Document:-
A/CN.4/SR.2568

Summary record of the 2568th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1999, **vol. I**

ment of draft articles and it would benefit from a simpler approach.

56. The CHAIRMAN thanked the Special Rapporteur for his introductory comments, which had provided the Commission with excellent guidance through the complicated matters dealt with in the draft articles. Before initiating a formal discussion, he would invite the members of the Commission to raise points of clarification.

57. Mr. HAFNER said he agreed with the Special Rapporteur that the Commission should not deal with the classification of primary rules if there were no consequences in secondary rules. The Special Rapporteur had cited the example of obligations of conduct and of result as having no secondary consequences. However, article 22 still contained legal consequences only for one of the two categories. Was the Special Rapporteur's position an anticipation of his view on the exhaustion of local remedies rule?

58. Mr. CRAWFORD (Special Rapporteur) said it was not accurate to say that the exhaustion of local remedies rule applied only to obligations of result; it also applied to obligations of conduct in the case of diplomatic protection. For example, a specific obligation towards an alien not to expropriate particular property would certainly be subject to the rule. The fact that article 22 was limited to obligations classified as obligations of result, and especially as extended ones, was another reason for eliminating it.

59. Mr. BROWNLIE said that the Special Rapporteur had gone far in purging the faults in chapter III deriving from the fact that the first Special Rapporteur, Mr. Ago, had adopted the vehicle of distinction between primary and secondary rules and then propounded a number of articles which confused the two types of rule. The current Special Rapporteur had therefore dumped the concept of complex acts. However, he had been less than thorough in his purge: the concept of continuing acts faced exactly the same problems as did some of the concepts already eliminated or fenced in. Could the Special Rapporteur explain why he had halted his purge?

60. Mr. CRAWFORD (Special Rapporteur) said that the point was a legitimate subject of debate. The notion of continuing acts did have a consequence in State responsibility in the context of cessation. To leave it out of the draft articles might be thought odd. Nevertheless, he was not convinced that there was not an extended obligation of cessation, or perhaps an active mode of restitution; the distinction between cessation and restitution was very difficult to draw. He therefore reserved the possibility of further development of the question in part two.

61. Mr. AL-KHASAWNEH said that he would like the Special Rapporteur to clarify his explanation of the relativity of the distinction between continuing and completed acts. The problem was that the moment of completion was never an isolated moment. If the Commission intended to refine the concepts to such an extent, it might fall into the trap of not leaving anything to the judges.

62. Mr. CRAWFORD (Special Rapporteur) said that his answer was essentially the one he had just given to Mr. Brownlie. Those questions were relative but part of the conceptual framework of the way people thought about breach; it was worth keeping them in play even if almost all matters of their interpretation and application were to be referred to the primary rules and to the persons applying those rules.

The meeting rose at 1 p.m.

2568th MEETING

Thursday, 6 May 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN, recalling that the Special Rapporteur had proposed considering his second report on State responsibility (A/CN.4/498 and Add.1-4) under three clusters of articles, invited the Commission to begin with the first cluster, consisting of articles 16 (Existence of a breach of an international obligation) and 18 (Requirement that the international obligation be in force for the State), corresponding to articles 16, 17 (Irrelevance of the origin of the international obligation breached), 19 (International crimes and international delicts), paragraph 1, and 18, paragraphs 1 and 2, adopted by the Commission on first reading.

[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 ... 1999*, vol. II (Part One).

[3] Ibid.

ARTICLES 16 TO 19

2. Mr. ROSENSTOCK said that the second report on State responsibility was a magnificent piece of work and that the Special Rapporteur had already greatly simplified matters, but that he himself would like to see them simplified further still. For example, it did not seem absolutely essential to retain article 16, even as a *chapeau* article. There was no need for such an article in order to convey the idea that a violation might exist even if the act of the State was only partly in contradiction with an existing international obligation. Furthermore, it would make little sense to add the words "under international law" at the end of article 16, as the entire set of draft articles fell within the sphere of international law. In addition, as the Special Rapporteur himself noted in paragraph 6 of the report, it was preferable not to apply the terms "subjective" and "objective" to the elements of responsibility, so as to avoid creating confusion.

3. Article 17 was a curious combination of an unnecessary paragraph 1 and a paragraph 2 that was positively misleading. The whole article was unnecessary and confusing and, if the idea set forth in its paragraph 1 was to be retained, it would be acceptable to do so by adding to the end of article 16 the words "regardless of the source [...] of the obligation", as suggested by the Special Rapporteur; but nothing useful would be accomplished thereby. The Special Rapporteur's comment in paragraph 24 of his second report was less than persuasive, for it appeared to mix up the substance of the obligation and the regime. With regard to article 19, paragraph 1, it would perhaps be wise to temper the effect of the advisory opinion of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* cited in the report, by the knowledge that the author of that paragraph had been an influential member of the Court. That being said, he could perfectly well envisage accepting the new article 16 proposed to replace articles 16, 17 and 19, paragraph 1, although he did not see why it could not simply be omitted.

4. As far as paragraphs 1 and 2 of article 18 were concerned, he thought that Switzerland, in the comments and observations received from Governments on State responsibility,[4] had hit the nail on the head in stating that the basic principle was self-evident and did not need to be explained. Furthermore, it was true, as the Special Rapporteur stated in paragraph 43, that the advisory opinion of ICJ in the *Namibia* case did not violate the principle set forth in article 18, paragraph 1, and that the inter-temporal principle did not entail that treaty provisions were to be interpreted as if frozen in time. It was because article 18, paragraph 1, was not in conflict with those realities that it was only desirable, but not imperative, to delete it; but that was not a reason for retaining it. If it was necessary to retain certain aspects of it for any reason, the new formulation proposed by the Special Rapporteur in paragraph 44 seemed to merit serious consideration by the Drafting Committee.

5. Article 18, paragraph 2, referred to situations so unlikely as to be barely conceivable. Furthermore, in paragraph 51 of his second report, the Special Rapporteur pointed out some of the difficulties to which it might lead. In any case, it would be better to consider that type of situation in the context of part two.

6. In conclusion, he again congratulated the Special Rapporteur on his excellent work and endorsed the five strategic issues that he had identified and which would be helpful, as would the organization of the discussion in three clusters.

7. Mr. KUSUMA-ATMADJA said that the second report of the Special Rapporteur was of excellent quality, but that, in some respects, it was far too detailed. As another speaker had noted, some latitude must be left to the judge, for, in some systems, while the judge reflected the position of the legislator through his decision, he also created law.

8. Mr. SIMMA said that, like Mr. Rosenstock, he thought the draft articles might be simplified still further. The work of pruning already accomplished was to be welcomed, but in certain respects the commentary was still far too extensive. It raised issues which few members of the Commission would have connected with the articles commented on and those issues were often discussed at great length and without any real necessity. That was particularly true of the problem of treaty obligations raised by one country with reference to Article 103 of the Charter of the United Nations and of the question of the validity of a dynamic or evolutionary interpretation of human rights treaty provisions. Similarly, while agreeing with the Special Rapporteur that the terms "subjective" and "objective" were confusing when applied to the elements of responsibility, he thought that the long statement on the question that occupied the whole of paragraph 6 of the report was not justified. It might perhaps be appropriate to include, as a *chapeau* article for the entire set of draft articles on State responsibility, an introductory text setting out the methodology and scheme of the articles as a whole and to include a few lines in that text on the distinction between the terms "subjective" and "objective".

9. Furthermore, at the end of article 16, he saw no need to add the words "under international law", as proposed by France,[5] for nothing would be gained by so doing. Paragraph 9 dealing with the issue of conflicting international obligations was far too long and, given that the Special Rapporteur himself noted in subparagraph (*c*) that those cases, however interesting they might be for other purposes, raised no special difficulties for article 16, he saw no reason for tackling them in the context of that article. In his view, they should be considered under chapter V of the draft articles. Consideration could be given to the question whether a State might be justified in not implementing a treaty it had concluded with State A because it was bound by another treaty with State B or with the international community as a whole, if the obligation under the latter treaty prevailed over the purely bilateral obligation. Would such a circumstance mean that non-performance of the bilateral obligation was not a wrongful act? The question of the relationship between disconformity with an obligation, wrongfulness and responsibility, dealt with in paragraphs 10 to 14, might also best be raised in an introductory text serving as a

[4] See 2567th meeting, footnote 5.

[5] Ibid.

chapeau to the draft articles as a whole. If that question was considered, it would be interesting to take a closer look at the distinctions which existed in German law, and no doubt also in other legal systems, and which involved three levels of analysis. For example, at the first level of analysis, if a rule existed prohibiting the use of force, any use of force by a State constituted, prima facie, a breach. At the second level, one would look for a reason, such as self-defence, precluding the unlawfulness or wrongfulness of the act. At the third level, in the absence of a justification, one would look for "subjective" circumstances connected with the mental state of the person or State body that had committed the act. Lastly, he thought that the proposal contained in paragraph 15, to replace the words "is not in conformity with" by some other formulation, for example, "does not comply with", was acceptable, but was more a stylistic improvement than a change of substance.

10. With regard to article 17, paragraphs 1 and 2, he suggested that it could be made clearer in the commentary that, in the event of a breach, the respective provisions of the law of treaties, such as articles 60 and 65 of the 1969 Vienna Convention, on the one hand, and the law of State responsibility, on the other, should always be interpreted and applied in concert. It seemed strange to him that, in some decisions or arbitral awards, the parties had attempted to keep those two levels of law separate. Article 73 of the Convention provided a perfect conjunction of those two sets of rules of international law. He also noted that it should perhaps be made clear that the example cited in the penultimate sentence of paragraph 23 of the report was drawn from domestic law, not from international law.

11. Turning to article 19, he said it was interesting that, in paragraph 30 of the report, the Special Rapporteur expressed surprise that the commentary[6] did not cite the important statement of PCIJ in the case concerning the *S.S. "Wimbledon"*, where the Court had affirmed that "the right of entering into international engagements [sc., on any subject whatever concerning that State] is an attribute of State sovereignty" [see page 25]. He himself often quoted that statement in his courses in support of the hypothesis that the assumption of treaty obligations was an expression of sovereignty, so that it could be said that the more treaty obligations a State had, the more sovereign it was. But he had never thought to apply it in the context referred to by the Special Rapporteur. It was significant, moreover, that, to make things clear, the phrase "on any subject whatever concerning the State" had been placed in square brackets. The comments made in paragraphs 30 and 31 were another example of slightly excessive commentary that could be deleted without any loss to the text. With regard to paragraph 32, he agreed with the Special Rapporteur that it would be preferable to speak of "content" rather than "subject matter", since there were rules on important subject matters that were not really fundamental.

12. On article 18, he said that material in paragraphs 41 to 43 had no place in the commentary. He agreed with what was said about the contrast between evolutionary and static interpretations of treaty provisions, even though the commentary on that subject was too brief. It should either be deleted or supplemented with reasoning to show why ICJ had been correct in its advisory opinion in the *Namibia* case. It could also be pointed out that certain terms of a treaty were necessarily open. For instance, if South Africa had agreed in 1920 that it was under an obligation to do everything for the "well-being" of the indigenous population of South-West Africa, it would be nonsensical to say, 50 years later, that "well-being" had to be interpreted according to its 1920 meaning. A term like "well-being" had to be interpreted dynamically. But that was not an issue that had to be taken up in the context of article 18. He did not see what was meant by the words "Interpretation of legal instruments over time is not an exact science" in paragraph 43 and thought that they should be deleted. Those were merely details, however, and he fully agreed with the Special Rapporteur's conclusions.

13. Mr. CRAWFORD (Special Rapporteur) said that, with a view to preventing any possible misunderstanding, the document under consideration was not the Commission's commentary on the draft articles, but merely his own thinking on the issues in the light of the comments made by States. The commentary would be produced once the Drafting Committee had considered the articles and would then be submitted to the Commission. In the meantime, it was very helpful to hear the comments of the members of the Commission on the substance of the report in order to get an idea of what they would like to see or would not like to see in the commentary.

14. Mr. HAFNER said that the length of the report by the Special Rapporteur was not in itself a bad thing. States often resorted to such reports to find explanations for State behaviour in international law. The Commission was dealing with a very complicated, theoretical part of the topic that nevertheless had to be accommodated to practice. The combination of the "continental European" concept of law reflected in the work of the first Special Rapporteur, Mr. Ago, and the more pragmatic "common law" approach of the present Special Rapporteur would certainly lead to general acceptance of the Commission's work on the topic.

15. With regard to the first part of the report, he agreed with most of the conclusions reached by the Special Rapporteur, who had been quite right in emphasizing the need for a holistic approach in order to identify the relationships among the different articles and parts of the draft. As to the thorny problem of the relationship between primary and secondary rules, the difficulty lay in the lack of an agreed definition of the distinction. Starting from a highly theoretical distinction between norms and metanorms, it might be concluded that primary norms could contain elements that were undoubtedly of a secondary nature. The problem also led to the very useful discussion of the relationship between responsibility and wrongfulness. He would prefer the solution of distinguishing between conduct or result as prescribed by a primary norm and the obligation flowing therefrom, since the obligation was shaped not only by the primary norm, but also by the secondary rules defining further the required conduct. For example, the obligation to protect diplomatic missions could not be understood as grounded solely in the relevant article of the Vienna Convention on Diplo-

[6] For the commentaries to articles 16 to 19, see *Yearbook ... 1976*, vol. II (Part Two), pp. 78 et seq.

matic Relations, but must be seen in the full context of the secondary norms. From that viewpoint, the breach of an obligation and, hence, responsibility would not come into play if wrongfulness was precluded. The Special Rapporteur rightly pointed out that, in practice, other expressions were used, with little consistency, and one had to live with certain imperfect solutions.

16. The problem of conflicting international obligations was an important one owing to the fragmentation of international law. He could add a further example to those cited by the Special Rapporteur in the sense that certain conduct could be considered a breach of an obligation by one mechanism, such as dispute settlement or non-compliance mechanisms, but not by another. For that reason, he was not in favour of the French suggestion, in the comments and observations received from Governments on State responsibility, that the words "under international law" should be added at the end of article 16, as that would sometimes require such mechanisms to broaden the basis of their judgements, contrary to the basic instruments which defined their jurisdiction. That risk must be avoided. As to the source of the obligation, no attempt should be made to define the sources of international law. As the Special Rapporteur had indicated, certain distinctions should be cited and used only in connection with the legal consequences, but that was not the case in the draft articles. Even the reference to international law could raise the question whether part of the basis for an obligation actually came within the category of sources of international law.

17. As to article 18, paragraph 1, the Special Rapporteur had been right to refer to the temporal relativity of international law and to express that in an article. He was going perhaps a bit too far, however, in paragraph 43 of his report, when he referred to the "progressive" or evolutionary interpretation of international law. That mode of interpretation was not generally accepted in contrast to other modes of interpretation recognized in the 1969 Vienna Convention. With regard to article 18, paragraph 2, the Special Rapporteur was right to suggest it could be deleted. It dealt neither with the effect of peremptory norms of international law nor with their content and the commentary to the first version of that provision showed that it was in fact an exception. Its deletion would simplify the text, to the benefit of those who would have to apply it in future.

18. Mr. GOCO asked whether the risk mentioned by Mr. Hafner of incorporating the words "under international law" might not be allayed if the first part of article 16 were amended to read: "There is a breach of an international obligation by a State when an act of that State is not in conformity with that international obligation."

19. Mr. HAFNER pointed out that there were a number of drafting problems with the English version of article 16, including whether it could be said that the act of a State could comply with something. The words "under international law" could give rise to substantive problems, however, of which two examples could be given. First, if a European or other court of human rights had to decide whether there had been a breach of a convention on human rights did it also have to establish that there had been a breach of general international law and apply not only that convention on human rights, but also the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, something which was certainly not within its jurisdiction? Secondly, would the International Tribunal for the Former Yugoslavia or the International Tribunal for Rwanda be entitled to apply a convention on human rights in order to determine whether a State had complied with its obligations under a given Security Council resolution? Those problems had already been raised, but had not been solved and it would be better to avoid them altogether by not including the words "under international law".

20. Mr. MELESCANU said that the words "under international law" might indeed create problems, but that they were still useful in preventing the provisions of domestic law from being used to characterize an international obligation. If those words were not included in article 16, they should be incorporated in the commentary or elsewhere in the draft articles.

21. Mr. CRAWFORD (Special Rapporteur) said that he had three points to make. First, the draft articles in no way affected the jurisdiction of courts. A court established by virtue of a treaty could deal only with cases submitted to it under that treaty. Secondly, such a court, whose jurisdiction was strictly limited to the treaty, could nevertheless go outside the four corners of the treaty and invoke general international law in applying the rules set forth in the treaty. For example, an international court having jurisdiction under a bilateral trade treaty might well find itself in a situation of having to apply rules of general international law in order to determine whether conduct alleged to constitute a violation of the treaty was indeed wrongful. Thirdly, a court whose jurisdiction was entirely self-contained and limited to the four corners of a particular instrument was possible, but such a regime would fall within the scope of *lex specialis*.

22. Mr. SIMMA said that he agreed with the Special Rapporteur's remarks on the interrelatedness of specific treaties and general international law. He personally had interpreted the French proposal as an attempt to solve the problem of conflicting treaty obligations; with the proposed addition, article 16 would tell the parties not to limit themselves to bilateral obligations, but also to invoke other rules of international law, such as Article 103 of the Charter of the United Nations and *jus cogens*. If, however, the intention was to prevent the involvement of domestic law, while there had certainly been a risk of that happening in connection with the rules on attribution discussed at the fiftieth session, no such risk arose in the context of article 16, which clearly came exclusively within the scope of international law.

23. Mr. HAFNER said that the rules that had to be interpreted and applied by a particular mechanism should be seen in the context of the secondary rules of international law. If the reference to international law was also applicable at the level of primary rules, a situation might arise where a breach of a certain treaty was found to exist, but could not be considered in the full context of international law because of the limited competence of the mechanism, and the act in question would therefore not be considered a breach of an international obligation under the draft articles. Such a situation could be open to misinterpreta-

tion and might completely rule out the application of the draft articles. It therefore seemed preferable not to include the words "under international law" in that context.

24. Mr. DUGARD said that, like the Special Rapporteur, he was in favour of pruning the articles wherever possible and especially in chapter III of the draft. He therefore agreed to the proposal that articles 16, 17 and 19, paragraph 1, should be merged into one article. It might, however, be appropriate to change the wording of the proposed new article to avoid enumerating the various sources of an international obligation.

25. With regard to article 18, he agreed with the Special Rapporteur that paragraph 1 should be maintained, subject perhaps to an exception in the case of continuing wrongful acts. He agreed with the Special Rapporteur that human rights obligations did not constitute an exception to the principle enunciated in article 18, paragraph 1. Referring to article 18, paragraph 2, he was interested in the examples given in the commentaries by Mr. Ago, and referred to in paragraph 45 of the report to illustrate the proposition that an act which had been unlawful at the time it had been committed should be considered lawful if that act was subsequently required by a peremptory norm of international law. The problem could be solved automatically by reference to the law of treaties and, in particular, to article 62 of the 1969 Vienna Convention dealing with a fundamental change of circumstances. Citing an example to illustrate such a possibility *a contrario*, he said that, when the Security Council had decided to place an embargo on arms deliveries to South Africa,[7] the problem had arisen of the continuing validity of the agreement concluded between the Union of South Africa and the United Kingdom of Great Britain and Northern Ireland[8] relating to the installation of a military base in South Africa and involving the delivery of a number of naval vessels and helicopters to that country. Since it had not been suggested at the time that supplying arms would violate a subsequent peremptory norm, the problem had been settled by negotiations, the question being raised as to whether a fundamental change of circumstances had or had not taken place. For that reason, as well as for those stated by the Special Rapporteur, he considered that article 18, paragraph 2, could be deleted.

26. Mr. SIMMA, reiterating the view that the law of State responsibility and the law of treaties were closely interrelated, and referring to Mr. Dugard's last point, said that to solve the problem of a treaty obligation conflicting with a new peremptory norm of general international law (*jus cogens*) by invoking article 62 of the 1969 Vienna Convention on a fundamental change of circumstances was to minimize the overriding importance and solemnity of *jus cogens* embodied in articles 53 and 64 of the Convention. Moreover, the Convention provided further on that, at the procedural level, the consequences of the invalidity, termination or suspension of the operation of a treaty for a specific reason were different from the consequences of the invalidity of a treaty arising from a conflict with a norm of *jus cogens*.

27. Mr. CRAWFORD (Special Rapporteur) said that there was another problem with solving a conflict between a treaty and a new peremptory norm of international law by invoking the law of treaties. The law of treaties was concerned with the treaty as a whole and, in the event of an inconsistency with a treaty, the effect of *jus cogens* would of course be to strike down the treaty as a whole. But the most common instances of inconsistency occurred in terms of the performance of the treaty. As ICJ had rightly noted in the case concerning the *Gabčikovo-Nagymaros Project*, the law of treaties determined whether there was a treaty, who were the parties to the treaty and in respect of what provisions and whether the treaty was in force. In that sense, the scope of the law of treaties differed from that of the law of State responsibility, even if those two branches of law were indeed closely interrelated. Necessity could not be invoked as grounds for the termination of a treaty.

28. Mr. PAMBOU-TCHIVOUNDA said that, after reading the learned report under consideration, he could not help wondering whether the Special Rapporteur intended to redefine the topic or to prepare the way for its consideration on second reading with a view to submitting a draft to the General Assembly before the end of the present quinquennium. So great was the density of the Special Rapporteur's proposals that the second of those alternatives was hard to imagine.

29. The current Special Rapporteur's approach bore some resemblance to that of Mr. Ago. Yet the Ago approach had yielded a text that the Commission had adopted on first reading, whereas the approach adopted by Mr. Crawford resulted in the proposals on chapter III, which were contained in paragraph 156 of the report, and were sometimes at variance with the contents of the body of the report. For example, the proposed wording of the new article 16 ("... when an act of that State does not comply with what is required of it ...") was different, in the French text, from that used for the same article in paragraph 34, the words *ne correspond pas* being used in one case and the words *n'est pas conforme* in the other. Failure to be in conformity was not at all the equivalent of failure to correspond. The former was a matter of legality and the latter, no doubt, a matter of perspective.

30. The tidying-up exercise undertaken by the Special Rapporteur should not, in his view, be considered synonymous with calling into question the articles adopted on first reading. The Commission must not lose sight of the fact that each of the draft articles of chapter III served a special purpose, even if that purpose formed part of the overall purpose of the chapter, whose value was not in doubt as the Special Rapporteur himself indicated in paragraph 4 of his report when he stated that "No comments call into question the need for chapter III as a whole"—in other words, the need for the Ago approach.

31. The merger of articles 16, 17 and 19, paragraph 1, proposed by the Special Rapporteur concealed the characteristics of a "breach of an international obligation", which was the title of chapter III, whereas Mr. Ago had thought it necessary to emphasize the characteristics or

[7] See Security Council resolutions 181 (1963) of 7 August 1963; 182 (1963) of 4 December 1963; and 191 (1964) of 18 June 1964.

[8] Exchange of letters (with annexes) constituting an agreement on defence matters (London, 30 June 1955) (United Nations, *Treaty Series*, vol. 248, No. 3495, p. 191).

nature and the content of the obligation breached or the breach of an international obligation, as well as the idea that an act not in conformity with an obligation in force constituted a breach of an international obligation by a State. Those definitions were key elements of the legal regime being built.

32. The original concept adopted by the Commission for the codification of the law of State responsibility had been an objective concept—which no one was, apparently, about to call into question—founded in law and intended to prevail over the highly subjective traditional concept based on the idea of fault. That concept ran throughout chapter III and he saw no reason why, on the basis of that concept, chapter III should not be an extension of the chapters that preceded it. Even if article 16 might seem simply to be a repetition of article 3 (Elements of an internationally wrongful act of a State), it was perfectly acceptable that it should extend article 3 by placing the emphasis on the substance and content of a breach of an international obligation.

33. Article 16 gave rise to two big problems. The first was connected with the French proposal, in the comments and observations received from Governments on State responsibility, to insert the phrase "under international law". But some members of the Commission had never stopped pointing out that the law of State responsibility always had to be assessed in the context of international law. The second problem related to the expression "what is required of it by that obligation", which he disliked. The first difficulty was to know who "required" and it was certainly not the obligation. And what, indeed, was required? The language was extremely vague, but the responsibility for that rested not with the Special Rapporteur, but with the Commission, which had written the law in that way during its consideration of the draft articles on first reading. What was required was a course of conduct, but conduct could also be a result, and it was difficult to tell in advance. All legal constructions, no matter how elaborate, were always affected by a factor of approximation, so that situations had to be considered case by case. When a judge was considering a question connected with the application or interpretation of a provision, he was free to state the content that seemed to him to suit the provision in question. It was legal precedents that would invest the provision with its consistency.

34. The reference standard advocated by the Special Rapporteur in article 16, that is to say, a failure to conform giving rise to a breach of an international obligation, was a difficult one to apply. It presupposed that such a situation of fact could in all respects present a profile that fitted in with the case described in the legal provision stated in the international obligation. In that sense, it was binding, although the Special Rapporteur had described it as flexible. The requirement of conformity was not a requirement of compatibility: conformity required a certain rigorousness, while compatibility allowed some room for manoeuvre. He therefore proposed that the words "by that obligation" should be replaced by the words "under that obligation". The problem of the repetition of the reference to international law would then be automatically resolved. It would be a question of a requirement of international law considered from the standpoint of the origins of the obligation—whether conventional or customary—and also of the parties to the dispute, in particular the injured party, which would rely on the obligation to seek reparation from the State committing the breach.

35. Turning to article 17, he said that paragraph 1 should be amended to read: "An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, including customary or conventional origin, of that obligation." Paragraph 2 could be deleted, for it served no real purpose.

36. In article 19, paragraph 1, it might perhaps be necessary to amend the words "regardless of the subject matter of the obligation breached". In the new version of article 16 proposed by the Special Rapporteur, the words "subject matter" had been replaced by the word "content". The Commission ought to consider that point in greater detail.

37. He had reservations about the usefulness of merging articles 16, 17 and 19, paragraph 1, into a single article. He still preferred, in fact, the approach taken by Mr. Ago.

38. He already thought that article 18 constituted a step forward in the legal regime and he was very much in favour of its paragraph 2.

39. Mr. ECONOMIDES congratulated the Special Rapporteur on his report, which was outstanding in all respects. However, he would prefer the Commission to retain as far as possible the substance of the draft articles considered on first reading and to change them only if there were very pertinent reasons for doing so. If the Commission wished to simplify, it could, for example, merge into a single article not only articles 16, 17 and 19, paragraph 1, but also articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time) and 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time). The end of such an article would read: "... regardless of the origin, content and character of the obligation (of conduct or result or a mixture of the two) or the character of the act of the State (instantaneous act, continuing act or composite act) and its gravity." That would amount to an oversimplification that would impoverish the Commission's contribution. It must therefore proceed cautiously and with restraint with respect to simplifying the draft articles.

40. It did not seem wise in that connection to incorporate paragraph 1 of article 19 in the new article 16 proposed by the Special Rapporteur. The Commission had in fact decided to defer its consideration of the whole of article 19. Furthermore, it would perhaps be better to address the question of the "subject matter of the obligation breached" in the context of article 19. On the other hand, he was in favour of merging articles 16 and 17 and deleting article 17, paragraph 2, as the Special Rapporteur proposed in paragraph 25 of his report.

41. Turning to article 16, he said that the word "origin" was preferable to the word "source", which appeared in paragraph 34, since it was more general, less formal and less technical. There were also grounds for retaining the

term "under international law" in order to make it perfectly clear that a State could invoke in its defence any provision of international law, including Article 103 of the Charter of the United Nations or *jus cogens*. With regard to the origin of the obligation, the word "institutional" should be inserted before the words "customary" and "conventional", for that would take account of sources that had become the prevailing ones, in particular the Security Council in its resolutions. The words "or other" should also be retained in order to cover unilateral acts and the general principles of law.

42. Article 18, paragraph 1, adopted on first reading was more complete and clearer than the new article 18 proposed by the Special Rapporteur. That reworked version did not state clearly that only an act of a State which was not in conformity with an international obligation could be regarded as an internationally wrongful act. Furthermore, there was no need to state that the act was performed or continued; the important point was that the obligation in question must be in force with respect to the State in question. He therefore proposed retaining article 18, paragraph 1, although the Drafting Committee could of course make some minor drafting changes in it.

43. It was absolutely necessary to retain article 18, paragraph 2. He would have preferred it to appear in chapter III, but was not against moving it to chapter V.

44. Mr. HERDOCIA SACASA said that the Special Rapporteur's great achievement had been to increase the consistency of chapter III, rendering it more compact, freeing it from its isolation and linking it to the other parts of the draft. The main question was how to determine whether there had been a breach of an international obligation by a State. In that connection, the new article 16 must, for the most part, repeat the elements already stated in article 3, subparagraph (*b*), that is to say, the attribution of an act to a State and the breach of an international obligation of that State.

45. A third important element was that the wrongfulness of the act must be considered in a broader context and not in an isolated and abstract manner, for there could be circumstances that precluded wrongfulness. On that point, it seemed that the Special Rapporteur had tried to link article 16 to chapter V by adding the phrase "under international law". Since different positions had been taken in the Commission, it should continue to consider the point.

46. He agreed with the Special Rapporteur that the term "not in conformity with" could be replaced by another term which was closer to article 3, subparagraph (*b*), and that it would be preferable to speak, for example, of "non-compliance" or "breach". The whole of the Spanish version of the new article 16 should be revised, for it was not clear. For example, it was difficult to see what the pronoun *ello* referred to.

47. There were two other elements of particular interest: the emphasis on a breach of an international obligation regardless of "the source (whether customary, conventional or other)" and of "the content of the obligation". However, it was necessary to make clear what was meant by the words "or other" and, in the English and Spanish versions, to replace the words "source" and *fuente* by the words "origin" and *origen*, respectively.

48. The new article 18 rightly raised the substantive question whether the obligation had been in force at the relevant moment. He supported the proposal to delete article 17, paragraph 2, and to move article 18, paragraph 2.

49. The CHAIRMAN, speaking as a member of the Commission, said that he generally approved of the new article 16. He too thought that the word "source" should be replaced by the word "origin" in the English version, but there was no need to list the sources in question.

50. On the other hand, he found the new article 18 more problematical. It illustrated the risk of trying to oversimplify the text adopted on first reading. It should in fact be made clear, as had been done in article 18, paragraph 1, adopted on first reading, that the acts of a State referred to in that article were only those acts which did not comply with what was required of a State by an international obligation. Furthermore, the concept of an internationally wrongful act had not appeared in the original paragraph 1 of article 18. It was not logical to introduce it in the new version of that article before even having defined it.

51. Mr. ROSENSTOCK said that it was perhaps not absolutely necessary to say that an obligation could not be breached when it did not exist. That was roughly what article 18, paragraph 1, adopted on first reading said.

The meeting rose at 1 p.m.

2569th MEETING

Friday, 7 May 1999, at 10.10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.
