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Summary record of the 2570th meeting

Topic:
State responsibility

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2570th MEETING

Tuesday, 11 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. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, 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*)

ARTICLES 16 TO 19 (*concluded*)

1. Mr. RODRÍGUEZ CEDEÑO congratulated the Special Rapporteur on the way in which he had performed the very complicated task assigned to him. Among other things, he had succeeded in producing a clearer version of chapter III (Breach of an international obligation) of part one of the draft articles.

2. The new article 16 (Existence of a breach of an international obligation) proposed by the Special Rapporteur in his second report on State responsibility (A/CN.4/498 and Add.14) used some of the language of article 16 adopted on first reading and some elements from article 17 (Irrelevance of the origin of the international obligation breached) and article 19 (International crimes and international delicts), paragraph 1. In the Spanish and French versions, the wording of the new article in paragraph 34 of the report differed slightly from the wording in paragraph 156. He preferred the former to the latter. It would be for the Drafting Committee to settle the problem.

3. According to the new article 16, there was a breach of an international obligation by a State when an act of that State did not comply with what was required of it by that obligation. In the event of nullification or impairment of benefits resulting from such agreements as the Agreement on Trade-Related Aspects of Intellectual Property Rights,[4] the question arose as to whether it was possible to speak, if not of breach within the meaning of new article 16, then at least of non-respect likely to trigger the international responsibility of a State in the very specific context of agreements concluded under the auspices of WTO. He was thinking in particular of article XXIII, paragraph 1 (*b*), of the General Agreement on Tariffs and Trade 1994 (GATT 1994),[5] which dealt with the problem of the responsibility of a State party to an agreement in the event of nullification or impairment of a benefit for another contracting party when the State applied a measure which was, however, not expressly and clearly in conflict with an obligation which it had assumed under the said agreement.

4. Furthermore, article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights stated that subparagraphs 1 *(b)* and 1 (*c*) of article XXIII of GATT 1994 did not apply to the settlement of disputes for a period of five years from the date of entry into force of the WTO Agreement. There was thus a link between the two provisions in the context of "dispute settlement" and he wondered whether the nullification or impairment of a benefit resulting from an agreement had some kind of link with non-respect of an obligation or whether it constituted a different degree of violation which the Commission did not cover in its study on State responsibility. There should be an express reference to the point either in article 16 itself or in the commentary.

5. It would be desirable in that connection to have interaction and convergence between the Commission and the other United Nations bodies which drafted legal instruments, in particular in the spheres of the environment, human rights and international trade law, in order to ensure that the terms used had the same meaning everywhere. For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal did not take the Commission's work fully into account.

6. It was essential to refer to international law, either in article 16 itself or in the accompanying commentary, in order to make it perfectly clear that the rules applicable to the international responsibility of States were the rules of international law and not the rules of the internal law of States.

7. Article 17 dealt with the irrelevance of the origin of the breached international obligation, a matter that ought perhaps to embrace the above-mentioned concept of the nullification or impairment of a benefit resulting from an agreement. The analysis of the international obligation was a fundamental element of the consideration of the international responsibility of States. Obligations could be classified according to their origin, content, scope or degree. The origin could be a customary or conventional rule or an independent unilateral act. A distinction must

[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 *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994-7).

[5] Ibid.

be made in that connection between "origin" and "source". As to the content, obligations could stem from positive law or *jus cogens*. Where the scope was concerned, it might come down to individual obligations or several subjects of international law or indeed *erga omnes* obligations. And a further distinction should be made between obligations of conduct and of result.

8. In new article 16, the Special Rapporteur rightly stressed that the origin of the obligation was not a relevant consideration. In that connection the brackets around the words "whether customary, conventional or other" should be removed. However, the words "or other" were too general and ambiguous. They referred in fact to unilateral acts, that is to say, to obligations which a State assumed unilaterally and independently and which it was required to fulfil pursuant to article 26 of the 1969 Vienna Convention and the *pacta sunt servanda* principle in the case of treaties and the *acta sunt servanda* principle in the case of unilateral acts. He would be ready to agree to keep the words "or other", provided that it was made clear in the commentary that the term referred to independent unilateral obligations.

9. The Special Rapporteur's proposal that the new article 18 (Requirement that the international obligation be in force for the State) should include the substance of paragraph 1 of article 18 adopted on first reading was acceptable. The other paragraphs of article 18 adopted on first reading were important and he endorsed the Special Rapporteur's proposal that they should be moved to other parts of the draft articles.

10. Mr. GOCO said that many countries which had ratified GATT 1994, including his own, were finding it difficult fully to discharge the resulting obligations. GATT 1994 contained provisions allowing for exceptions to those obligations. And indeed many States had submitted requests for exceptions. He wondered whether, if a State was not able to apply an agreement fully, it should be regarded as breaching an international obligation within the meaning of article 16, which stated a general principle: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

11. Mr. CRAWFORD (Special Rapporteur) said that a particular obligation resulting from any agreement might be subject to restrictions, limitations, exclusions or exceptions, but that was a matter anterior to the draft articles. The draft articles came into play when there was a conflict, in the form of a breach, with the primary obligation as established; that ought to alleviate Mr. Goco's fears. It was perfectly clear that the distinction between the primary obligation and the functioning of the law of State responsibility excluded that difficulty.

12. He urged the members of the Commission not to spend too much time on articles 16 and 18, which had already prompted many extremely valuable comments and were less controversial than the following articles.

13. Mr. HE said that the phrase "under international law" should be kept in new article 16. On the question of a conflict of international obligations, he shared the view of France, in the comments and observations received from Governments on State responsibility,[6] that the obligations imposed by the Charter of the United Nations took precedence over other conventional obligations, regardless of their origin. Of course, States had differing interpretations of the provisions of the Charter and the question should therefore be discussed in the commentary.

14. As a matter of State responsibility, he noted that the senseless attack on the Chinese Embassy in Yugoslavia, which had caused loss of human life and considerable material damage, constituted a violation of an international obligation.

15. Mr. ROSENSTOCK, speaking on a point of order, asked the previous speaker to explain to the Commission what that event had to do with the topic under consideration.

16. The CHAIRMAN said that he took it that the example given by Mr. He related to the question of the obligations of States under the Charter of the United Nations.

17. Mr. HE said that the act in question constituted a violation of an international obligation and of the Vienna Convention on Diplomatic Relations and that it could not be excused on any ground whatsoever. He felt profound sorrow for all the people who had been killed or injured during the attack. There would have to be a detailed investigation to determine whether the act had been deliberate or due to a mistake or carelessness.

18. Mr. ROSENSTOCK said that it was extremely regrettable that a member should try to involve the Commission in a debate of that kind. The members of the Commission were independent experts and not representatives of Governments. The speaker should be requested to stick to the documents before the Commission.

19. The CHAIRMAN requested Mr. He to limit his comments to the matters on the Commission's agenda.

20. Mr. HE said once again that there had been a breach of an international obligation and that those who had committed the act must take responsibility for the harm done to the embassy's staff.

21. Mr. ILLUECA congratulated the Special Rapporteur on his report, which was a genuine work of legal art. The Commission had set about considering draft articles 16 and 18 without prejudice to the conclusions that it might reach on article 19.

22. The merging into a single article of articles 16, 17 and 19, paragraph 1, raised a number of terminological problems that had to be resolved. For example, in the Spanish text of paragraph 156 of the report, the English title of article 16 had been translated as *Existencia de incumplimiento de una obligación internacional*, whereas the word "breach" should have been translated by the word *violación*, as in paragraph 34 of the report.

23. Similarly, the beginning of article 16 as adopted on first reading ("There is a breach of an international obligation by a State") had been correctly translated into Spanish as: *Hay violación de una obligación internacio-*

[6] See 2567th meeting, footnote 5.

nal por un Estado. In paragraph 34 of the report, however, that phrase had been translated as: *Un Estado viola una obligación internacional cuando un hecho suyo no cumple lo que debe hacer.*

24. In paragraph 34, the word "source" had been translated into Spanish by the word *origen* and, in paragraph 156 of the report, the words "when an act ... does not comply with" had been translated, curiously enough, by the phrase *cuando ello no se ajusta a*.

25. Before the Special Rapporteur's substantive proposals were considered, it should be recalled that, as stated in paragraph 107 of section D of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session prepared by the Secretariat (A/CN.4/496),

> "Many delegations ... expressed support for the Commission's efforts to amalgamate some provisions, or delete articles. It was observed that the draft articles provisionally adopted by the Commission on first reading had already had an impact on State practice and had recently been referred to by the International Court of Justice in a decision ... the view was also expressed that any major changes would undermine the growing authority that many of the draft articles were acquiring, and that revisions would create undesirable delay in finalizing the draft articles."

26. The Special Rapporteur's idea of merging articles 16, 17 and 19, paragraph 1, into a single article was undoubtedly useful in practice, but it altered the terminology by the use of the word "source" in new article 16, whereas the word "origin" had been used in article 17, paragraph 1, as adopted on first reading.

27. Mr. CRAWFORD (Special Rapporteur) said that the use of the word "source" instead of the word "origin" had been a mistake. In writing the report, he had used "source" but, after many members of the Commission had given their views, he had realized that that was not appropriate. If there were translation errors in versions of the report in languages other than English, corrections would be issued.

28. Mr. ILLUECA said it was important to be clear about terminology and that the Commission had already held a long discussion on the terms used in the article under consideration. At its twenty-seventh session, in 1975, the Commission had adopted a general plan for the draft articles on the topic of State responsibility[7] and, at that time, part one had been entitled "The origin of international responsibility". The provisional adoption on first reading of part one of the draft articles had subsequently given rise to a discussion on the words "source" and "origin" which was reflected in paragraph (25) of the commentary to article 17,[8] which indicated that: "The Commission as a whole finally adopted the word 'origin', but qualified it by adding, by way of example, the adjectives, 'customary, conventional or other', so as to leave no ambiguity."

29. The use of the term "origin" had been lent authority in the decision in the *Rainbow Warrior* arbitration, in which the Arbitral Tribunal had held that "Any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[9]

30. Another terminological problem arose in article 16. After asking, in paragraph 15 of his report, whether the words "not in conformity with what is required ... by that obligation" were apt to cover the many different kinds of breach, the Special Rapporteur had concluded that the phrase was flexible enough to cover the many permutations of obligation, and that any doubts could be sufficiently covered in the commentary. On the other hand, he admitted that it was slightly odd to talk of an act as not being "in conformity with" an obligation and that the Drafting Committee might wish to consider alternative formulations in the various languages (for example "does not comply with" for the English text). The latter comment was surprising because article 16 dealt not with an act of a State that "does not comply with an obligation", but with an act of a State that "is not in conformity with what is required ... by that obligation", and that placed the emphasis on the conduct of the State. Accordingly, there was nothing odd about the wording of article 16. That article had also been discussed at length and had been adopted on first reading in the context of the consideration of a topic that the Commission had had before it for over 20 years. As indicated in paragraph (4) of the commentary to article 16 as adopted on first reading:[10]

> The Commission ... considered that the wording "is not in conformity with what is required of it by that obligation" was the most appropriate to indicate what constitutes the essence ... of a breach of an international obligation by a State. Th[e] wording was found preferable to other expressions such as "is in contradiction with" or "is contrary to", because it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it.

To decide on a change of terminology now would deprive the Drafting Committee of precious time and might be perceived by the Sixth Committee as an invitation to reopen a discussion that had already been closed.

31. The inclusion in the proposed new article 16 of the phrase "regardless of the subject matter of the obligation breached" taken from article 19, paragraph 1, with the replacement of the words "subject matter" by the word "content", would also give rise to a problem. It would be better to leave article 19 aside for the moment, without prejudice to comments that the Commission might receive on that question in conformity with paragraph 5 of General Assembly resolution 51/160. He nevertheless thought that the French proposal for the addition of the words "under international law" at the end of article 16 was entirely justified.

32. The Special Rapporteur's proposals on article 18 were also acceptable. Paragraph 1 stated the important principle that, for responsibility to exist, the breach must have occurred at a time when the obligation had been in force for the State and set out the principle of inter-temporal law. That could be of great interest in a case of environmental damage, for example, when one of the parties had, in conformity with a treaty, contracted an obligation

[7] *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

[8] See 2568th meeting, footnote 6.

[9] See 2567th meeting, footnote 7.

[10] See 2568th meeting, footnote 6.

to take steps within a specified period. Paragraph 2 of article 18 was unnecessary and could be deleted, as proposed by the Special Rapporteur.

33. Mr. ADDO congratulated the Special Rapporteur and said that, in his opinion, article 16 added nothing new by comparison with article 3 (Elements of an internationally wrongful act of a State), subparagraph (*b*), and that there was no reason to add the phrase "under international law". Articles 3 and 4 provided all the elements required, since article 4 indicated that internal law could not prevail over international law and article 3, subparagraph (*b*), stated that there was an internationally wrongful act of a State when conduct attributable to the State under international law "constitutes a breach of an international obligation of the State". Like Mr. Rosenstock, he wondered whether article 16 should be retained. Nevertheless, he was greatly attracted by the Special Rapporteur's proposal that articles 16, 17 and 19, paragraph 1, should be merged into a single article, as long as the phrase "under international law" was not inserted. In English, he preferred the words "does not comply with" to the words "is not in conformity with".

34. He agreed that article 17, paragraph 2, should be deleted, since it was unnecessary and confusing. He was in favour of retaining article 18, paragraph 1, which set out an important general principle, for it was crucial that an act of a State should constitute a breach of an obligation only if that obligation had been in force for the State at the time when the act had been performed. For example, a State that had not signed or ratified a treaty must not be held responsible for a breach of international obligations flowing from that treaty. He had no objection to the deletion of article 18, paragraph 2, as proposed by the Special Rapporteur. He also agreed with Mr. Simma that the commentary to the articles would be improved by being pruned and simplified.

35. Mr. ELARABY said he also thought that the commentary should be shorter and more concise. He supported the Special Rapporteur's proposal that articles 16, 17 and 19, paragraph 1, should be redrafted as a single article and was in favour of the inclusion of the expression "under international law" in the new article for the sake of clarity. He preferred the wording "is not in conformity with" to the wording "does not comply with", as the former was broader in scope; and also preferred the word "origin" to the word "source".

36. The question of conflicts of international obligations was a particularly thorny one. Even if it was already considered to be covered by article 39, in the interests of maximum clarity, the Special Rapporteur might perhaps also include a reference to the peremptory rules of *jus cogens*. Consideration should also be given to the possibility of including some saving clauses to reflect existing priorities with regard to the rules of *jus cogens*. In that connection, he cited the example of the saving clauses included in the Treaty of Peace between the Arab Republic of Egypt and the State of Israel.[11]

37. With regard to the relationship between disconformity with an obligation, wrongfulness and responsibility, he referred to paragraph 12 of the report, which stated, with reference to the judgment of ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*, that responsibility might have not two but three elements, attribution, breach and the absence of any "special" defence or justification, and he suggested that the third element should be set forth more explicitly.

38. Mr. ECONOMIDES, speaking on article 16, said that the words "in conformity with what is required of it" introduced a subjective element that was not always appropriate. The obligation envisaged, if it were customary, was universal: in other words, the same for everyone and was not required of any given State. The expression could be applied only to treaty-contracts or treaty-agreements under the terms of which two States could have specific obligations that differed. He suggested that article 16 should be reworded so as to begin with the words: "There is a breach of an international obligation by a State when an act of that State is not in conformity with that obligation under international law."

39. Mr. PAMBOU-TCHIVOUNDA said that he had expressed the same concern as Mr. Economides with regard to the use of the words "what is required of it" and had already drawn attention to their subjective character. He suggested that the Commission should request the Drafting Committee to try to find a new wording.

40. Mr. CRAWFORD (Special Rapporteur) said he agreed that the wording of article 16 implicitly raised the question to what extent responsibility was conceived as essentially bilateral or "subjective", a problem that would also arise in connection with *jus cogens* in chapter V (Circumstances precluding wrongfulness). The objective was the drafting of a general law of obligations dealing both with universal obligations and with bilateral treaties. As it had been decided not to compartmentalize the issues, the Drafting Committee would have to find wording for article 16 which was general enough to cover both aspects and which must in any case not imply that relationships of responsibility were exclusively bilateral, still less subjective.

41. Mr. BAENA SOARES called upon the Commission not to discount the work done by the previous special rapporteurs, but also to realize that, after so many years of study, the topic had now become urgent. The Special rapporteur's concern to simplify and clarify was entirely commendable, as was the work he had done to prune the text, but there, too, moderation was called for.

42. With regard to article 16, the text proposed by the Special Rapporteur improved on the previous version with no loss of substance. In addition to replacing the word "source" by the word "origin", the brackets and the text they enclosed should be deleted and the Drafting Committee should be left to choose between the English expressions "in conformity with" and "comply with", although the latter seemed the wiser choice. Whichever expression was used, very careful attention would need to be given to its translation into the other languages. The expression "under international law" was useful and should be retained.

43. The new version of article 18 was also an improvement on the previous one. Judging by the comments of

[11] Treaty of Peace (Washington, 26 March 1979), United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100.

Governments, the basic principle embodied in its paragraph 1 seemed to be undisputed. The deletion of paragraph 2 was justified, as the two questions addressed in that provision would be better located in part two or in chapter V of part one of the draft articles. Paragraphs 3 to 5 were simply transferred to articles 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), which would be considered subsequently. With regard to the draft articles as a whole, the Commission should coordinate its work with any work by other bodies that might be of relevance to its discussions.

44. Mr. Sreenivasa RAO said that he broadly supported the Special Rapporteur's analysis, but noted that some of his proposals should be reformulated by the Drafting Committee. The draft articles adopted on first reading had had their own scheme and had referred to principles and concepts—primary and secondary rules, obligations of conduct and of result—which, because so much time had elapsed between the first and second readings, had found expression in practice, including that of ICJ, and also in doctrine. Simplification was necessary, but must go hand in hand with the preservation of stability, so as not to create confusion by eliminating, modifying or according different treatment to concepts whose value and importance had already been recognized. Furthermore, a number of questions raised by the draft articles adopted on first reading were unlikely to be resolved at the second reading stage because those problems concerned not the substance of State responsibility, but the primary rules. They could thus not be regulated by referring to secondary rules. Only when an obligation had arisen for the State could all the other considerations, including those under chapter V, be brought into play. The commentary to the draft articles adopted on first reading had already stressed the links between the articles in chapter III and, in particular, those in chapter V. It would be interesting to introduce that link into the articles of chapter III themselves, but those articles should not be made unduly cumbersome. It would be for the Drafting Committee and the Special Rapporteur to find the right balance and an appropriate architecture for the draft articles as a whole.

45. The expression "under international law" must be retained because that was the basis for the draft articles as a whole; because care must be taken to avoid any encroachment by private international law or internal law, even by inference; and because it was right to emphasize the existence of higher rules, represented by the Charter of the United Nations, *jus cogens* or *erga omnes* obligations. The commentary to the draft articles adopted on first reading had drawn no distinction between the expressions "in conformity with" and "comply with", but, if it was absolutely necessary to find one, the first might be seen as presupposing that all the requisite elements were present for the conduct not to constitute a breach, whereas the second would be more flexible and would be concerned solely with achieving a result. There again, it would be for the Drafting Committee to decide. As to the effects of the commission of a crime on *jus cogens* obligations, it was normal and accepted that obligations did not all have the same status and that some obligations vis-à-vis an aggressor State, for example, could be suspended pending resolution of the hierarchically more important question of the aggression. As to whether *jus cogens* and *erga omnes* obligations were merely two facets of one and the same state of affairs, it should be borne in mind that *jus cogens* obligations directly introduced a hierarchy and eliminated any other obligation in the event of disconformity, whereas *erga omnes* obligations were more horizontal in nature, giving more members of the international community the possibility of reacting.

46. With regard to article 17, its paragraph 1 might be reformulated so as to make it more a saving clause than a conditional clause. Paragraph 2 was superfluous. The same went for article 18, whose paragraph 1 could be expressed in the form of a safeguard and whose paragraph 2 could be deleted, for the reasons cited by the Special Rapporteur in paragraphs 50 and 51 of his report. The Special Rapporteur was also right to transfer paragraphs 3 to 5 of article 18 to other parts of the draft articles. As to article 19, paragraph 1 should be retained in that article or, as proposed by the Special Rapporteur, incorporated in article 16, provided, however, that the latter solution did not in any way imply a move towards deleting article 19, for that question had still not been decided. A merging of article 16, the remainder of article 17 and article 19, paragraph 1, was acceptable, as was substitution of the word "origin" for the word "source". The examples given in paragraph 42 of the report were not entirely well chosen, but the Special Rapporteur's underlying argument remained valid.

47. Mr. LUKASHUK said he regretted that the Commission had not responded with its customary openness and attentiveness to the perfectly legitimate feeling expressed by Mr. He. With regard to the draft articles, the fact that States were not overeager to accept the Commission's proposals on the subject should encourage the Commission to prepare texts that were as down-to-earth and clear-cut as possible. He noted that the draft articles adopted by the Commission on first reading had been used by ICJ, for example, in the case concerning the *Gabčíkovo-Nagymaros Project*. We were witnessing a new trend in the progressive development of international law: the Commission stated the rule which it believed existed or should exist and ICJ recognized the rule as a norm of positive international law.

48. Turning to article 16, he said he was inclined to agree that the words "comply with" could be replaced by a more forceful expression, since the idea they conveyed did not necessarily presuppose the engagement of responsibility. Unlike Mr. Addo, he considered that the phrase "under international law" was important, not because of the possible existence of responsibility in internal law, but because of the existence of many diverse norms in international relations, such as political or moral norms, usage and commitments that gave rise to special kinds of responsibility.

49. Lastly, he expressed support for the Special Rapporteur's proposal that article 17 should be deleted.

50. Mr. ROSENSTOCK said that he was not convinced by Mr. Lukashuk's argument in favour of inserting the phrase "under international law" and asked the members of the Commission who supported the proposal to state the reasons for doing so. One might arguably use the

wording "with what is legally required of it by that obligation", but that was not really necessary either.

51. Mr. SIMMA, referring to Mr. Lukashuk's comment on the words "comply with", noted that a number of environmental protection instruments contained detailed provisions and procedures for the settlement of disputes in the event of "non-compliance" with a treaty, but refrained from introducing the notion of a breach precisely in order to keep the matter separate from the law of State responsibility. A case in point was the Montreal Protocol on Substances that Deplete the Ozone Layer. It would therefore be wise to avoid wording of that kind.

52. Mr. Sreenivasa RAO, replying to Mr. Rosenstock, said that the phrase "under international law" was of crucial importance in that it laid the basis for establishing a clear hierarchy between the rules in force and obligations arising from multiple sources.

53. With regard to the terms "non-compliance" and "non-conformity", he thought that the former referred rather to an obligation of conduct that offered a certain amount of latitude in terms of the choice of means to be used in its fulfilment. As he was unwilling to enter into an etymological discussion, he would go along with whatever wording the Commission considered most appropriate in the light of the aim to be achieved.

54. Mr. TOMKA, referring to the different suggestions for replacing the phrase "does not comply with what is required of it" in article 16, which had been adopted on first reading and maintained by the Special Rapporteur, said that the phrase had been discussed at length by the Commission, which had clearly explained its choice in paragraph (4) of the commentary to the article (see paragraph 30 above). As the reasons adduced at the time were still valid, there was no call for any change.

55. He thought it would be more appropriate to include the issue of the "bilateralization" of State responsibility in the case of multilateral instruments under part two of the draft articles, in conjunction with that of an injured State. For example, the obligation under the Vienna Convention on Diplomatic Relations to respect the diplomatic immunity of an embassy was applicable to all embassies, but, if it was breached in the case of one country, only that country could claim damages. No distinction should be made in article 16 between a bilateral instrument and a multilateral instrument.

56. Mr. CRAWFORD (Special Rapporteur), summing up what had been a useful discussion on the first cluster of articles, said that, despite certain differences of opinion, there appeared to be a fairly large measure of agreement—some substantive and some procedural—on points of principle.

57. Starting with the least controversial points, he noted that there had been no real objection to the deletion of article 17, paragraph 2. At all events, the history of article 17 and the underlying principle could be reflected in the commentary, as had been suggested. It was acknowledged that the essential provision of article 17 was that contained in paragraph 1, since the Commission had to elaborate secondary rules applicable to all international obligations, whatever their origin.

58. No member of the Commission had argued for the retention of article 18, paragraph 2, in chapter III. It would perhaps be found, after more detailed consideration, that the provision it contained belonged more appropriately in chapter V.

59. Turning to more controversial questions, he said he was convinced that article 16 had both an introductory and a normative function and should therefore be retained, together with article 18, paragraph 1. He gathered that the Commission was, on the whole, in favour of amalgamating articles 16, 17, paragraph 1, and 19, paragraph 1. It was for the Drafting Committee to come up with appropriate wording and in particular to take a decision on the phrase "is not in conformity with what is required of it", "does not comply with what is required of it" or "is in breach of what is required of it".

60. He noted that there had been disagreement about the phrase "under international law", which he had inserted in response to a proposal by France, in the comments and observations received from Governments on State responsibility, which was apparently concerned to prevent any conflict of obligations, not in order to draw a distinction between international law and internal law, since that already existed, but to forge a link between chapter III and chapter V of the draft articles. It seemed to state, on the one hand, that there was responsibility and, on the other, that there was no wrongfulness. That was a real problem that could be solved in different ways, primarily in chapter V. For the time being, the Drafting Committee could place the phrase in square brackets and revert to it following the debate on chapter V.

61. With regard to the principle of the inter-temporality of international law, he noted that there was broad agreement on retaining article 18, paragraph 1, which stated a principle of general application. The Drafting Committee would have to choose between the initial wording and his proposal, which he would not insist on, although he firmly believed that States were entitled to some form of guarantee against the retrospective application of the law, except in the case of a *lex specialis* arrangement.

62. With regard to the use of the term "non-compliance" to refer to failure to carry out an obligation not involving a breach of international law, he agreed with Mr. Simma that it was vague because it could just as well refer to failure to carry out an obligation that might not involve a breach of international law.

63. With regard to article 19, paragraph 1, he had taken due note of the comments of Messrs Economides, Pambou-Tchivounda and Sreenivasa Rao. He had preferred the word "content" to the words "subject matter" of the obligation breached because it was more precise. He was convinced that the point made in the paragraph properly belonged in article 16 in the form in which he had proposed it, without prejudice to the substantive issue raised by article 19, namely, the distinction between "international crimes" and "international delicts". The existence of obligations to the international community was generally acknowledged, but the Commission would have to determine how it would fit that idea into the framework of State responsibility.

64. In conclusion, he proposed that the Commission should refer the first cluster of articles it had considered to the Drafting Committee.

65. Mr. ECONOMIDES said he supported the proposal on the understanding that the Drafting Committee would also have before it the articles corresponding to the draft articles provisionally adopted by the Commission on first reading so that it could base its discussions on all the material available.

66. The CHAIRMAN said that would be arranged. If he heard no objection, he would take it that the Commission agreed to the Special Rapporteur's proposal.

It was so agreed.

The meeting rose at 1.05 p.m.

2571st MEETING

Wednesday, 12 May 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

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

Organization of work of the session (*concluded*)*

[Agenda item 2]

1. The CHAIRMAN invited members to approve a draft programme prepared by the Bureau for the next two weeks of the session. It was proposed that the general discussion on the topic of State responsibility should be continued in plenary whenever possible, depending on the Special Rapporteur's ability to be present. The afternoons would generally be allotted to meetings of the Drafting Committee, which would continue to deal with the topic of nationality in relation to the succession of States during the first week and, depending on the progress made, would probably go on to State responsibility in the second. The programme also provided for a meeting of the Planning Group and of the Working Group on the long-term programme of work.

2. Mr. CRAWFORD (Special Rapporteur on State responsibility) said that, as soon as the Commission completed its consideration of the third cluster of articles in chapter III of part one of the draft, he intended to introduce chapter I, section B, of his second report on State responsibility (A/CN.4/498 and Add.14), dealing with chapter IV.

3. The CHAIRMAN took note of that announcement. He said that, if there were no objections, he would take it that the Commission agreed to the proposed programme of work for the period from 17 to 28 May 1999.

It was so agreed.

4. Mr. GOCO (Chairman of the Planning Group) announced that the members of the Planning Group were: Mr. Baena Soares, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Simma and, ex officio, Mr. Rosenstock. Other members of the Commission were, however, welcome to participate in the work of the Planning Group.

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*)

ARTICLES 20, 21 AND 23 (*continued*)*

5. Mr. SIMMA, continuing the debate on the second cluster of articles in chapter III (Breach of an international obligation), namely 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), said that, before deciding what to do with them, the Commission should recognize that the distinction between obligations of result and obligations of conduct had become almost commonplace in international legal discourse, not only at the academic level but also at that of inter-State relations. The view that the concept was practically a classic in civil law systems was perhaps something of an overstatement, as a result of a tendency on the part of some French lawyers to identify all civil law systems with French law. In German law, for example, the distinction as such had no place, except in connection with labour contracts, as opposed to contracts relating to services.

* Resumed from the 2569th meeting.

[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.