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Summary record of the 2569th meeting

Topic:
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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 *fuentes* 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.

State responsibility¹ (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 extended a warm welcome to Mr. Peter Tomka and congratulated him on his election to the Commission. He invited the Commission to continue its discussion of the Special Rapporteur's proposals for the first cluster of draft articles (arts. 16 to 19) contained in his second report on State responsibility (A/CN.4/498 and Add.1-4).

ARTICLES 16 TO 19 (continued)

2. Mr. YAMADA said that he supported the basic approach taken by the Special Rapporteur, that is to say, to trim the draft articles and retain only the essential elements. He had originally felt that article 16 (Existence of a breach of an international obligation) did not add anything to article 3 (Elements of an internationally wrongful act of a State), subparagraph (b), and could therefore be deleted, but he experienced no difficulty with the proposal for a new article 16 merging article 16 with article 17 (Irrelevance of the origin of the international obligation breached) and article 19 (International crimes and international delicts), paragraph 1. However, he was somewhat uneasy about the inclusion in the new article 16 of the phrase "when an act of that State does not comply with"; it would be clearer to say "when that State does not comply with", even though the focus must be on the concept of a specific act of the State. He hoped that the Drafting Committee would be able to find an appropriate expression. It was also inappropriate to add "under international law": the question of conflicting obligations cited by France, in the comments and observations received from Governments on State responsibility,⁴ and dealt with in paragraphs 8 and 9 of the second report, as an example of the predominance of the Charter of the United Nations was dealt with in article 39 (Relationship to the Charter of the United Nations), and the exclusion of internal law in article 4 (Characterization of an act of a State as internationally wrongful). Such issues must be governed by the general articles that applied to all the articles in the draft. The inclusion of "under international law" in article 16 might lead the Commission to do likewise in other articles. On another point, he preferred "origin" to "source", for the latter term might raise complicated questions of what else could be regarded as a source of international law in addition to customary and conventional law.

3. The Special Rapporteur's proposal on the subject matter of the obligation, dealt with in article 19, paragraph 1, was an improvement. The deletion of article 17, paragraph 2, was acceptable, even though the text was of

historical and academic significance, as explained in the commentary.⁵ Most systems of internal law distinguished between the concept of obligations assumed by contract and the concept of tort. Yet the question was whether that distinction held good in international law. Sir Humphrey Waldock had proposed a draft article on breach of treaties,⁶ but the Commission had decided that the 1969 Vienna Convention covered only a material breach of treaties (art. 60) and had left the general issue to the regime of State responsibility (art. 73). Accordingly, the Commission had not addressed the question whether there should be a distinction concerning responsibility arising from the different sources of an international obligation. Article 17, paragraph 2, confirmed that no such distinction existed in international law and it would therefore be advisable to record the point in the commentary.

4. He agreed with the Special Rapporteur that article 18 (Requirement that the international obligation be in force for the State), paragraph 2, should be considered in relation to part one, chapter V, and part two, but it was difficult to accept the notion of the retroactive effect of emerging peremptory norms. In any event, the case discussed in the commentary was a very rare one.

5. Mr. GOCO said that the problem of the phrase "when an act of that State does not comply with" would, of course, be settled by the Drafting Committee, but he wondered whether Mr. Yamada saw any material difference between the two versions he had mentioned.

6. Mr. YAMADA said that, as English was not his mother tongue, he would certainly prefer to leave the matter to the Drafting Committee.

7. The CHAIRMAN said he agreed that the personification of acts of the State might cause problems and that the matter should be settled by the Drafting Committee.

8. Mr. CRAWFORD (Special Rapporteur) said that the phrase "when an act of that State does not comply with" was indeed a matter for the Drafting Committee. Among other things, there was, of course, a need to make sure that all the language versions of the phrase sounded right. He was himself now persuaded that "origin" was better than "source".

9. Mr. HE said that the proposed new article 16 constituted a good amalgamation of articles 16, 17 and 19, paragraph 1; it was a good idea, in particular, to note the irrelevance of the source of the international obligation. The phrase "under international law" had two effects. As Mr. Melescanu had pointed out (2568th meeting), its use could block any involvement of domestic law, even though that might not really be necessary, because the topic was clearly one of international law. More relevant was the fact that it could help to deal with the problem of conflicting international obligations. The Special Rapporteur had listed in the commentary three situations, in two of which general international law or treaty provisions could resolve the conflict so that one obligation would prevail over the other. However, that was not true in the third example, when it might be impossible for a State to

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.

⁴ See 2567th meeting, footnote 5.

⁵ See 2568th meeting, footnote 6.

⁶ *Yearbook ... 1963*, vol. II, p. 72, document A/CN.4/156 and Add.13, art. 20.

comply with both obligations. The inclusion of “under international law” indicated that the content of obligations was a systematic question under international law. The brackets should be removed from around the phrase “whether customary, conventional or other”, as it was inappropriate to use brackets in a formal legal document.

10. The Special Rapporteur’s reformulation of article 18, paragraph 1, was acceptable; the principle was self-evident and needed no explanation. He could also accept the proposals for article 18, paragraphs 2 to 5.

11. The revised draft articles were an improvement on the ones adopted on first reading: they were succinct and well structured and avoided the confusion and redundancies of the earlier version.

12. Mr. MELESCANU said that he accepted the Special Rapporteur’s proposal for a new article 16. It was a good idea to make it clear that a breach of an international obligation did not depend on the source of the obligation, but a problem of conflict of obligations immediately arose if all sources of international law were treated on the same footing. He was not convinced by Mr. Yamada’s argument concerning article 39 because there could be situations to which the Charter of the United Nations did not apply. For example, in 1996 Romania had concluded a treaty with the Federal Republic of Yugoslavia containing an undertaking that the two States would not make their territory available to a third State in the event of a conflict in which one of them was involved. In the debate in the Romanian Parliament on the use of Romanian airspace by NATO a clear conflict had emerged between the bilateral treaty and Romania’s obligations to NATO. If the Security Council had taken a decision on the question there would have been no problem, but in order to cover such cases the draft articles should perhaps contain a provision setting out a hierarchy of different sources of international law. The best solution might be to include in chapter V a provision referring to obligations *erga omnes* or peremptory obligations under international law.

13. Again, it was useful to include the phrase “or the content of the obligation” because that solved a second difficult issue. However, the different obligations—of conduct, result and so forth—should be specified. Hence the content of article 17 was still of some relevance.

14. Two general comments were called for. First, the Special Rapporteur’s great effort to simplify the draft articles was commendable, but the Commission must guard against the danger that oversimplification might create problems. Secondly, as the Special Rapporteur had pointed out, the commentary was concerned more with providing information about the practice and doctrine than with discussing the draft articles as such. The Commission should set itself more ambitious goals: the commentary should be designed to clarify the text of the draft articles and should also include the arguments needed to get them accepted.

15. Mr. CRAWFORD (Special Rapporteur) said that he would revert to the question of conflict of obligations raised by Mr. Melescanu when he responded to the whole debate. He agreed with what Mr. Melescanu had said about the commentary. Once the Drafting Committee had completed its consideration of the draft articles, commen-

taries would be produced and discussed in a working group before being submitted to the Commission.

16. Mr. ECONOMIDES, responding to the statement by Mr. Melescanu, said that all sources of international law were of equal value, but that three categories of rules—obligations under Article 103 of the Charter of the United Nations, *jus cogens* rules, and rules relating to the concept of international crimes—had a hierarchically higher status than did the normal rules of international law. International crimes had been set aside by the Commission for the time being by agreement of its members; the concept of *jus cogens* would be considered in the context of chapter V; and it only remained to consider, in the framework of article 39, whether a State was internationally responsible vis-à-vis another State with which it had concluded a bilateral or multilateral agreement, if the obligation set forth therein was breached because it was contrary to a Charter obligation.

17. Mr. GOCO said that, since the topic of State responsibility had been on the Commission’s agenda for a considerable number of years, and had been assigned to a sequence of Special Rapporteurs, each of whom had adopted a different approach, it might be wise to reflect the views of previous Special Rapporteurs in the commentary, so as to make it abundantly clear to persons not members of the Commission why yet another version of the draft articles had had to be prepared.

18. Mr. SIMMA said he could not subscribe to Mr. Economides’ view that international crimes constituted a third category of rules with superior force. The concept of international crimes had nothing to do with the hierarchy of norms. He also asked for some clarification as to how the Special Rapporteur wished to proceed in dealing with the question of crimes.

19. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides had given what was—except perhaps for the reference to crimes—a relatively classical, and constructive, statement on the matter of conflicting obligations, pointing out that the question of the Charter of the United Nations was resolved by the express provision in part two which would in due course apply to the whole of the draft articles; that the question of *jus cogens* would be dealt with in chapter V; and that the question of crimes had been deferred.

20. As to Mr. Simma’s query, he certainly did not envisage holding another debate on crimes as such at the current session. Instead, he had in mind a debate on the basis of an informal paper, on the question of the extent to which the notion of obligations to the international community as a whole would sufficiently cover the issue. He proposed, in the context both of part one and of part two to outline the articles that might achieve that aim. It was absolutely essential, however, that the Commission should complete part one and the commentaries thereto—leaving aside for the moment the issues unresolved as a result of the debate on article 19 at the previous session—in time for submission to the General Assembly at the end of its current session. That was the priority.

21. Mr. ECONOMIDES said that—always assuming article 19 was adopted—the notion of international crimes was the highest norm of the international legal

order, because, while a rule of *jus cogens* could be amended, modified or derogated from by a new rule of *jus cogens*, there could be no derogation from the notion of international crimes.

22. Mr. SIMMA said he could not accept the proposition that the Commission could, by adopting article 19, create a category of rules superior even to those of *jus cogens* and of the Charter of the United Nations. Unlike *jus cogens* and the Charter, which were, to differing extents, broadly accepted, the issue of international crimes remained highly controversial.

23. Mr. ROSENSTOCK said he fully agreed with the statement just made by Mr. Simma, and also wished to applaud the effort made by the Special Rapporteur to prevent the Commission from becoming embroiled in a debate on the question of crimes before the time was ripe.

24. Mr. AL-KHASAWNEH said he fully agreed with the remarks just made by Mr. Economides. However, he wished to join Mr. Rosenstock in pleading that the controversial question of crimes should not be dealt with prematurely.

25. Mr. TOMKA said there appeared to be some confusion on the question of the hierarchy of norms: a crime was an unlawful act, not a norm; and an international crime was the most serious unlawful act breaching the norm.

26. Mr. ECONOMIDES confirmed that he had of course been referring, not to the criminal act itself, but to the whole range of rules of international law prohibiting international crimes.

27. The CHAIRMAN said that the debate on the first cluster of draft articles would continue at the next meeting.

ARTICLES 20, 21 AND 23

28. Mr. HAFNER, referring to articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 21 (Breach of an international obligation requiring the achievement of a specified result) and 23 (Breach of an international obligation to prevent a given event), concerning the obligations of conduct, result and prevention, said he agreed with the Special Rapporteur's view that there was no need to introduce the distinction between obligations of conduct and result. Firstly, no different legal consequence would follow from that distinction. Of course, the existing text still made an important distinction insofar as the rule of the exhaustion of local remedies was said to apply only to obligations of result. Article 22 (Exhaustion of local remedies) would be dealt with at a later stage, but he wished to affirm in the current context that the distinction concerning the rule of exhaustion of local remedies was unjustified: he could not hide his impression that the previous Special Rapporteur had restricted that rule to obligations of result in order to be able to defend the theory of its substantive nature. However, he did not concur with that restriction. On the other hand, neither did he concur with the current Special Rapporteur that that rule was of a purely procedural nature since, if no local remedies were resorted to, the State could immediately resort to the consequences of

State responsibility—such as, for instance, reprisal—although the wrongdoing State would have the means to rectify the situation. That was not the desired result, but it was certainly a matter for discussion later.

29. The second reason for his objection to the distinction was its vagueness and the inconsistency with which it was applied, to which specific reference was made in paragraph 68 of the second report. Thus, for instance, he had always regarded it as debatable whether the prohibition of expropriation was an obligation of conduct or of result.

30. The third reason was the fact that a number of primary norms contained both elements. To take, for instance, principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁷ which was already considered to constitute a customary rule, certainly the correct interpretation was that it was an obligation of conduct even though the breach was effectuated by a certain result. But it must be construed as saying that States had to take the measures necessary to achieve the requisite result. Hence, he fully shared the view expressed in paragraph 79 of the report that obligations of conduct and obligations of result presented not a dichotomy but a spectrum. Lastly, the distinction was of no importance in the context: what counted was the related question of the moment at which the breach was completed.

31. As was spelled out in the report, the matter was also linked with the question whether the enactment of legislative acts as such could of itself constitute a breach. Paragraph 78 of the report solved that question by referring to the "content and importance of the primary rule". While he hesitated to recognize importance as an appropriate decisive criterion, he shared the general view in that regard. In the case concerning the *Interpretation of article 24 of the Treaty of Finance and Compensation of 27 November 1961*, Austria had claimed that, by enacting a certain law, Germany had acted contrary to international law and committed a breach of an international obligation, namely, that of non-discrimination—not vis-à-vis individuals, but vis-à-vis Austria as a State [see p. 19]. Owing to the restricted competence of the arbitral commission, it had been unable to deal with that issue; nevertheless, it had recognized that such claims could arise between States.

32. Again, he largely shared the Special Rapporteur's opinion about the nature of obligations of prevention. However, the last sentence of paragraph 87 gave the impression that damage might become the criterion triggering responsibility, though the Special Rapporteur did prudently stress that such a situation "might" occur. However, if the Commission addressed the issue of prevention as it had at its fiftieth session, it must come to the conclusion that responsibility could arise even if no damage had yet occurred. If, for instance, a State did not abide by the duty to take certain preventive measures, damage was not the necessary condition for responsibility—unless damage was conceived as also comprising the increased risk of damage that necessarily resulted from the absence of the preventive measures. Although it could also be argued

⁷ *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

that, within the general duty of prevention, other obligations could arise which would fall within the categories of obligations of conduct or result, that merely showed that even the duty of prevention did not comprise one single type of obligation or duty, but different types of obligations.

33. Consequently, the draft articles now before the Commission dealt with primary rules without any real necessity for so doing, and tended to confuse the issue. In his view, theoretical issues had no place in the draft articles, which would have to be applied by practitioners. That must be a guiding principle for the Commission's work on the topic. Admittedly, the Special Rapporteur rightly referred to the existing use of those distinctions in practice, for instance, in various cases before ICJ. Nevertheless, that did not convince him of the need to include such distinctions in the draft on State responsibility. Whether an obligation was declared by the Court to be an obligation of conduct or of result was a matter relating to the primary norms, and, insofar as practice did not derive consequences for responsibility from it, it could be left to the discussion on those norms. State responsibility went to the heart of international law, but that did not mean consideration must be given to all aspects of international law, even those that had no impact on State responsibility.

34. Consequently, in response to the question posed in paragraph 92 of the report, he saw no need for a new article 20. If the Commission wished to retain it, it was doubtful whether the reference to the means was needed, particularly the second reference. It could raise the question of the link between means and result. Inasmuch as the means to be adopted were not specified, the result or lack of result could not be made dependent on whether or not the State had adopted the means. Hence, if it was the Commission's general wish, for one reason or another, to retain article 20 in the new form, the reference to means should in any case be deleted.

35. The CHAIRMAN said members would have an opportunity to respond to Mr. Hafner's statement during the forthcoming debate on the second cluster of draft articles.

Nationality in relation to the succession of States⁸ (A/CN.4/493 and Corr.1,⁹ A/CN.4/496, sect. E, A/CN.4/497,¹⁰ A/CN.4/L.572, A/CN.4/L.573 and Corr.1)

[Agenda item 6]

REPORT OF THE WORKING GROUP

36. The CHAIRMAN, speaking in his capacity as Chairman of the Working Group on nationality in relation to the succession of States, presented the interim report of the Working Group. The Working Group established by the Commission at its 2566th meeting on 4 May 1999 had held three meetings, from 4 to 6 May. It had considered the comments and observations received from Governments

(A/CN.4/493 and Corr.1) and oral comments made in the Sixth Committee regarding the draft articles adopted by the Commission on first reading on the basis of the memorandum by the Secretariat (A/CN.4/497).

37. At the outset, the Working Group had decided that it would deal first with the merits of the draft articles themselves, and only at a later stage would it address the issue of the form, structure and order to be given to them. It took the view that a number of points referred to by States in the Memorandum by the Secretariat were purely matters of drafting and could be taken up by the Drafting Committee.

38. So far, the Working Group had considered articles 1 to 13. No changes had been deemed warranted for the text of articles 1 to 5 and 7 to 13. Bearing in mind the observation contained in paragraph 47 of the Memorandum by the Secretariat, the Working Group intended to suggest an amendment to article 6 so that the retroactive attribution of nationality was limited to situations in which persons would be temporarily stateless during the period between the date of the State succession and the attribution of nationality of the successor State or the acquisition of such nationality upon exercise of the right of option.

39. The Working Group also intended to suggest the addition of a third paragraph to article 13. It should deal with the right of residence of persons concerned who had not acquired the nationality of the successor State. Full texts of those proposals would be included in the final version of the report of the Working Group to the Commission.

40. The Working Group considered that a more detailed elaboration of some of the commentaries to the draft articles was appropriate, but that task should be carried out in parallel with the consideration of those articles by the Drafting Committee. Suggestions in that regard would be included in the report of the Working Group.

Organization of work of the session (continued)*

[Agenda item 2]

41. The CHAIRMAN said that Mr. Yamada had been conducting informal consultations on the question of how the Commission should deal with agenda item 9, "Jurisdictional immunities of States and their property", and wide support had been expressed for two proposals: (a) to establish a working group to be entrusted with the task of preparing preliminary comments as requested by the General Assembly in paragraph 2 of resolution 53/98; and (b) to appoint Mr. Hafner as Chairman of the Working Group on jurisdictional immunities of States and their property.

42. He said that, if he heard objection, he would take it that the Commission agreed to those proposals.

It was so agreed.

The meeting rose at 11.25 a.m.

⁸ For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

⁹ See footnote 2 above.

¹⁰ *Ibid.*

* Resumed from the 2566th meeting.