treaty. The Special Rapporteur was perhaps leaving open the possibility of reverting to that question later. It was also possible, however, that the Special Rapporteur had intended to exclude finally the possi-

[5] *Yearbook... 1975*, vol. II, pp. 56-57, document A/10010/Rev.1, para. 45.

[6] 1363rd meeting, paras. 7 *et seq.*

bility, in the matter of responsibility, of any distinction being made based on the source of the obligation and had no intention of reverting to that question later. He would therefore be interest to know what were the Special Rapporteur's intentions in that regard.

38. Mr. YASSEEN said he agreed with Mr. Calle y Calle that the word "source" should be retained, as its meaning was quite clear and its use was hallowed by international law. Any attempt to replace it by less well-established terms might lead to misunderstanding. It was hard to find an international law treaty which did not refer to "source". The world "source" was used in the Preamble to the Charter of the United Nations. There need, therefore, be no hesitation about retaining the term in article 16.

The meeting rose at 5.50 p.m.

1366th MEETING

Tuesday, 11 May 1976 at 10.20 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 16 (Source of the international obligation breached) [1] (*concluded*)

1. Sir Francis VALLAT said that the reasoning in the Special Rapporteur's fifth report (A/CN.4/291 and Add.1-2) had convinced him of both the need for and the basic soundness of article 16. He believed that the two ideas contained in paragraph 1 and 2 respectively were a necessary part of the structure of the draft articles. Article 16 itself was not a controversial provision but it paved the way for the more difficult provisions of article 17 and the still more difficult ones of article 18.

2. A number of points of drafting had been raised during the discussion and he himself shared the doubts which had been expressed with regard to the title of the article and most of those relating to the wording of the two paragraphs.

3. With regard to the mention in paragraph 1 of the "source" of the international obligation breached, he found the reference to the provisions of the Preamble to the Charter of the United Nations somewhat misleading. The key to the approach to article 16 was that the article was concerned with obligations rather than with rules. The third paragraph of the Preamble to the Charter called for the establishment of conditions under which "respect for the obligations arising from treaties and other sources of international law can be maintained". If the Commission was going to follow the language of the Charter in article 16, the key word would be "arising" and the article would have to speak of obligations arising from treaties or other sources of international law.

4. All those who, like himself, had been called upon in the course of their academic work to explain the provisions of the Preamble to the Charter knew how much confusion had resulted from the particular passage which he had quoted. It raised the question whether it was intended to refer to the distinction between treaty law and customary international law and thence immediately brought to mind all the statements by the International Court of Justice on the role of treaties as a source of customary international law.

5. The use of the term "source" would involve the difficulty of determining whether it was meant to refer to material sources, formal sources, historic sources or law-making factors. He himself preferred that the term should be avoided and that an effort should be made to find a more neutral one.

6. Mr. QUENTIN-BAXTER said that he shared the anxiety expressed by other members regarding the use of the term "source" but could see no better alternative. Probably the best way of solving the problem was to maintain a proper balance between article 16 and the following articles, especially article 18. He agreed with Mr. Sette Câmara that the emphasis should be placed on content; if that emphasis was maintained, the drafting problems would be easier to solve.

7. He also shared the concern expressed by other members regarding the expression "régime of responsibility" and would have been glad if he could have concluded that paragraph 1 of article 16 was sufficient to express the intention of the article. In his view, however, the presence of paragraph 1 made paragraph 2 necessary. It was one thing to say, in paragraph 1, that an internationally wrongful act would occur whatever the source of the obligation breached; it was another thing to say, in paragraph 2, that the source of the obligation would not in itself determine the legal consequences of the breach.

8. As he understood the Special Rapporteur's intention the expression "régime of responsibility" carried with it not only the idea of legal consequences but also the idea that a distinction should be made among obligations according to a hierarchy: certain obligations affected only States having an interest; others affected the whole community of nations, and obligations under a rule of *jus cogens* stood above both those categories.

9. Mr. HAMBRO said that he was surprised at the criticism of the word "source". The term was so commonly used that he saw no reason for replacing it by another term in the draft. It would be better to try to

[1] For text, see 1364th meeting, para. 1.