Document:-
A/CN.4/SR.2571

Summary record of the 2571st meeting

Topic:
<multiple topics>

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

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.

6. As to the reversal of the effect of the distinction, referred to in paragraph 58 of the second report, that had been operated by a former Special Rapporteur, Mr. Roberto Ago, and the Commission at its twenty-eighth session, in 1976,[4] the fact that it had gone unnoticed for so many years suggested that the Commission should perhaps take a more serious interest in comparative law. However, confusing as Mr. Ago's interpretation of the distinction might be, it did not in itself provide an argument for doing away with the concept if it served a real purpose. In his opinion, it did so, but its value was cognitive rather than normative, and it was undoubtedly helpful in the interpretation of primary rules. Viewed from that angle, it did not matter that most obligations, in practice, appeared to be of a hybrid nature, as pointed out in the second report.

7. An instance of a case where the distinction was of value was the issue of reservations to human rights treaties. Thus, the articles of the 1969 Vienna Convention that dealt with the effects of reservations largely depended upon it. In short, the distinction was useful in an explanatory, didactic sense, but whether it should be included in a codification treaty was quite another matter.

8. Another interesting example was provided by article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, an important treaty provision which represented a delicate mix of obligations of conduct and obligations of result. Article 23 of the draft, as adopted on first reading, was yet another good example, since the text spoke of an obligation of conduct while the commentary to the article[5] made it clear that the obligation was not absolute.

9. The conclusion to be drawn was that, while the doctrinal concept was undoubtedly a useful one, the distinction could hardly be made operational at the level of secondary rules. For that reason, it should be deleted from the draft articles but should be dealt with adequately in the commentary, the weight given to it depending on the form the Commission decided the draft should ultimately take.

10. With reference to an article by Dupuy,[6] he would welcome comments by the Special Rapporteur on the suggestion put forward in the article that the existing terminology should be replaced by the terms "obligation to endeavour" and "obligation to achieve"[7] which, it was argued, might prove helpful in determining the precise moment from which a breach began (*momentum a quo).*

11. Lastly, if the provision on the exhaustion of local remedies was to be moved from the rather odd place it currently occupied, he entirely agreed that article 21, paragraph 2, could be deleted.

12. Mr. ILLUECA, referring to article 23, pointed out that, while the text adopted on first reading contained a specific reference to "conduct", no such reference was to be found in the text of the new article 20, paragraph 2, proposed by the Special Rapporteur. In view of Mr. Simma's comments, it was important for the Drafting Committee to carefully consider whether the notion of conduct should not be restored.

13. Mr. PAMBOU-TCHIVOUNDA said that, as with the first cluster of articles, members should ask themselves whether the Special Rapporteur had provided enough examples in positive law to enable them to arrive at a decision. Had positive law changed sufficiently since 1976 to warrant doing away with the distinction between obligations of conduct and obligations of result? If, as Mr. Simma had just said, the distinction had become commonplace in international law at the doctrinal level, it would surely be worthwhile to take the search for applications of the concept a little further by looking, for example, into the law of the sea and various special regimes. The upshot might well be that the distinction did, after all, have a place in the draft articles on State responsibility.

14. Mr. MELESCANU said that the distinction should not be included in the final draft. It clearly related to the primary rules and, if the Commission intended to be consistent with its own decision to focus on the secondary rules, it had to delete articles 20 and 21, as the Special Rapporteur proposed. To attempt to proclaim a general rule distinguishing between obligations of conduct and obligations of result would be far too ambitious. As Mr. Simma had pointed out, a subtle mix of the two was present in most cases. The decision should be left to the judge in each particular case, depending on the circumstances.

15. Mr. CRAWFORD (Special Rapporteur) said Mr. Melescanu's comments were more or less what he had wanted to say himself. Clearly, the distinction between obligations of conduct and obligations of result failed to cover the whole field of obligations in many cases. The Commission should not be apprehensive about abandoning what was, in effect, a doctrinal distinction if that distinction continued to be upheld in the area of primary rules. As to Mr. Pambou-Tchivounda's remarks, he had searched very hard for judicial distinctions. The results of the search were duly reflected in the report. In the *ELSI* case referred to in paragraphs 62 to 64 of the report, Judge Schwebel had indeed referred to the distinction as embodied in articles 20 and 21 in his dissenting opinion [see pages 117 and 121], but it had had no effect on the majority decision.

16. Mr. GOCO said that the law of State responsibility was a central pillar of the whole structure of international law. It was about accountability for a violation of international law: if a State breached an international obligation, it bore responsibility for that breach. That proposition appeared very simple, yet it was not. The draft articles gave rise to many problems, such as attribution to a State and the entire substantive law of obligations. In civil law systems the topic of obligations and contracts was easily understood, but the treatment of that topic in international law was quite different and much more complicated. He had been impressed by the responses of several States which had criticized the draft articles adopted on first reading as being, among other things, overrefined and

[4] See the commentaries to articles 20 and 21 (2567th meeting, footnote 9), in particular paragraph (2) of the commentary to article 20 and paragraph (1) of the commentary to article 21.

[5] See *Yearbook…1978*, vol. II (Part Two), pp. 81 et seq.

[6] P. M. Dupuy, "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to State responsibility", *European Journal of International Law* (see 2566th meeting, footnote 6), pp. 371-385.

[7] Ibid., p. 382.

impracticable. It was to the Special Rapporteur's credit that he had responded to that criticism by simplifying and clarifying the text.

17. Article 16 (Existence of a breach of an international obligation) spelled out the broad rule, and the key words in that rule were "not in conformity with what is required of it", for they meant that the obligation with which the State must comply had to be a definite and precise one. Hence, articles 20 and 21 specified the various categories of obligation requiring a State to adopt a particular course of conduct or ensure a specific result, while article 23 established another type of obligation of result.

18. The Special Rapporteur's conclusion on those three draft articles contained a strong argument for deleting them, because they had been so heavily criticized by Governments. He associated himself with that criticism, but needed to be convinced of the way in which a State could be held accountable under the circumstances stated in the three draft articles. Under article 23, for example, could a State be held liable in the absence of a specific obligation of prevention?

19. Perhaps the problem could be solved by customary law or by treaty obligations, but he would prefer to find the answer in the broad rule set out in article 16. That would require all the categories entailing a particular course of action, a particular result or even the prevention of a specific event to be covered by the rule, so that there would then be no need for a separate classification. Of course, there was always room for interpretation, but interpretation inevitably hinged on the existence of specific rules.

20. Mr. ROSENSTOCK said article 3 (Elements of an internationally wrongful act of a State), subparagraph (*b*), said that, when a State breached an obligation, it committed an internationally wrongful act; article 16 said there was a breach when a State was not acting in conformity with its obligations; and article 19, paragraph 1, said that a breach was a breach no matter what the subject matter of the obligation. The question was whether that approach, or the somewhat less redundant form proposed by the Special Rapporteur, was enriched or further clouded by articles 20, 21 and 23.

21. The claim for retention of the articles was based, inter alia, on the view that the existence of a breach was determined in a completely different way, depending on whether the breach was of an obligation of conduct or of result. But no very convincing evidence was provided to support that view. The Special Rapporteur was correct to say that a classification of an obligation as one of result or of conduct was no substitute for the interpretation and application of the primary norms themselves. Sometimes the conduct/result distinction might be a useful prism through which to view and explicate an obligation, sometimes not. Indeed, taking the distinction seriously would sometimes lead to tragically wrong results, as in the case of torture for example.

22. There might be something to be said for retaining the existing concepts, even if they were not comprehensive in their coverage. If they created confusion, however, it did not seem wise to retain them just because some people found the distinction useful sometimes. Deletion of articles 20, 21 and 23 need not be a denial of the utility of the distinction in all cases. Rather it should be explained as being based on the view that, since the distinctions were not always useful and were not reflected in the categories contained in part two, they should not be articulated in part one as norms.

23. While the Special Rapporteur's reformulation in his bracketed article 20, in paragraph 156 of his report, was clearer than the existing draft articles, it still seemed to purport to make a normative distinction of general validity concerning a process which was often not applicable or the application of which would risk nothing but confusion. For those who hesitated to delete, he commended the excellent article by Dupuy. He stated: "The classification of State obligations in articles 20 and 21 is of no use because it is, at one and the same time, too rigid and too approximate."[8] That position was the one most generally taken in the legal literature. The fact that the distinction made in the draft articles had acquired some currency, although a factor to be taken into account, was not of itself sufficient reason for retaining confusing concepts. The distinction had not been received in the sense mentioned by Mr. Pambou-Tchivounda. To those who feared that the Commission was cutting too much, he would point out that the weightiness of a text was not a function of how heavy it was.

24. Mr. ECONOMIDES said that he agreed with other members that the distinction between obligations of conduct and of result was a very difficult one and the Special Rapporteur was right to say that the content of an obligation depended on the interpretation of the primary rule creating the obligation. The distinction was essentially one of doctrine, but it was increasingly used in practice. There was often no agreement in the doctrine as to which obligations belonged in which category, although obligations of conduct were easier to accept and usually more flexible, while obligations of result were usually more strict. However, many States had the wrong impression that obligations of conduct never entailed responsibility. It would be a good idea to make it clear to them that such obligations were also legal ones and that a failure to exercise due diligence could trigger responsibility.

25. The criteria contained in the three draft articles in question did not cover all cases: there could be obligations of prevention which were obligations of conduct rather than of result, and obligations of result which did not leave States a choice of appropriate means. It all came down to the interpretation of the primary rules.

26. It was necessary to determine in specific cases whether the three articles added anything to the general provision contained in article 16. They sometimes seemed to repeat the same idea, that is to say, that the violation of an obligation entailed responsibility. It might be helpful to add to the list given in the proposed article 16 "(whether customary, conventional or other)" a reference to the type of obligation—of conduct or of result. That would offer a warning to States and might be a good solution to the problem. He agreed with the Special Rapporteur that the distinction drawn was current in international law. It would be impossible to delete it without further ado.

[8] Ibid., p. 377.

Hence, it might be wiser to retain the text in brackets until the Commission had completed its work on the draft, when it would be able to see whether there were other reasons for retaining the text.

27. He doubted whether the proposal for article 20, paragraph 1, was an improvement on the existing form of language, which had the advantage of following the model of article 16 by beginning with the same words. Such uniformity was desirable in a normative text when linking two closely related provisions. Furthermore, he did not understand why in the French version the verb *requérir* had been replaced by *exiger*. "Require" was used in English in both versions and was certainly preferable, and the phrase *un comportement spécifiquement déterminé* was preferable to the proposed *un comportement particulier*. There was no good reason to abandon the existing wording. Of course, the Drafting Committee could work on the basis of both versions.

28. He could accept the merger of article 21, paragraph 1, and article 23 into a single provision but, there again, the text should draw on some of the elements of the language adopted on first reading. He could also agree to the deletion of article 21, paragraph 2. However, the provision might be of some value and should be mentioned in the commentary.

29. Mr. CRAWFORD (Special Rapporteur), responding to the linguistic points made by Mr. Economides, said that the English "a particular course of conduct" was a translation of the original French *un comportement spécifiquement déterminé*. He currently thought that "particular" was a bad translation of *spécifiquement déterminé*. That example showed how, in the draft articles, so much turned on a few words.

30. Mr. PAMBOU-TCHIVOUNDA said that he fully endorsed Mr. Economides' remarks about the need to link the three draft articles under discussion to article 16 and to include in article 16 a reference to the type as well as to the origin of the obligation. In his opinion, the suggestion made by Mr. Economides had the approval of the Commission. The Commission must therefore address the consequences by developing the additional element in the subsequent related articles.

31. He also agreed with Mr. Economides' comments on article 21, paragraph 2, although he was not absolutely sure that the paragraph should be deleted and the point made only in the commentary. Paragraph 2 did contain something quite different, that is to say, the question of the equivalence of results or the recourse by a State having an international obligation to a means other than the one assigned to it by the obligation; in order to achieve equivalence of result it might in fact be necessary to use a different means.

32. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pambou-Tchivounda as to the value of the comments made by Mr. Economides, who had accepted the essential critique of articles 20 and 21, questions of language aside, but thought that the Commission should complete its consideration of the draft articles before taking any final decisions. However, Mr. Pambou-Tchivounda's point about article 21, paragraph 2, was quite different. The problem with that paragraph was that it equivocated between two positions, one unacceptable and one unexceptionable. It was unacceptable that there could be a breach which somehow later ceased to be a breach when something else was done, for example when compensation was paid for a violation of a human right. Such a violation was a violation, and payment of compensation did not change its status. But that was what the commentary, unacceptably, said. Everyone could accept the text if it meant merely that there was no breach in the case of an obligation of result where the time for the State to take action had not yet come and the State meanwhile corrected the breach—but there was no need for an article to say so. He thought that article 21, paragraph 2, was positively harmful and that to render it harmless would at the same time render it even more useless than it currently was. He agreed that the Drafting Committee should look at the article 16 hypothesis suggested by Mr. Economides, but he did not agree with Mr. Pambou-Tchivounda that the Commission would be obliged, if that hypothesis was accepted, to spell out the consequences. The new article 16 said that there was a breach irrespective of the content or origin of the obligation or, under the Economides hypothesis, of the type of obligation. Once that provision was accepted, there was no need to talk about the different kinds of breach. However, he would experience no difficulty in retaining a historic relic of the article 16 distinction as a basis for an elaboration in the commentary.

33. Mr. PAMBOU-TCHIVOUNDA, clarifying his previous statement, said it was his view that article 21 was worth retaining, if only because of the very particular situation provided for in paragraph 2.

34. Mr. ECONOMIDES said he did not contest the Special Rapporteur's conclusion that the examples of applicability to human rights cases were not relevant. Article 21, paragraph 2, could, however, be applied in other circumstances. For example, a State that had concluded an agreement to guarantee another State a certain quantity of water drawn from an international river might reduce that quantity but subsequently provide an equivalent supply from a different international river. No international responsibility would then arise. In such cases, article 21, paragraph 2, might be of some value. He had already accepted, however, that that idea could be consigned to the commentaries.

35. Mr. ADDO said that articles 20, 21 and 23 were confusing in the extreme and should be deleted. They were of no practical utility and, judging from the comments of some countries, the Sixth Committee would not take kindly to them. The concepts they set forth were not known to the common law, and even the civil law countries that had given birth to them found it hard to map out their contours. Tomuschat,[9] and to some extent Dupuy,[10] found them difficult to apply, and Judge Schwebel had been in the minority when using those distinctions in the *ELSI* case. While the concepts embodied in articles 20, 21 and 23 might not be alien to international law, they had

[9] Tomuschat, loc. cit. (2567th meeting, footnote 11), p. 335.

[10] P. M. Dupuy, "Le fait générateur de la responsabilité internationale des États", in *Collected Courses of The Hague Academy of International Law, 1984-V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, pp. 9-134, at p. 47.

not attained the level of universal acceptance that would require their codification.

36. In his view, State responsibility could be reduced to the proposition that, whenever a State was in violation of an international obligation, it incurred responsibility for that violation. That much was basic and obvious. What was surprising was that, after 45 years, that straightforward proposition remained unresolved and confusion continued unabated.

37. Three principles regulated that area of international law. First, there must be an international legal obligation. The obligation might exist between two States only, or it might be of general application. It might arise under a treaty or under customary international law. Secondly, the breach of the obligation by the State must result from a positive act or failure to carry out that obligation: article 1 of the draft articles on State responsibility established the general principle that every internationally wrongful act of a State entailed international responsibility. Thirdly, once there had been a breach of an international obligation, the State in breach was required by international law to make reparation for the liability it had incurred. The Commission should concentrate on those principles and avoid fine distinctions that might not serve a universal purpose.

38. While they were of academic and intellectual value, the concepts embodied in articles 20, 21 and 23 were of no practical utility. It must be remembered that the draft articles were intended, not for cloistered academics, but for practitioners in the larger world. Consequently, he could not support the Special Rapporteur's tentative proposal to embody the substance of the distinctions in a single article, and reiterated his view that all three articles should be deleted.

39. Mr. KATEKA, referring to Mr. Addo's comments, said it was perhaps fortunate that academics were at hand to help the Commission extricate itself from the quandary in which it currently found itself. Mr. Hafner—himself an academic—had said (2569th meeting) that theoretical issues had no place in a set of draft articles that would have to be applied by practitioners. Having carefully studied the distinctions between obligations of conduct, result and prevention as set forth in the second report of the Special Rapporteur, he himself was none the wiser. He was thus grateful to the Special Rapporteur for clarifying the issues involved, and endorsed his conclusion that articles 20, 21 and 23 served no useful purpose and should be deleted.

40. Mr. Sreenivasa RAO said that the distinction drawn between obligations of conduct and of result was a useful one and should be retained. Mr. Simma had provided an accurate analysis of the true purport of the distinction, which was cognitive rather than normative, serving as a tool with which to assess the type of obligation without predetermining its outcome or applying qualitative standards thereto. The distinction drawn in the existing draft articles was just one of a number of possible forms of categorization. Nonetheless, some form of categorization or refinement was essential. That had already been achieved in the articles adopted on first reading and, for better or worse, the concepts were there to stay.

41. While he agreed with the Special Rapporteur that one inference to be drawn from the commentary to article 21, paragraph 2,—that torture or arbitrary detention became permissible if compensation was subsequently paid—was entirely unacceptable, that did not mean that a concept which had stood the test of time should be jettisoned, merely because it was not all-encompassing or because a few examples of oversimplification or overrefinement could be found. When he had first joined the Commission, the precise distinction between primary and secondary rules or between obligations of conduct and of result had been unclear to him. Now, thanks to articles 20 and 21, he had grasped that distinction and he was not prepared lightly to throw away the tool that had clarified the issue for him.

42. Articles 20 and 21 served a purpose: they enabled an obligation to be posited as a primary rule, prescribing certain conduct even if the outcome remained uncertain. States could thus be held accountable even at a stage prior to any deleterious outcome. The value of categorizing certain obligations as obligations of conduct was, as was pointed out by Combacau[11] and cited in the second report, to indicate that, while the ultimate result was unpredictable, it could nonetheless be striven for through the means specified.

43. Article 23 should be deleted. Obligations of prevention, which were usually regarded as an obligation of conduct and a primary rule, had no place in the law of State responsibility. The conduct prescribed was the material factor; obligations of prevention should thus be subsumed under obligations of conduct.

44. As to questions of drafting, obligations of conduct and of result, which were by their very nature different concepts, should not be combined in one article. The only difference of substance in the proposed new article 20 appeared to be the use of the word "means" to replace "conduct"—a choice he was happy to leave to the Drafting Committee, though his preference was for the word "conduct", as obligations of conduct were the point at issue. Article 21, paragraph 2, however, should not be deleted.

45. Lastly, it should be borne in mind that the distinction between means and result was of value to developing countries. *Pace* Mr. Hafner, the reference to means should not be eliminated, even if the main emphasis was to be placed on the result; developing countries did not all have equal means at their disposal to achieve the result required of them.

46. Mr. SIMMA, responding to the comments made by Mr. Sreenivasa Rao, said that neither his own remarks nor the work of the Special Rapporteur should be construed as an attempt to obtain a truncated draft. The only question was precisely what, of all the materials produced by Mr. Ago, and yielded by the discussions in the Commission over the years, should be incorporated in the draft articles, and what in the commentary. The doctrinal distinction between primary rules and secondary rules was entirely apposite. That distinction was the very oxygen that brought life to the draft articles, but it had never been

[11] See 2567th meeting, footnote 10.

suggested that the actual text should spell it out. Indeed, to do so would be counterproductive. The draft articles were informed by a veritable wealth of doctrine, but only a small portion of that wealth was actually on display in the text. Article 20, if read in isolation from the commentary, simply stated something that anyone with common sense could deduce: that an international obligation requiring a certain course of conduct was breached in the event of a departure from that conduct. But in reality, there was no way to express the point in a less bald and abstract manner, short of bringing in the full array of doctrine. That was why he thought the point would be better made in the commentary, where it could be treated in abstract terms but also illustrated with concrete examples.

47. Mr. TOMKA said he was not convinced of the advisability of deleting the three articles. One reason was his respect for the work of Mr. Ago, who had developed for the Commission a methodology for grappling with the very difficult topic of State responsibility. Other reasons were set out in paragraph 91 of the second report. The articles were quite complicated, particularly article 21, paragraph 2, and the commentary to that text was no longer fully appropriate in the view of the approach taken to human rights in contemporary international law.

48. The distinction between obligations of conduct and obligations of result seemed to be the focus of the discussion, but the aim of articles 20, 21 and 23 as adopted by the Commission on first reading had been to determine when the various types of obligations were breached. Each article did not have to contain a legal rule setting forth the rights and obligations of the parties: definitions and qualifications of the legal provisions were sometimes also needed. It was unlikely that the legal consequences of breaches of obligations of conduct and breaches of obligations of result would differ, since nothing in the articles designated the different unlawful acts. That stood in contrast to the dichotomy between international delicts and international crimes, which did entail different consequences. Judges and States might need to qualify a given obligation with a view to determining when it was breached.

49. The combining of articles 21 and 23 did streamline the text but he would prefer, as a matter of legal technique, to have two separate articles dealing with breaches of obligations of conduct and breaches of obligations of result. If such an approach was adopted, the commentary could be drafted along the lines suggested by Mr. Simma.

50. There were certain linguistic inconsistencies that would have to be ironed out, notably in the titles of chapter III, article 20 and article 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time).

51. Mr. ROSENSTOCK said that Mr. Sreenivasa Rao had shown a conservatism that surpassed even his own. He was astonished to hear that the fact that an article had no consequences was a reason for retaining it. Nothing in the debate so far suggested that the distinction between obligations of conduct and obligations of result was useful in terms of secondary rules. Perhaps someone could explain why the Commission was dealing with tools for the analysis of primary rules in an instrument that should and did focus on secondary rules. The distinction, if it had any cognitive utility at all, should be placed, not in an article, but in the commentary, where it was just possible that common ground might be obtainable.

52. Mr. KUSUMA-ATMADJA, referring to the statement by Mr. Addo, said the Commission was trying to finish up work on the topic of State responsibility that had gone on too long. If it could do so before the end of the current quinquennium, it would make a noteworthy contribution. Too much material had been subsumed under the topic of State responsibility and the task currently was to sift and sort that material. Mr. Addo's remarks had been very welcome in terms of the need for streamlining, but he did not agree with the idea of deleting some material altogether. If necessary, it could be placed in the commentary or even in a note to the commentary. The Special Rapporteur had been trying to accommodate a wide range of views, but the time had come for him to be firm. He himself spoke as someone who had been an academic and was a practitioner.

53. Mr. PAMBOU-TCHIVOUNDA, commenting on Mr. Tomka's remarks, said the Commission had decided that the draft articles should envisage rules relating to regimes, in other words, secondary rules. It would be lamentable, however, for the Commission to restrict the treatment of the topic of State responsibility to the development of secondary rules. Was not part one concerned with primary rules? In that connection, he would draw attention to article 3 as an illustration.

54. The Commission's mandate to codify material that had never lent itself to codification obliged it to incorporate primary rules, even if they were kept to a minimum. Those who would be using the draft articles would be encountering certain rules for the first time. By retaining a distinction that was intended to facilitate the work, the Commission must not be obliged to excise some of the material amassed. In that respect, he agreed with Mr. Sreenivasa Rao.

55. Articles 20, 21 and 23 should perhaps be transmitted to the Sixth Committee in square brackets, in view of the divergence of views in the Commission about the advisability of retaining them. Personally, he favoured their retention. International law had evolved since the work of the first Special Rapporteur, Mr. Ago, in 1976. In the instruments on the law of the sea, environmental law and diplomatic law, States could be seen to have tacitly acknowledged the distinction between obligations of conduct and obligations of result, even if those terms themselves were not used.

56. Mr. CRAWFORD (Special Rapporteur) said that it was absolutely impossible to do away with the distinction between primary and secondary rules. Mr. Ago had formulated the distinction, and he himself remained true to it. Article 3 fell squarely within the framework of that conception of the draft articles. Mr. Tomka and Mr. Sreenivasa Rao appeared to approve the merger of articles 21 and 23. Article 20 as it stood, however, was logically void.

57. Mr. Sreenivasa Rao had said that the abolition of the distinction between obligations of conduct and obligations of result would entail certain consequences for the position of many countries in respect of obligations of means. If that was true, then the distinction must not be abolished. But it was not true. For the purposes of working out how primary rules were applied, a distinction was made between obligations of conduct and obligations of result, but that was all. Absolutely nothing was said about any particular obligation being an obligation of conduct or of result or whether the means available to a State were of relevance to the performance of its obligation. That was a matter for the interpretation and application of primary rules.

58. Mr. KATEKA said that some members of the Commission opposed retaining the three articles in any form, others believed they should be placed in square brackets, others wanted the material in the articles placed in the commentary. Where the Commission stood on the issue had to be worked out. The articles should not be sent to the Sixth Committee in square brackets, as that would only complicate the Committee's work.

59. Mr. Sreenivasa RAO, clarifying the position he had taken earlier on Mr. Simma's statement, said he had agreed with him that the articles were cognitive, not normative. Mr. Rosenstock had asked why an article that served no purpose should be retained. Perhaps because its place in the global construct of State responsibility was not visible. Article 16, for example, had links to articles 3, 21, 22, 23 and 45 (Satisfaction). An abstract notion was being unravelled in differing ways throughout the draft. Accordingly, since the distinction was not entirely wrong, it should be retained.

The meeting rose at 1.10 p.m.

2572nd MEETING

Friday, 14 May 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Candioti, Mr. Dugard, Mr. Economides, 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. Rosenstock, Mr. Simma, Mr. Yamada.

Nationality in relation to the succession of States[1] (*continued*)* (A/CN.4/493 and Corr. 1,[2] A/CN.4/496, sect. E, A/CN.4/497,[3] A/CN.4/L.572, A/CN.4/L.573 and Corr.1)

[Agenda item 6]

REPORT OF THE WORKING GROUP (*concluded*)*

1. The CHAIRMAN, speaking as Chairman of the Working Group on nationality in relation to the succession of States, introduced the report (A/CN.4/L.572).

2. On the basis of the Memorandum by the Secretariat (A/CN.4/497), giving an overview of the comments and observations of Governments, made either orally or in writing, the Working Group had first dealt with the merits of the draft articles and then with the question of the form, structure and order of the future instrument. It had decided to suggest to the Commission the retention of the current wording of articles 1 to 5, 8 to 18 and 20 to 26, as well as a new wording for article 6, an amendment to article 7, paragraph 1, the deletion of article 19, an amendment to article 20, and an amendment to article 27, which would be renumbered as article 2 bis.

3. Going through the Working Group's conclusions article by article, he said that, with regard to article 1 (Right to a nationality), the Working Group, having examined the question of the right to at least one nationality mentioned in paragraph 26 of the Memorandum by the Secretariat, had concluded that the matter had been sufficiently discussed by the Commission in the past and that its position had been clearly stated in the commentary. Concerning article 2 (Use of terms), having considered the observation summarized in paragraphs 28 to 31 of the Memorandum, the Working Group had decided that it was advisable to maintain the definition of the term "Succession of States", which had been taken from the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter referred to as the "1983 Vienna Convention"). On the other hand, it had thought it inadvisable to attempt to define the term "habitual residence", since that difficult endeavour might result in the adoption of a definition subject to cultural relativity. Since Governments had not made any substantial comments on article 3 (Prevention of statelessness), the Working Group had not suggested any changes. With regard to article 4 (Presumption of nationality), having considered all the arguments set out in paragraphs 36 to 43 of the Memorandum, the Working Group had decided that the Commission had already extensively debated the issues during first reading and had therefore decided to retain the current text. On article 5 (Legislation concerning nationality and other connected issues), the Working Group had decided not to

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* Resumed from the 2569th meeting.

[1] 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.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.