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Summary record of the 2104th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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of the injured State to claim cessation and the obligation of the author State to discontinue the internationally wrongful act subsisted even in the absence of interim measures.

28. A further reason why he considered that the inclusion of a separate rule on cessation of an internationally wrongful act was justified was the legitimate interest at stake. On the basis of the case-law in the making of the ICJ, the Commission had established, in paragraph 3 of article 5 of part 2 as provisionally adopted, as a counterpart to a State's obligations *erga omnes*, a corresponding right of all "injured States" if the internationally wrongful act constituted an international crime. Thus the determination of capacity to take action in the case of an internationally wrongful act depended on the characterization of the wrongful act itself, either as an international delict or as an international crime. If the act was a crime, all States were entitled to claim its cessation, but they did not all enjoy the right to reparation.

29. Noting in conclusion that the Special Rapporteur had placed the provision on cessation in the part of the draft dealing with the legal consequences of international delicts (chap. II of part 2) (*ibid.*, para. 20), he pointed out that, if that provision were not moved to the part devoted to general principles (chap. I), it would have to be reproduced in the same form in the part relating to the legal consequences of international crimes (chap. III).

The meeting rose at 11.30 a.m.

2104th MEETING

Thursday, 18 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. TOMUSCHAT said that the main innovation introduced by the Special Rapporteur was perhaps greater clarification and concretization. The rules proposed by the previous Special Rapporteur in the previous draft article 6 of part 2 had dealt much too briefly with the consequences of internationally wrongful acts and the article could thus have become a mere shopping list that failed to provide the guidance the community of nations expected from the Commission's draft. The present Special Rapporteur rightly saw the need for much greater detail.

2. As for the suggested structure of the draft, there appeared to be a slight discrepancy. In the outline submitted in his preliminary report (A/CN.4/416 and Add.1, para. 20), the Special Rapporteur set out the subdivisions tentatively proposed for part 2 of the draft, but those headings did not appear in the part of the report containing the new draft articles 6 and 7 (*ibid.*, para. 132). Those headings were useful, however, and should be retained.

3. The intention was to separate the legal régime of international delicts from that applicable to international crimes, yet the wisdom of that approach was questionable. In the first place, article 6—drafted for delicts—would not be any different if drafted for international crimes. It was obvious that a duty of cessation existed for crimes, in fact even more than for delicts. The same considerations largely applied to draft article 7 as well. In that connection, he disagreed with the somewhat polemical character of the Special Rapporteur's arguments (*ibid.*, paras. 10 *et seq.*), which presented the concept of a lowest common denominator as something rather negative. A common denominator was not necessarily a low denominator. He was convinced that a broad régime applicable to all internationally wrongful acts did exist and that international crimes entailed some additional consequences—consequences which the Commission would have to determine as a matter of legal policy.

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting para. 40

4. Another drawback resulted from dissociating the régime of international crimes from that of international delicts. By setting aside for the time being the more serious offences, one would be deliberately ignoring the fact that there were certain limitations to international responsibility. States were not mere abstract entities; they were communities of human beings. For instance, article 20 of the African Charter on Human and Peoples' Rights[4] stated: "All peoples shall have right to existence. . . . " The consequences of an internationally wrongful act must not be defined in such terms as to negate a people's right to existence. To take the example of the recent armed conflict between Iran and Iraq, even if it could be determined with certainty which had been the aggressor, the ensuing consequences could not conceivably lead to a situation tantamount to financial chaos for the people declared to be the aggressor.

5. As to international case-law, the decisions of international courts and arbitral tribunals covered only a limited field, mainly injury to aliens, the specificity of which the Special Rapporteur did not wish to acknowledge. Most of the cases tried by such courts and tribunals related to situations in which material damage had occurred, for only in that type of case did States engage in proceedings before international courts. However, the legal departments of foreign ministries dealt with many other cases involving no material damage. In that regard, the former Special Rapporteur for the present topic, Mr. Ago, had affirmed that damage was not a pre-condition for responsibility—an approach that was the Commission's starting point in its attempt to codify the content, forms and degrees of international responsibility. Almost every day breaches were committed of such international obligations as the duty of consultation or the duty of co-operation. It was important to remember that the draft articles on State responsibility covered those breaches as well. They should be taken into account right from the beginning of the Commission's work.

6. With regard to draft article 7, he was not at all certain whether every breach of an international obligation gave rise to international responsibility in the full sense and set in motion all the draft articles to be elaborated. His doubts could be illustrated by the law of the environment. International norms on the subject had been mushrooming over the past decade, but States had so far accepted essentially primary obligations of prevention: they displayed little or no enthusiasm for secondary norms providing for restitution in kind or financial compensation where due diligence had not been observed. That was evidenced by Principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).[5] He was not, of course, maintaining that there should be no responsibility in that field; he merely wished to express his doubts about an automatic connection between responsibility and the duty of reparation, whether in kind or in financial terms.

7. There was in fact already a loophole in the Special Rapporteur's strategy of leaving aside the régime of international crimes. Draft article 7 spoke of the "injured State", which, under paragraph 1, had the right to claim restitution and, under paragraph 4, the right to claim financial compensation in lieu of restitution in kind. The question arose of determining which was the injured State. Article 5 of part 2 of the draft did not draw any distinction between a directly injured State and a State that was only "legally" injured. The provisions of article 5 would in fact have a strong impact on all the provisions that followed. Thus, in the case of a multilateral treaty for the protection of human rights, every other State party could claim to be injured by a violation. From the very outset, therefore, the relationship involved was not merely a bilateral one, a fact that introduced very great difficulties into the topic. In any event, it was plain that a State which had not suffered any material damage could not have the same rights as a State that was a material victim. Article 5 should have elaborated on that distinction.

8. One question was whether the Special Rapporteur would be proposing an article on the subject of interest. Some arbitral awards had granted interest, treating it as an integral component of pecuniary claims, whereas others had not. The Commission might, of course, arrive at the conclusion that the matter was not ripe for codification, but he felt that the point should be examined.

9. With regard to cessation, it might well seem naive to ask whether the primary obligation violated lapsed by virtue of the breach, but the answer should be firmly in the negative. The whole system of international law would be called into question if it were easy to evade international obligations in that way. Except in some marginal cases where compliance with the original obligation was impossible after a given period of time had elapsed, the primary obligation continued to exist.

10. The Special Rapporteur related the duty of cessation to two types of State conduct, actions and omissions. As far as omissions were concerned, the position was simply that the injured State was claiming its right to performance by demanding that the defaulting State should live up to its duties. No new obligation was involved. If enforcement were sought through a judicial procedure, the injured State would not be asserting a right different from that with which the respondent State had failed to comply. It was doubtful whether one could speak in that connection of "cessation". What the injured State expected was simply the performance of the original obligation. He agreed on that point with the remarks made by Mr. Barboza (2102nd meeting).

11. An obligation to cease actions that infringed the rights of other States must be seen in a slightly different light. In particular, such an obligation was found in instances where, through infringement of the prohibition of the use of force or intervention, the sovereign rights of another State had been encroached upon. In a case of that kind, the duty of cessation had specific characteristics which distinguished it from the primary rule concerned. Respect for the sovereign rights of other States could be called a general obligation which constituted the converse of the sovereignty of every State. Sovereignty as such, however, did not give rise to any claim *vis-à-vis* other States as long as it was respected. Only in the course of an infringement did specific, concrete rights come into existence, namely the right of the injured State to request that the unlawful

[4] Adopted at Nairobi on 26 June 1981 (see OAU, document CAB/LEG/67/3/Rev.5).

[5] *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.

interference be stopped and that any consequential damage be made good.

12. The famous *Trail Smelter* case[6] was a useful example. Canada had always been bound to respect the territorial integrity of the United States of America. Before the Trail Smelter started its noxious industrial activities, however, the United States did not have a specific claim against Canada in that respect. Such a claim originated in the deleterious fumes which crossed the border between the two countries. Another example was the case concerning *United States Diplomatic and Consular Staff in Tehran*, in which Iran's general obligation under article 29 of the 1961 Vienna Convention on Diplomatic Relations had evolved into the specific duty to "immediately terminate the unlawful detention"[7] of the United States personnel. Yet another example was the *Nicaragua* case: in deciding that the United States was under a duty "immediately to cease and to refrain from all such acts"[8] against Nicaragua that had been found to constitute breaches of legal obligations, the ICJ had referred exclusively to actions and not to any omissions on the part of the United States Government. Accordingly, one would be fully entitled to classify the right to request cessation as a "new right", falling under the rubric of secondary rules.

13. In that connection, he wished to draw attention to the case-law of the Court of Justice of the European Communities under article 169 of the EEC Treaty,[9] which was a rich source of inspiration. In the event of a member State of the European Economic Community failing to comply with its obligation to implement directives issued by the Community, and the Court of the Communities then finding that there had been a breach of the Treaty, the State concerned would be required to take appropriate measures for the execution of the judgment. Such a judgment gave rise to a new obligation.

14. Draft article 7 seemed to deal exclusively with the situation in which material damage had occurred. The outline proposed by the Special Rapporteur (A/CN.4/416 and Add.1, para. 20) suggested that cases of a purely legal injury would be dealt with in part 2 of the draft under the heading of "satisfaction" (chap. II, sect. 1 (*b*) (iii)). That point, however, could usefully be stated expressly in the article itself.

15. With regard to material impossibility of restitution, he was by no means convinced that municipal law should be disregarded altogether as being irrelevant. Of course, internal law could not preclude international responsibility, but the obligation of restitution might not extend to certain categories of acts. National judgments, in accordance with article 50 of the European Convention on Human Rights,[10] were a case in point. The Special Rapporteur referred to that problem in his report (*ibid.*, para. 94), yet thought that it should not affect the general rule of restitution. That approach meant that judgments by national courts which embodied a violation of international law had to be set aside or rescinded. Under article 50 of the European Convention on Human Rights, however, if internal law did not permit such action, just satisfaction was to be afforded to the injured party. The reasons adduced by the Special Rapporteur on that point were not entirely convincing. The problem was not whether a State could avoid its international responsibility by invoking municipal law. The issue was confined to the consequences attached to an internationally wrongful act. In the case of a judgment inconsistent with international law, the State concerned could be under an obligation to enforce the international obligation, but it might not be duty bound to set aside the judgment itself. It did have a duty to grant the injured party equitable satisfaction. The whole matter must obviously be examined more closely.

16. The CHAIRMAN, speaking as a member of the Commission, said that he joined other members in congratulating the Special Rapporteur on his rich and well-documented preliminary report (A/CN.4/416 and Add.1), which would give fresh impetus to the Commission's work on State responsibility. Given the growing importance of the topic, it would be helpful if, in future reports, the Special Rapporteur could deal with whole chapters, or at least sections, of his proposed outline for the draft, and if he could also submit his reports some weeks before the Commission's session started.

17. The Special Rapporteur had referred to three points on which he intended to depart from the outline previously envisaged by the Commission. First, the Special Rapporteur intended to make a sharper distinction between delicts and crimes, in order to stress the specific legal consequences of international crimes, and to devote a separate chapter to the legal consequences deriving from an international crime. That approach, which he endorsed, would be helpful in reformulating draft articles 14 and 15 of part 2, which had rightly been criticized by the General Assembly as being inadequate. He agreed that a more carefully elaborated chapter on the legal consequences of international crimes was needed, but it should be drafted in such a way that those consequences were not identified with the infliction of punishment, since it would be dangerous to regard the specific régime of State responsibility for the most serious violations of international obligations as a kind of criminal responsibility. Indeed, the Commission had deliberately avoided that expression from the outset, and it would be advisable to adhere to the same approach. It would also be advisable not to regard the object of countermeasures or reprisals as the infliction of punishment and not to accept punitive damages as a form of reparation. One of the advantages of the previous Special Rapporteur's approach had been that he had managed to avoid those cloudy waters, which were the playground for power politics.

18. Dealing with the legal consequences of international crimes in a separate chapter could cause problems when it came to drafting the articles, since many consequences might well be additional to those already defined in connection with international delicts. The words "in addition" might therefore be a useful tool in avoiding unnecessary,

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[6] For the arbitral awards of 16 April 1938 and 11 March 1941, see United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

[7] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3, at p. 44, para. 95.3 (*a*).

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, at p. 149, para. 292 (12).

[9] See *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

and otherwise inevitable, repetition. That drafting point could nevertheless be settled when the legal consequences of international crimes had been determined.

19. Secondly, the Special Rapporteur proposed to distinguish between substantive consequences and what he termed procedural or instrumental consequences, apparently taking the view that implementation measures, as hitherto understood by the Commission, could be identified as procedural or instrumental, and that they should be dealt with in part 2 of the draft. The Special Rapporteur also believed that part 3 could be confined to the settlement of disputes.

20. He agreed with the Special Rapporteur that the distinction between substantive and instrumental consequences was not absolute. Thus he could not accept the idea that reparation should be regarded as a substantive consequence and that the right to take reprisals, for example, was to be regarded as merely procedural because it served to secure cessation, reparation and guarantees against repetition. Such a controversial categorization should be avoided and was unnecessary in the draft.

21. Furthermore, reparation and countermeasures, which were consequential rights and had many common features, depended on an established violation of an international obligation, and procedural rules had to be applied in both cases. Reparation was not the only legal consequence of a wrongful act, nor was it the sole content of the relationship called State responsibility. The injured State also had a right, though not an unlimited right, to take countermeasures, which were also the legal consequence of a wrongful act and whose application depended mostly, if not entirely, on the non-fulfilment of the claim for reparation. Countermeasures could also be used to enforce the cessation of a wrongful act, to avert irreparable damage, to induce the other party to accept an agreed dispute-settlement procedure, and so on.

22. He therefore had serious reservations about treating reparation as the only substantive legal consequence of a wrongful act, and countermeasures as merely instrumental or procedural consequences to enforce reparation. That would reintroduce the old civil-law approach to State responsibility and, at the same time, lead to the criminalization of serious violations of international law. The special structure of international law, in which obligations and rules were the product of agreements between States, meant that responsibility must have a specific content involving reparation and the right to countermeasures, both being directed at guaranteeing the original obligation and ensuring compliance with that obligation in the event of a breach.

23. The third point on which the Special Rapporteur intended to depart from the previous outline concerned procedural rules, which were of two different kinds: one related to the implementation of the claim for reparation and the application of countermeasures, and the other to the settlement of disputes. Not only in the case of countermeasures, but also with regard to the claim for reparation, there had to be specific provisions defining the conditions for their application. The previous Special Rapporteur had rightly laid down a procedural condition for invoking reparation to the effect that a State claiming reparation must notify the State alleged to have committed the internationally wrongful act of its claim, and that the notification must indicate the measures required to be taken and the reasons therefor (draft article 1 of part 3). Such procedural rules could well be combined with the rules relating to the settlement of disputes in part 3 of the draft, since any dispute presupposed a claim, and there might be a need to exhaust dispute-settlement procedures at all points in the process under which State responsibility was invoked.

24. Accordingly, to make clear the process whereby effect was given to the legal consequences of an internationally wrongful act, it might be advisable to define the legal consequences in part 2, and the procedure for applying them and for solving any disputes that might arise at any point during that process in part 3. That approach had been followed in the previous Special Rapporteur's draft and by the Commission itself in referring the articles in question to the Drafting Committee. A similar method had also been adopted in sections 3 and 4 of part V of the 1969 Vienna Convention on the Law of Treaties. A different method had, however, been used in other treaties, such as the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities,[11] which contained a detailed description of the procedural steps with respect to implementation of the rights concerned and incorporated the rules on dispute settlement in a separate chapter. There were substantive and procedural aspects to the reparation claim and the right to apply countermeasures that differed from the rules on dispute settlement. He was not altogether happy, therefore, with the distinction drawn by the Special Rapporteur between substantive and procedural legal consequences and with his intention to confine part 3 to rules on dispute settlement. He would prefer to follow the approach adopted thus far by the Commission, concentrating in part 2 on determining the rights and duties that emerged as legal consequences of an internationally wrongful act and combining in part 3 rules for giving effect to those consequences with rules on the settlement of disputes that might arise during that process.

25. In his report (*ibid.*, para. 62), the Special Rapporteur sought the Commission's views on the new draft article 6 of part 2, on cessation, and on its place in the draft. According to the Special Rapporteur, cessation could not be regarded as part of a claim for reparation because the obligation to cease the wrongful conduct was not part of the content of international responsibility deriving from the so-called "secondary" rule, and the provision on cessation should merely emphasize the continued subjection of the wrongdoing State to the primary obligation.

26. Admittedly, a claim for cessation could derive from continuation of the obligation violated, although that was true, in a sense, of the whole relationship under State responsibility: in addition to the obligation violated, rights aimed at securing compliance were created. In his view, however, there was good reason to deal with the claim for cessation of an internationally wrongful act as part of, or at least in close connection with, the claim for reparation. As the Special Rapporteur himself stated, "the truth seems to be that one is confronted in many instances with a combination of remedies, particularly of cessation and restitution in kind" (*ibid.*, para. 49), and quite often measures

[11] *International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868.

taken to make reparation, and particularly restitution, necessarily included cessation of the wrongful conduct.

27. As was apparent from a number of instances in which the Security Council and the ICJ had ordered cessation, it would often be extremely artificial to draw a strict line between cessation and restitution. The decisions he had in mind related, for example, to demands for the withdrawal of South African troops from Angola and of Israeli troops from Lebanon, for the release of political prisoners in South Africa and in Namibia, for the termination of the *apartheid* régime and of the occupation of Namibia, for the immediate release of diplomatic personnel from the United States Embassy in Tehran, and for an end to military and paramilitary acts against Nicaragua. It was clear from such decisions that, whenever a violation extended over a period of time and cessation involved, at least in part, restoration of the legal situation, the claim to stop the violation coincided to a large extent with the claim for restitution. That, however, left the door open to further claims for damages which were often involved when an injunction to cease the unlawful conduct was accompanied by a reference to an obligation to make reparation. Typical examples were the findings of the ICJ in the *Nicaragua* case[12] and in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[13]

28. The fact that claims both for cessation and for restitution were rooted in the continuing existence of the obligation violated did not warrant the conclusion that the very essence of the provision on cessation was to stress the continued existence of the original obligation despite violation. To adopt such an extreme position was to ignore the new aspects contained in the claim for cessation. It was clear from the *dicta* of the Security Council and the ICJ that there was a difference between a general claim for respect for certain rights and a claim for the termination of specific conduct deemed to be in violation of those rights. A claim for cessation was more than just an affirmation of the continuance of the original obligation, since it involved new elements depending on the way in which the right had been violated. Such a claim pointed to a certain line of conduct and implied that that conduct was an internationally wrongful act, as borne out by the fact that cessation could be enforced by sanctions. The importance of new elements in the claim for cessation, which derived from the particular type of unlawful conduct and whose purpose was to stop a particular activity that was in breach of an international obligation, should not be underestimated.

29. A separate article on cessation was certainly justified by the special features of the claim for cessation. In his view, draft article 6 should remain where it was and not be moved to the chapter on general principles. Such a claim was part of, or at least a prelude to, the claim for reparation, and hence it would be wise not to separate it unduly from reparation and to bear the common elements in mind. That would also be in conformity with broad international practice.

30. It was not enough for article 6 to provide solely that the author State remained under the obligation of cessation. He would prefer to stress the new aspect which derived from the continuance and specific form of the obligation. That could be done by a reference to the right of the injured State or States to claim immediate cessation of the wrongful conduct. Admittedly, in the case of a breach of an obligation *erga omnes*, which might be a treaty obligation, all parties could claim cessation of the breach, unless otherwise stipulated by the treaty. He was not maintaining that they could not claim reparation in the sense of legal restitution, but a claim for further material damage would be confined to the victim State which had suffered special harm in addition to the general breach.

31. A further point concerned the limitation of article 6 to wrongful acts "of a continuing character". The Special Rapporteur had used a number of different expressions, including "wrongful acts characterized by duration in time" and "wrongful acts extending in time". The Commission, in the commentary to article 18 of part 1 of the draft, had used the expression "act which extends over a period of time" to refer to three different types of acts: acts of a continuing character; acts composed of a series of actions; and complex acts.[14] To cover those three categories of acts, the expression "act of the State extending in time" was used in the title of article 25 of part 1. He had doubts about the need to retain such a delicate distinction between acts which all extended over a period of time in part 1 of the draft. However, confining the claim for cessation to only one category—continuing acts—would make draft article 6 far too narrow. In the decisions of the ICJ and in the practice of States, claims for cessation had also been recognized in the case of a series of actions and of complex acts. For instance, the Court had not been concerned with whether the laying of mines in the internal or territorial waters of Nicaragua during the early months of 1984, and certain attacks on Nicaraguan territory in 1983 and 1984, constituted a continuing act or a series of actions: it had found a duty to cease and refrain from all such acts forthwith. Since there might often be a situation in which a series of actions or a complex act had to be treated simply as a continuing act, it would be preferable to reword article 6 so as to cover all wrongful conduct extending over a period of time, in the following terms:

> "The injured State has the right to claim from the State whose action constitutes an internationally wrongful act extending in time immediate cessation of the wrongful conduct."

32. The new draft article 7, on restitution in kind, provided a good basis for the work of the Drafting Committee, but it should also answer the question whether the claim was directed at restoring the *status quo ante* or a hypothetical status that would have existed had there been no violation. Inasmuch as the purpose of a claim for reparation was to wipe out the consequences of the wrongful act, the term "restitution" should perhaps not be interpreted so broadly. For practical reasons, and following the example of article 8, paragraph 2 (*a*) and (*d*), of the Convention on the Regulation of Antarctic Mineral Resource Activities,[15] the claim for restitution should be limited to restoration of the *status quo ante*, which could be clearly determined without prejudice to any compensation of *lucrum cessans*.

[12] See footnote 8 above.

[13] See footnote 7 above.

[14] See *Yearbook . . . 1976*, vol. II (Part Two), p. 88, para. (5) of the commentary.

[15] See footnote 11 above.

33. While he agreed with the Special Rapporteur that internal law as such could not be invoked to preclude restitution, some limitations were needed to ensure that a claim for restitution could not be used by aliens to restrict the right of a people to self-determination. He endorsed the approach adopted in paragraph 1 (*c*) and paragraph 2 of draft article 7, although the wording could be improved.

34. Lastly, paragraph 4 of article 7, under which the freedom of the injured party to choose compensation instead of restitution would be restricted if such a choice involved a breach of an obligation arising from a peremptory norm, should also refer to cases in which it involved a breach of an obligation *erga omnes* arising out of a multilateral treaty that would therefore affect the rights of the other States parties to the treaty. That point, to which the Special Rapporteur referred in his report (*ibid.*, para. 113), should not be left to the chapter on the legal consequences of crimes.

35. Mr. BARSEGOV thanked the Special Rapporteur for his very detailed and interesting preliminary report (A/CN.4/416 and Add.1), which was evidence of a high level of professionalism and sophisticated legal thinking. Since he was addressing the Commission on the topic of State responsibility for the first time, he felt he should point out that his own approach, and that of Soviet doctrine, to the question of State responsibility for internationally wrongful acts was based on the policy of strengthening international legality and the rule of law, a policy which had achieved new prominence since the Soviet Union had embarked on its programme of *perestroika*. It was that concern which explained his dissatisfaction with the slow pace of progress on the topic within the Commission: little had been achieved in the previous two years, and no substantial progress could be expected from the current session.

36. In submitting the new draft articles 6 and 7 on cessation and restitution in kind for part 2 of the draft, the Special Rapporteur had asked the Commission to confine its deliberations to international delicts, although the articles were so formulated as to apply to all internationally wrongful acts. That approach, he had explained, was merely a *modus operandi* based on the fact that the legal consequences of delicts were less problematic and constituted a more familiar subject. Although the report made reference to the advantages of such an approach—which it was, of course, the Special Rapporteur's prerogative to adopt—it was silent as to its obvious negative aspects, and he shared Mr. Roucounas's doubts (2103rd meeting) as to the appropriateness of making an artificial division in the consideration of the draft articles by discussing delicts alone without reference to crimes. Delicts were defined by reference to crimes: according to paragraph 4 of article 19 of part 1 of the draft, already adopted on first reading, international delicts were those internationally wrongful acts which were not international crimes. The consequences of a crime, on the other hand, must be defined in terms of the consequences of delicts, using the formula by which the consequences of a crime were the consequences of a delict plus those deriving from the applicable law.

37. Each type of wrongful act had its specific consequences which, depending on the case, could be distinguished not only according to their gravity, but also—and primarily—according to their nature and subject. If such differences were not taken into account, difficulties would arise in selecting remedies and, more importantly, in defining the substance of such remedies in the light of real situations.

38. The approach adopted might have the effect of dragging out the Commission's work on the topic, which would be regrettable at a time when the international situation offered an opportunity for the further strengthening of international legality and the rule of law.

39. In his view, a distinction should not be drawn between delicts and crimes, both of which were infringements of the norms of international law differing only according to scale or gravity. To confine the discussion to delicts, without dealing with problems common to all wrongful acts, would be difficult, not to say impossible.

40. In practice, all national penal codes were constructed on the following pattern: first the constitutive elements of the offence were indicated, and then, depending on the degree of gravity, the penalty was provided. Such a procedure in the present context would be difficult and time-consuming, but would ultimately justify itself. However, as every approach had its advantages and its drawbacks, it was up to the Commission to do its best using the approach adopted by the Special Rapporteur.

41. Turning to the specific issues raised by the new draft articles, he said that in his view the cessation of a wrongful act presupposed the need to determine the legal significance of cessation and to distinguish it as a legal remedy. He wished to emphasize the obligation of a State which had committed a wrongful act and of the right of the injured State and of the international community of States to demand cessation of the act.

42. The concept of responsibility in international law was based on the emergence of a new secondary obligation which consisted of the redress by the State committing the wrongful act of the situation resulting from that act, in other words the elimination of its consequences. That obligation implied the fullest compliance with the primary obligation, i.e. it did not entail the disappearance of the primary legal relationship in the form of the specific right of one party and the specific obligation of the other, which existed prior to the commission of the wrongful act. A breach of the law did not lead to the extinction of the law itself. It was precisely on the basis of that subjective right and the norms underlying it that the requirement arose of reverting to the primary obligation in order to eliminate the situation of a breach. Without such a legal foundation it would be difficult to speak of an obligation to discontinue the wrongful conduct.

43. Cessation of a wrongful act or of a crime as a distinct remedy was closely linked to the possibility of subsequent restitution, punishment or sanctions. The link between the cessation and restitution and other remedies would become clearer if a distinction were drawn between the actual cessation of the wrongful act itself and the juridical cessation of the state of breach, delict or crime, which intervened only after a full settlement of the issue, which might include restitution or other legal remedies.

44. While the distinction between cessation of the wrongful act and other remedies was relative, he agreed

with the Special Rapporteur that it had its positive aspect, which consisted mainly in the discontinuance of the harmful consequences of the act and the reduction of their scope. Obviously, the graver the wrongful act or crime, the more important it was to secure its prompt discontinuance.

45. The need to cease a wrongful act, especially a wrongful act of a continuing character, resided, in the Special Rapporteur's view, in the fact that any wrongful conduct, apart from having obvious direct and specific injurious consequences detrimental to the injured State or States, was a threat to the very rule infringed by the unlawful conduct. In other words, the norms of international law developed by States themselves were all the more vulnerable for being exposed to destruction as a result of violations by States. That was why the remedies under consideration were so important and why the significance of cessation of a wrongful act went beyond the level of bilateral relations to the level of relations between the wrongdoing State and all other States as members of the international community.

46. The Special Rapporteur seemed to place the obligation to cease a wrongful act somewhere "in between" primary and secondary rules. In the Special Rapporteur's view, cessation of the wrongful act must be related, both as an obligation and as a remedy for breaches of international law, not to the effect of a so-called secondary rule which acquired legal force by virtue of the commission of the wrongful act, but to the continuous and normal effect of the primary rule violated by the wrongful conduct. That was a position with which it was possible to concur, provided it was recognized that the processes concerned were linked and that they paralleled each other. The obligation to cease the wrongful act was the other side of the obligation to behave in a specific way. In other words, the rule "Behave properly" might be expressed in the form "Do not behave improperly".

47. The natural conclusion was that, in the interests of enhancing the effectiveness of legal remedies for a wrongful act, it would be appropriate if cessation of the breach and *restitutio in integrum* were retained as two distinct but interrelated categories of remedy for a breach of the rules of international law or of international obligations.

48. The provisions of draft article 6, on cessation, could be accommodated in chapter I (General principles) of the proposed outline for part 2 of the draft (A/CN.4/416 and Add.1, para. 20), but might perhaps be more appropriately left in chapter II. At the same time, it was necessary to specify the legal meaning of cessation: article 6 seemed to limit itself to its factual aspect.

49. The Special Rapporteur had linked the issue of the restoration of a legal situation to restitution, pointing out in paragraph 3 of draft article 7 that no obstacle deriving from the internal law of the State which committed the internationally wrongful act might preclude by itself the injured State's right to restitution in kind.

50. Such elementary issues as the nature of cessation should not be neglected. The draft articles should contain a provision to the effect that restoration of the situation that had been violated presupposed not only the factual discontinuance of the act, but also abrogation of the illegal formal acts, both international and national, which were based on the breach of international law. Those acts should be regarded as having no legal validity *ab initio*. National laws, administrative regulations and court decisions which infringed the rules of international law were subject to abrogation, annulment or amendment. Such an approach was based on recognition of the primacy of international law over internal law and on the premise that the international obligations of States took precedence. From that point of view as well, the provisions of paragraph 3 of draft article 7, although unobjectionable in themselves, were not enough.

51. If the question of cessation seemed relatively simple, the same could not be said of restitution. Specific problems arose from the private-law form of the institution, which led in his view to some confusion between the notions and institutions relevant to legal relations of a public character and those relevant to private civil law. Although he had reverence for the legal genius of Rome and the highest regard for Roman civil law, the possibility of importing the concepts of that law into the totally different area of inter-State relations had its limits as considerable difficulties would arise with respect to the content of those concepts.

52. It was not clear whether restitution would also apply to international crimes. If restitution broadly meant restoration of the situation which existed before the breach, the question arose whether its implications were purely material, financial or property-related, or could it assume public-law or politico-legal dimensions? It was therefore important to clarify what types of State responsibility were involved, and what was the subject of restitution. It should be borne in mind that, in doctrine, a distinction was made between two forms of responsibility: material and non-material. The Commission would have to recognize that, in real situations, the reparation of a breach would involve taking into account a variety of specific circumstances which did not find material expression in the narrow sense of that term.

53. One solution would be to distinguish between material and legal restitution; but it was important to understand the purpose of such a distinction, and what was intended by the notion of legal restitution. Resolving such issues called for a unified concept based on the fact that the forms of responsibility constituted a means by which the legal situation violated by the wrongful act was to be restored, and that the form was determined by the nature of the wrongful act.

54. In the case of annexation, for example, would the return of State territory to an injured State constitute restitution in kind? And what were the implications of the concept in the case of such internationally wrongful acts as genocide, the forcible transfer of a population or changes to the demographic composition of a foreign territory? In such instances, would financial compensation be regarded as an adequate form of restitution in kind? How could the dead be brought back to life? Should a State having committed the crime of genocide be given as a bonus the territory of the people which it had reduced to the condition of a minority through the commission of that crime? The law was often silent on such issues because the applicable rules had not yet been drawn up. The Commission's aim should be to establish rules that could be invoked in such situations.

55. Similar problems arose with regard to international delicts. Everything depended on what kind of international

obligations had been violated and on whether the case involved situations such as the seizure of a vessel or the arrest of a foreign citizen, or the extremely complex legal problems raised by the politico-legal relations between States. Such problems merited specific study and should be taken into account when formulating the general rule.

56. It had been decided not to consider questions relating to international crimes, but the effect of ignoring them might be to render the exercise abstract, remote from reality and prone to distortion.

57. On the question of the scope of restitution, he said that he would be in favour of according it a broader and more comprehensive function as a legal remedy. There were many possibilities for new approaches in that respect, provided the issue was not confined within the bounds of the rules and institutions of civil or Roman law. In addition, attention should be drawn to the need for a reciprocal relationship between restitution and an actual breach of the law, which would exclude the possibility of recourse to the institution of restitution as a means of political pressure. That should not, however, enable a State which had committed an internationally wrongful act to evade its responsibility on the grounds that recourse to restitution would pose a serious threat to its political, economic or social system.

58. Mr. PAWLAK, referring to the general plan for the topic adopted by the Commission at its twenty-seventh session, in 1975,[16] said that the results of the Commission's work on part 1 of the draft, dealing with the origin of international responsibility, were very positive, and he supported the principles defined in chapter I of part 1. Articles 1, 3 and 4 thereof represented significant progress in codifying the basic rules of State responsibility.

59. However, the principles in part 1 did not by any means exhaust the wealth of customary international law deriving from State practice and from the decisions of international courts. Every State had its own rights and obligations, and a breach of an obligation entailed responsibility for that State. Likewise, every State had a duty to respect the rights of other States, and a corresponding right to demand that other States respect its own rights. In its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had recalled the finding of the PCIJ that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[17] It could therefore be inferred that even the much-valued part 1 of the draft warranted thorough review by the Commission on second reading, so as to ensure that the articles reflected the principles and norms which now applied both in customary international law, such as contemporary State practice and United Nations practice, and in international treaty law, such as the Vienna conventions adopted after the Chernobyl disaster.

60. As for part 2 of the draft, on the content, forms and degrees of international responsibility, he endorsed the Special Rapporteur's general approach. On the whole, the innovations introduced and the changes made to the method followed by the previous Special Rapporteur seemed logical. He did not fully agree with the proposal to deal separately with the legal consequences of international crimes and of international delicts, although it might help to accelerate the Commission's work on the draft articles. The Special Rapporteur's proposed distinction between the rights and obligations of States pertaining to cessation and to various forms of reparation could be adopted as a working hypothesis for the time being. He could also accept the Special Rapporteur's arguments in favour of devoting the whole of part 3 of the draft to dispute settlement.

61. The new draft articles 6 and 7 formed the first stage in the new outline of part 2 proposed by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1, para. 20). They required thoughtful analysis, both from the conceptual point of view and for the purpose of uniformity in drafting. It was disappointing, however, that only two articles had been submitted to the Commission so far.

62. From a comparison of the new article 6 with paragraph 1 of draft article 6 as submitted by the previous Special Rapporteur, it could be seen that cessation now emerged as a separate legal concept. The previous Special Rapporteur had proposed, in effect, that the discontinuance of the internationally wrongful act should be left to the decision and competence of the injured State, whereas the present Special Rapporteur was seeking to place a general obligation on States to cease an action or omission which constituted an internationally wrongful act. That approach could lead to the conclusion that the obligation of cessation was not a legal consequence of an international delict or crime, and that it should be treated as a general principle of State responsibility. If so, it should be placed in part 1 of the draft and be formulated accordingly. A rule of cessation was important both for the injured State and for other States with an interest in relying on and preserving the relevant primary rule of international law.

63. He agreed, on the whole, that cessation should cover any wrongful act extending in time, not only delicts. Hence he could not entirely agree with the Special Rapporteur that there could, in practice, be separate rules of cessation for international delicts and for international crimes. The same approach should be adopted to cessation of both kinds of internationally wrongful acts.

64. The Special Rapporteur seemed to be concerned in the new draft article 7 only with the material aspect of State responsibility. A much broader approach was needed. State practice drew a ready distinction between political, material and moral responsibility for internationally wrongful acts committed by States. From a political point of view, a State that was injured by an internationally wrongful act might take non-material steps, such as breaking off diplomatic relations with the author State. Violations of international law might themselves have political, material or moral dimensions. During the Second World War, millions of people had been forcibly taken to Germany from occupied territories to be used as forced labour. Material compensation for those crimes had not been fully made even now, yet to confine restitution for them to their material dimension would be quite insufficient. Acts of aggression, being the most serious violations of international law, had consequences more far-reaching than material reparations. The victorious States

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

[17] *I.C.J. Reports 1949*, p. 174, at p. 184.

in an armed conflict might impose limitations on the sovereignty of the defeated State, for example by occupying its territory, securing reparations, and introducing measures designed to eliminate the aggressive forces in that State. Such measures could create conditions whereby the defeated State would, in future, be enabled to conduct a peaceful policy in accordance with international law. All such non-material aspects should be taken into account in drafting the articles of part 2 and the problem of *restitutio in integrum* should certainly not be confined to its material aspects.

65. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked members for the comments made so far. Some of them related to points which were not covered in his preliminary report (A/CN.4/416 and Add.1) but would be amply dealt with in his second report, which he intended to submit during the present session. The second report would contain chapters on reparation by equivalent, satisfaction, and guarantees of non-repetition. He also hoped to touch on the problem of fault, and the extent to which both fault and damage were involved in questions of reparation.

66. There would have been no reason to deal expressly with moral damage in the new draft article 7. However, the article did refer to "injuries", which included any kind of damage or loss, whether material or moral, suffered by the nationals of the injured State. Moral damage to a State itself was also covered by the provisions on *restitutio*, and would be emphasized in the second report. It was not correct, therefore, to say that restitution for moral injuries had been omitted. Nor was it correct to assert that the articles on cessation and restitution ruled out the environment as a subject of protection under the rules of State responsibility. Environmental protection was a topic that should certainly be submitted for inclusion in the Commission's long-term programme of work and it must take pride of place among the topics chosen for the progressive development and codification of international law. It had also been said that the preliminary report and the new articles proposed did not cover the problem of interest, but that was clearly a matter to be dealt with in conjunction with pecuniary compensation and not in connection with *restitutio in integrum* as defined in the report. As for the remark made by one member concerning human rights, he failed to understand what exactly it meant in relation to the report and draft articles under discussion.

67. The timing of his reports had admittedly been unsatisfactory, at both the previous and present sessions. However, there were inherent difficulties, well known to members of the Commission, in the progressive development and codification of topics of international law. Many years had elapsed between the start of the work on codifying the present topic and the adoption of part 1 of the draft on first reading. Moreover, the parts of the draft entrusted to the previous Special Rapporteur, Mr. Riphagen, and to himself were undeniably the most difficult. Whereas part 1 had tackled that "static" aspect of the topic which was the definition of internationally wrongful acts, parts 2 and 3 were intended to cover the consequences of such acts, namely the essential core of the rules of State responsibility and their implementation. An example—just one among many—was notably the distinction between delicts and crimes. While that distinction had been easy to formulate in article 19 of part 1, it became much more problematic when one had to determine, in parts 2 and 3, the rules covering the specific consequences of the acts qualified as crimes and the implementation of those consequences. The only conclusion so far reached by both his predecessor and himself was that the régimes governing delicts and crimes were the same up to a certain point, but neither of them had been ready to determine the point at which those régimes differed. State practice and doctrine offered little guidance on the consequences of international crimes.

68. It was most unlikely that, in the third (1990) report, he would be able to advance as far as draft article 15 of part 2 and the five draft articles of part 3. Any attempt to do so would inevitably be flawed by insufficient study of the relevant doctrine, jurisprudence and diplomatic practice. Practice was notably sparse on the matter of satisfaction. The decision lay with the Commission: either it could allow sufficient time for the study, or it could decide to expedite the drafting of the articles, in which case little significant progress would be made in the progressive development and codification of the topic. As for the forthcoming second report, it would focus on the substantive consequences of internationally wrongful acts, as distinct from measures or countermeasures taken by the injured State.

69. He agreed that the exact definition and theory of cessation were not easy matters and that it was not entirely clear where cessation should be placed in the draft. It should, however, be distinguished from the questions of *restitutio in integrum*, reparation by equivalent, satisfaction and guarantees of non-repetition.

70. Mr. BARSEGOV asked whether the Special Rapporteur would agree that it would be more logical not to refer the new draft articles to the Drafting Committee until the work on related questions had also reached draft form. Secondly, he wondered whether the Special Rapporteur intended, in his further work, to include specific examples of international crimes such as those listed in paragraph 3 of article 19 of part 1 of the draft.

71. Mr. EIRIKSSON asked whether the Special Rapporteur intended to cover the role of reprisals in the next stage of his work.

72. Mr. ARANGIO-RUIZ (Special Rapporteur), in reply to Mr. Barsegov, said that, since the Drafting Committee already had before it the previous draft articles 6 and 7, it would be best to refer the new ones to it as well. When the Committee was ready to deal with them, it would have before it also the draft articles submitted in the forthcoming second report, namely those on pecuniary compensation, satisfaction and guarantees of non-repetition. The Committee would have sufficient material to work on. Secondly, on the question of specific crimes, it was not yet clear how crimes of State were to be defined in relation to State responsibility, although cessation was even more important for crimes than for delicts. Certainly he intended to include examples of international crimes, such as wilful damage to the environment.

73. As to Mr. Eiriksson's question, reprisals would be covered in the third (1990) report, together with measures—a term which he preferred to "countermeasures".

74. The CHAIRMAN queried, along the lines of Mr. Barsegov's question, whether there was any purpose in

referring to the Drafting Committee articles which might be wholly altered.

Programme, procedures and working methods of the Commission, and its documentation (*concluded*)*

[Agenda item 9]

75. The CHAIRMAN announced that the members of the Working Group to consider the Commission's long-term programme of work (see 2095th meeting, para. 24) would be Mr. Al-Khasawneh, Mr. Díaz González, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat. The Working Group would elect its own chairman and would submit a report in due course to the Planning Group.

76. Mr. KOROMA said that he would prefer to have been consulted before the membership of the Working Group was decided.

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

[Agenda item 1]

77. The CHAIRMAN said that the Commission would be able to revert the following week to the question of the list of war crimes to be included in the draft Code of Crimes against the Peace and Security of Mankind (see 2102nd meeting, para. 39).

The meeting rose at 1.05 p.m.

* Resumed from the 2095th meeting.

2105th MEETING

Friday, 19 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. THIAM said that he would confine his remarks to three aspects of the topic: injury, the distinction between international crimes and international delicts, and the cessation of the internationally wrongful act.

2. With regard to injury, it might be asked what place the Special Rapporteur was assigning to it in the draft. The articles first proposed on the subject had sparked off considerable controversy, which had since abated but had not wholly died down. The Special Rapporteur was, so to speak, on a moving train and found himself at a stage in the work where it was appropriate to raise the problem once again. He was suggesting an outline for part 2 of the draft (A/CN.4/416 and Add.1, para. 20), but that part should begin with some provisions on the concept of injury, so as to link up with part 1. The transition from part 1 to part 2 was based on the concept of the injured State, and that presupposed that injury had occurred, although no provision dealt with the nature, characteristics or limits of such injury. It would be advisable for the Special Rapporteur to clarify his position on that point.

3. In part 1, the distinction between an international crime and an international delict had been made for the purposes of analysis and classification. There was, however, no clear-cut dividing line between the two concepts, especially from the point of view of the consequences. Some consequences were common both to crimes and to delicts, but there were others that were peculiar to crimes. It was the common consequences that should therefore be dealt with first: the obligation to discontinue the wrongful act, in the case of a continuing breach or an act of a repetitive or complex nature; and the obligation to provide reparation, in its various forms, namely *restitutio in integrum*, compensation or satisfaction. In the case of the consequences peculiar to crimes, there were, above all, effects *erga omnes*: the obligation to withhold legal recognition from the situation brought into being by the crime (occupation, annexation, etc.); the obligation not to lend assistance to the author

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting, para. 40.