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Summary record of the 2169th meeting

Topic:
State responsibility

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68. Lastly, he reserved the right to comment later on draft article 9, which could not be confined to dealing with the case of "compensation due for loss of profits" (para. 1). The term "profits" was much too restrictive, since there existed other earnings, benefits, etc. which could be lost and thereby provide grounds for reparation.

The meeting rose at 1 p.m.

2169th MEETING

Wednesday, 6 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/425 and Add.1,[2] A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)[4] (*continued*)

1. Mr. RAZAFINDRALAMBO congratulated and thanked the Special Rapporteur for his valuable second report (A/CN.4/425 and Add.1) and for his oral introduction (2168th meeting), which had made the report easier to understand.

2. Chapter I of the report dealt with moral injury to the State and the distinction between satisfaction and compensation. He shared the Special Rapporteur's view that reparation by equivalent also covered moral damage to the persons of nationals or agents of the injured State, as an integral part of the principal damage suffered by that State: the examples given in support in the report (A/CN.4/425 and Add.1, para. 10) and in the Special Rapporteur's introduction were conclusive. As to moral damage inflicted directly on the State, there was no doubt that it was specific damage which was different from that caused to the State's nationals or agents, as well as from material damage caused to the State itself. As convincingly shown by the Special Rapporteur, moral damage of that kind was both "legal" and "political" in that, first, it was the result of a breach of an international obligation *vis-à-vis* the injured State and, secondly, it was an offence against the honour, dignity and prestige of that State. Legal writings and case-law were unanimous in recognizing that such damage required a specific form of reparation designated by the generic term "satisfaction".

3. Chapter II dealt with reparation by equivalent, a form of reparation applicable where *restitutio in integrum* was not possible and consisting in pecuniary compensation equivalent to the value of the damage caused. The term generally used in French to designate that form of reparation was *indemnisation*. However, since that term was used both in the case of responsibility for the breach of an international obligation and in the case of liability for injurious consequences arising out of acts not prohibited by international law —such as nationalization—the Special Rapporteur had done well to propose the expression "reparation by equivalent". No useful purpose would be served by reviewing all the issues raised by that form of reparation: the list given in the report (*ibid.*, para. 22) seemed exhaustive and covered all the legal aspects that were worth considering in the present instance. He would therefore make only a few comments.

4. He would not take sides in the doctrinal dispute as to whether there were any specific rules of international law relating to the various aspects of the problem of reparation by equivalent. As the Special Rapporteur pointed out, however, while the number and variety of concrete cases led one to exclude the actual existence *de lege lata* of very detailed rules, that did not exclude the possibility of reasonably developing any such rules (*ibid.*, paras. 28-29). The formulation of such rules was all the more desirable in that, as the Special Rapporteur so wisely indicated, the topic of State responsibility dealt with so-called "secondary" legal situations, with regard to which any State could find itself with an equal degree of probability either in the position of offending, responsible State or in the position of injured State, both of which would share the same

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

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook ... 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) 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.

[4] For the texts, see 2168th meeting, para. 2.

"prospective" or "hypothetical" interests (*ibid.*, para. 33).

5. The study of arbitral practice and legal writings had led the Special Rapporteur to reject the distinction between direct and indirect damage in favour of a "clear", "continuous" and even "uninterrupted" causal link. The Special Rapporteur nevertheless stressed that the concepts of the "normality" and "predictability" of the damage also had to be taken into account. Although the subjective requirement of predictability seemed to prevail in judicial practice, the Special Rapporteur considered that the causal relationship must be "immediate" and "exclusive", or simply "exclusive" when the injuries were linked "by a series of events each exclusively linked with each other by a cause-and-effect relationship" (*ibid.*, para..42). In view of all those qualifying elements, which were none the less probably justified by the uncertainty of the case-law on the question of causality, some confusion was quite normal, at least when it came to making a choice. He was not sure that the term "uninterrupted" used by the Special Rapporteur might not be taken to mean "without a break", which would be difficult to reconcile with the idea of a "series of events". He was also not sure whether it should be left to the court to impose the dual requirement of "normality" and "predictability", which was not referred to in draft article 8. The Special Rapporteur appeared to be resigned to the solution of leaving it to the court to choose from among the concomitant causes which had played a decisive but not exclusive role in the injury. He also gave arbitrators and diplomatic negotiators discretionary power in that regard. That might be an admission of helplessness that would hardly be compatible with the task of codifying the law.

6. The Special Rapporteur dealt with the conduct of the injured State not from the point of view of the rule of "contributory negligence" or the lack of "due diligence", but rather as an application of the rule of "concomitant causality". That position appeared to be in keeping with the approach he was advocating with regard to the impact of fault on compensation.

7. The report contained sufficiently clear and comprehensive explanations on the scope of reparation by equivalent and the concept of material injury suffered by the State, so that few comments were necessary. In particular, the Special Rapporteur had made a very interesting study of the concept of *lucrum cessans* and rightly noted that it was connected with the idea of profit and not with that of indirect damage. The analysis of judicial practice and legal writings had led the Special Rapporteur to conclude that *lucrum cessans* could in principle be the subject of compensation on the basis not only of the presumption of a cause-and-effect relationship between the wrongful act and the damage, but also of the presumption of the existence of profits in respect of which compensation was claimed. As the Special Rapporteur indicated, there were several methods of determining *lucrum cessans*. The main point was that the compensation should be as close as possible to the damage actually caused. In any event, it was difficult to make a choice, which would depend on the circumstances of the case, go beyond any codification and be a matter for judicial determination.

8. The Special Rapporteur had made a special analysis of the case of the expropriation of a going concern. In the context of the subject-matter, such an expropriation had to be unlawful. It was therefore not surprising that *lucrum cessans* would then be assessed on the basis of the principle of full compensation (*restitutio in integrum*) in the broad sense of the ruling handed down in the *Chorzów Factory* case (Merits) (*ibid.*, para. 72).

9. While the determination of compensation was governed by the general principle of full reparation for the damage, the same was not true of the assessment of *lucrum cessans* proper, in respect of which several methods could be applied, so that, as the Special Rapporteur pointed out, one arbitrator had ruled, apparently rightly, that that was "a question of fact to be evaluated by the arbitrator" (*ibid.*, para. 74). There could therefore be no question of including in the draft articles a provision relating to the method of assessing compensation, and in fact the Special Rapporteur had merely described the main methods of assessment used, in particular the discounted cash-flow method.

10. He had no particular comments to make on what the Special Rapporteur said with regard to the allocation of interest, the determination of the *dies a quo* and the *dies ad quem* and the rate of interest. He nevertheless thought that the allocation of interest was usually regarded as being intended to compensate for the additional damage suffered by the victim as a result of the period of time which elapsed between the occurrence of the injurious, i.e. wrongful, act and the final payment of compensation. In such a case, interest was allocated on the compensation as a whole without any distinction between *damnum emergens* and *lucrum cessans* and it was paid as of the date of the damage, the date of the claim or the date of the award. Not infrequently, such interest was calculated on the whole of the compensation assessed, including, in the event of unlawful expropriation, compensation for loss of profits, as in *Benvenuti et Bonfant* v. *People's Republic of the Congo* (1980). However, the Special Rapporteur seemed to place greater emphasis on the case of a claim regarding a sum of money, for example capital, and on the fact that, in such a case, interest was awarded in order to compensate the loss of earnings resulting from the non-availability of that capital. That was the case that was apparently dealt with in draft article 9. The Special Rapporteur therefore appeared to have opted, with regard to the *dies a quo*, for a different solution from the three points of departure for interest accepted in practice. He had to confess that he had some difficulty in understanding the scope of the wording proposed by the Special Rapporteur in that regard.

11. As to the rate of interest, he was inclined to agree with the opinion expressed by Subilia (*ibid.*, para. 97) that it could be useful to refer to the lending rate laid down annually by the World Bank, since that rate had the advantage of being accepted by practically all States. It should be noted, however, that the Special Rapporteur, apparently rightly, had not considered it

necessary to mention a given rate of interest in draft article 9.

12. Chapter III of the report dealt with satisfaction as a specific mode of reparation. In view of the moral and political nature of that form of reparation, the Special Rapporteur had carried out a scholarly and exhaustive analysis of legal writings, international case-law and diplomatic practice. The analysis showed that satisfaction was undoubtedly of an "exemplary", "punitive" and "vindictive" nature and that it was quite different from modes of compensatory reparation such as restitution and reparation by equivalent. To use the term repeatedly employed by the Special Rapporteur, satisfaction was of an "afflictive" or punitive nature. The word "afflictive" seemed to have been taken by the Special Rapporteur from Morelli (*ibid.*, para. 144 *in fine*). The meaning of that term was etymologically clear, but its use was somewhat doubtful. The term was habitually used in the French criminal-law expression *peines afflictives et infamantes* and meant, according to the Robert dictionary, a penalty which affected the criminal in his body and life (*qui frappe le criminel dans son corps, sa vie*). The afflictive nature was thus reflected in physical suffering or discomfort and, in that regard, could be applied to all penalties involving deprivation of freedom. An afflictive penalty could, however, apply only to a physical person. In the case under consideration, therefore, it would be inappropriate to use the word "afflictive". Although use of the word "afflictive" might be confusing for Roman-law jurists and the word "punitive" would be more than enough, he could agree that the term "afflictive" should be taken in the figurative sense and placed systematically in quotation marks. In any event, he agreed with the Special Rapporteur that satisfaction should be dealt with specifically in the part of the draft articles relating to the legal consequences arising out of an internationally wrongful act.

13. In chapter IV, the Special Rapporteur had carried out an equally well-documented and persuasive analysis of the need to include among the consequences of an internationally wrongful act guarantees of non-repetition of the act. Of the various types of guarantees that could be required, he had referred to explicit requests made by international bodies for the amendment of existing legislation or the adoption of new legislation, and, in his oral introduction, he had referred to the "*Rainbow Warrior*" case. In that connection, he had also mentioned the complaints procedure under the Optional Protocol to the International Covenant on Civil and Political Rights. In that case, however, what were involved were complaints by private individuals. A much more relevant example was provided by the procedure set forth in articles 26 to 34 of the Constitution of the International Labour Organisation and relating to complaints filed by one member State against another member State. That procedure involved the establishment of a commission of inquiry whose conclusions might be as binding as recommendations of the International Labour Conference itself and be aimed at the amendment of the legislation or practices complained of or the adoption of measures to remedy certain irregular situations. An example had been the complaint lodged by France against the Government of Panama with regard to the application of certain maritime conventions. It was therefore entirely appropriate to assign guarantees of non-repetition an autonomous role in relation to other forms of reparation.

14. In chapter V, the Special Rapporteur considered the problem of attribution of fault to a State and explained his position in that regard. First of all, in part 1 of the draft articles, the Commission had not "excluded" fault from the constituent elements of an internationally wrongful act; in that connection, the Special Rapporteur cited article 31 (*Force majeure* and fortuitous event), which in his view contained an implicit reference to fault. It was difficult to agree unreservedly with that interpretation: *force majeure* and fortuitous event were concepts that presupposed the absence of any "fault" and also, in his own view, the absence of a violation of an obligation giving rise to responsibility. They might have a place within the system of "objective responsibility" based on an "internationally wrongful act". In that regard, the Special Rapporteur had undertaken a clear and concise analysis of the respective merits of the "fault theory" and the "objective theory" and had given an original interpretation of the attribution of conduct to a State, namely that it involved a simple operation carried out by a foreign-office lawyer or by an international judge called upon to interpret the law. On that point, the Special Rapporteur had apparently merely described the intellectual exercise normally engaged in by the person called upon to interpret the law in a particular case, noting the result of that exercise without questioning the basis of the responsibility in question. However, as pointed out in the study prepared by the Secretariat on "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", the concept of "internationally wrongful act", with both its elements (subjective and objective), had been generally accepted as the point of departure for the rules of international law governing State responsibility for international wrongs both by those favouring the subjective fault theory and by those supporting the "objective theory".[5] He believed that there was therefore no need at the current stage to consider whether and to what extent the element of fault should be taken into account in the definition of an internationally wrongful act. In his view, what the Commission should determine was the effect of the fault element on the forms and degrees of reparation. In that connection, the relevance of such an element to reparation was, as noted in the above-mentioned study, recognized by many writers, including those who favoured "objective" responsibility. The Special Rapporteur also cited some concrete and significant examples which attested to the fact that international jurisprudence took account, at least implicitly, of the effect on pecuniary compensation of the so-called "subjective" element of an internationally wrongful act.

[5] *Yearbook ... 1978*, vol. II (Part One), p. 201, document A/CN.4/315, para. 511.

15. He fully endorsed the conclusion which had been drawn by the Special Rapporteur from the study of jurisprudence and diplomatic practice and which confirmed the views of many writers that the so-called "subjective" element represented by fault in a minor or major degree had played a significant role with regard to both the coming into play of satisfaction and the quality and number of the forms of satisfaction claimed (*ibid.*, para. 188).

16. It would also be worth answering the question posed by the Special Rapporteur (*ibid.*, para. 190) as to whether and to what extent fault on the part of a low-ranking State agent was, according to jurisprudence, a fault of the State itself or whether jurisprudence indicated that the responsibility of the State was predicated on a merely objective basis. Actually, however, the problem would seem to be of mainly theoretical interest in so far as the Commission chose, as he trusted it would and as the Special Rapporteur invited it to do, if only in the interests of the progressive development of international law, to take account of the so-called "subjective" element to some extent in the case both of pecuniary compensation and of the coming into play of satisfaction.

17. Turning to the proposed articles, he expressed his preference for alternative A of paragraph 1 of draft article 8 (Reparation by equivalent), since alternative B, which dealt both with the pre-existing situation not re-established by restitution in kind and also with any damage not covered by restitution in kind, was redundant. He had no objection to paragraph 2, but would have liked paragraph 3 to include a specific reference to the direct, normal and reasonable nature of loss of profits. Paragraph 4, which apparently completed the preceding paragraph on the requirement of a causal link, was actually concerned with an uninterrupted causal link. The Special Rapporteur therefore saw no need to refer to the concepts of normality and predictability, which might make the paragraph somewhat too general in scope. Paragraph 5 was mainly concerned with the negligence of the injured State. He would not express an opinion on the content of the concept of negligence, regarded by some as a form of subjective fault and by others as linked to non-compliance with an international obligation of vigilance, but wondered why the Special Rapporteur had not dealt in paragraph 5 with the aggravating circumstances of an internationally wrongful act, which could increase compensation.

18. Draft article 9 (Interest) dealt only with interest intended to compensate for loss of profits. Why had the Special Rapporteur decided not to include a more general provision whereby interest could accrue to compensate for further damage arising by virtue of the fact that there was a lapse of time between the wrongful act and the final settlement? In the restricted context of *lucrum cessans*, the *dies a quo* proposed by the Special Rapporteur in paragraph 1 seemed to differ from the three solutions referred to in the report (*ibid.*, paras. 82 *et seq.*) and regarded as those generally adopted in national and international practice. The formula proposed in paragraph 2 with regard to compound interest, which could remain valid in the context of a general provision on interest, would be clearer if the second part of the sentence formed a separate subparagraph, reading: "The interest rate applied shall be the rate that is the most appropriate for ensuring full compensation." It would be followed by a second subparagraph, reading: "Compound interest shall be awarded for that purpose."

19. Given the many and varied forms of satisfaction, the list drawn up at the end of paragraph 1 of draft article 10 (Satisfaction and guarantees of non-repetition) should be purely indicative, with the word "including" being added after the words "adequate satisfaction". Also, the form of satisfaction provided for in paragraph 3 should be the subject of a provision that would come immediately after paragraph 1.

20. Mr. CALERO RODRIGUES, commenting first on a point of terminology, noted that, in the very first paragraph of his second report (A/CN.4/425 and Add.1), the Special Rapporteur announced that he would deal with the "substantive consequences of an internationally unlawful act". In his preliminary report (A/CN.4/416 and Add.1, para. 20), however, he had proposed an outline of work for part 2 of the draft containing a chapter II entitled "Legal consequences deriving from an international delict", which would include a section 1 entitled "Substantive rights of the injured State . . .". In the latter case, the word "substantive" seemed to have no other purpose than to distinguish those rights from "procedural" rights, in other words from "measures to which resort may be had in order to secure cessation . . .", the subject of section 2. He did not know whether the word "substantive" was used in paragraph 1 of the second report with the same limited intent, but at least it called attention to a distinction that might be of some importance when the Commission entered into the detail of the consequences of an internationally wrongful act in part 2 of the draft articles.

21. All the consequences with which the Commission was dealing could be said to be legal consequences, since they were the result of the operation of legal rules. If the Commission went a little deeper, however, consequences that operated purely on the legal plane could be called legal consequences. The legal situation had to be redressed and the legal relationship restored. In some cases, however, the internationally wrongful act might cause material damage and a simple re-establishment of the pre-existing legal situation might not suffice to redress it. The obligations created in such cases could be referred to as substantive consequences, which differed from legal consequences *stricto sensu*.

22. The consequences of an internationally wrongful act as proposed by the Special Rapporteur comprised cessation, restitution in kind, reparation by equivalent, and satisfaction, including guarantees of non-repetition. The first consequence operated only on the legal plane and was a legal consequence *stricto sensu*. The second operated on both the legal and the material planes: it was therefore partly legal and partly substantive. The other two consequences were not designed to change the legal situation and operated on the material plane only in the case of reparation by equivalent and on the

moral plane in the case of satisfaction. That distinction should serve to dispel the doubts the Special Rapporteur seemed to entertain. In his preliminary report, he had noted that "restitution in kind does not always constitute necessarily, *in concreto*, the adequate, complete and self-sufficient form of reparation of an internationally wrongful act" (*ibid.*, para. 117). In other words, if restitution in kind was indispensable to redress the situation on the legal plane, it might not be effective outside that plane. That was why the Special Rapporteur stated in his second report that "reparation by equivalent, or pecuniary compensation, is the main and central remedy resorted to following an internationally wrongful act" (A/CN.4/425 and Add.1, para. 2). As a legal consequence *stricto sensu*, *restitutio* was irreplaceable; as a substantive consequence, reparation by equivalent might prove more effective.

23. The Special Rapporteur drew on many authorities in emphasizing the essentially compensatory function of reparation by equivalent. It could even be said that it should have an exclusively compensatory function. As stated in the second report, it should cover "the 'material' injury suffered by the offended State which has not already been covered and is not coverable by restitution in kind" (*ibid.*, para. 52). In that connection, he noted, with regard to the explanations concerning use of terms given by the Special Rapporteur in paragraph 3 and footnote 4 of the second report, that the Commission should use the word "damage" to refer to material or moral *préjudice* and the word "injury" to refer to legal *préjudice*. The question, however, was how to determine which damage should be compensated for. The two elements traditionally mentioned did not seem very useful. One was the distinction between direct and indirect damage which, though it had been used for a long time, raised more problems than it solved. The other was the concept of "predictability". The Special Rapporteur was inclined to accept that criterion, which, in his view, "prevails in judicial practice", and as a "clear example" of it he mentioned the *Portugese Colonies* case (Naulilaa incident) (*ibid.*, para. 38). That was a controversial case, however, as was apparent from the sources cited by the Special Rapporteur himself. In any event, predictability introduced an element of subjectivity which should be avoided. In fact, in summing up the causal-link criterion (*ibid.*, para. 42), the Special Rapporteur did not mention predictability. In the case of "concomitant causes", considered from the standpoint of compensation, only partial damages should be paid in view of their relative effectiveness.

24. Those concepts, which were inherent in the principle of compensation, were set forth in paragraphs 4 and 5 of draft article 8. While the drafting of those paragraphs might need some revision, he agreed with their substance, for they established the relationship between the State that committed a wrongful act and the State that suffered damage as a consequence of that act.

25. In its other paragraphs, article 8 was intended to indicate when reparation by equivalent intervened, what damage should be compensated for and what compensation should be paid. The first question was dealt with in paragraph 1. The two alternatives proposed for that paragraph seemed to differ only in their wording. He preferred alternative A because it was shorter, but its wording could be improved.

26. Paragraph 2 of article 8 stated that pecuniary compensation should cover "any economically assessable damage to the injured State ... including any moral damage sustained by the injured State's nationals". In saying that the damage to be covered should be "economically assessable", the provision was surely not trying to give instructions to courts on how to assess damage. It was simply stating the obvious but fundamental principle that, in order to be compensated for in pecuniary terms, damage had to be capable of being assessed in economic terms. But, in that case, what was the situation with regard to "moral damage"? In the report, the Special Rapporteur stated that "the practice and literature of international law show that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated for as an integral part of the principal damage suffered by the injured State" (*ibid.*, para. 9) and cited, *inter alia*, the "*Lusitania*" case (*ibid.*, para. 10) and the *Heirs of Jean Maninat* case (*ibid.*, para. 12). In his own view, however, those were extreme cases. More often, the tendency was to try to assess non-patrimonial damage in terms of its economic or material aspects or consequences, which could serve as a basis for calculating compensation. That was what had happened in the *Corfu Channel* case (*ibid.*, para. 57) and in the "*Lusitania*" case (*ibid.*, para. 56). In instances of death or physical injury, as in cases of detention, etc., it was relatively easy to assess in pecuniary terms the damage to be compensated for. It was, however, practically impossible to do so in cases of mental suffering, such as humiliation, shame or degradation. That did not mean that, in such cases, the injured person should not claim satisfaction (in the general sense indicated in paragraph 18 of the report); but treating such satisfaction as reparation by equivalent was not in keeping with the principle that reparation by equivalent was of an exclusively compensatory nature.

27. For that reason, he did not agree with the proposal in paragraph 2 of article 8 that pecuniary compensation should cover "any economically assessable damage ... including any moral damage sustained by the injured State's nationals". The text should read either: "... any economically assessable damage to the injured State or to its nationals"; or "... any material damage to the injured State or to its nationals". The reference to "moral damage sustained by the injured State's nationals" should be transferred, in one form or another, to draft article 10, which dealt with satisfaction and referred to the possibility of "nominal or punitive damages" (para. 1). As the Special Rapporteur himself pointed out, citing several examples in support, "situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as 'satisfaction' rather than pecuniary compensation" (A/CN.4/425 and Add.1, para. 17). Thus, if the

reference to "moral damage sustained by the injured State's nationals" were deleted from paragraph 2 of article 8, all that would be left would be the obligation to compensate for material or "economically assessable" damage, and that was the essential function of reparation by equivalent.

28. The concept of material damage nevertheless had to be developed further, and that was done in paragraph 3 of article 8 and in article 9. Paragraph 3 of article 8 dealt with the general question of *damnum emergens* and *lucrum cessans*. That question was dealt with masterfully in paragraphs 63 to 76 of the report, which did honour to the Special Rapporteur and the Commission. It was precisely on account of the high quality of that analysis that he did not feel entirely satisfied with paragraph 3 of article 8, which, although he could not say exactly what was wrong with it, left him with the feeling that something was missing.

29. Draft article 9 gave rise to doubts of a far more precise nature. The Special Rapporteur devoted a considerable part of his report to the question of interest. On the question itself there seemed to be little doubt. As the Special Rapporteur pointed out, "authors seem to agree that interest on the amount of compensation for the principal damage is due under international law not less stringently than under municipal law" (*ibid.*, para. 77); and he added that "International practice seems to be in support of awarding interest in addition to the principal amount of compensation" (*ibid.*, para. 80). Article 9 took that for granted in paragraph 1, but then went on to deal with two very controversial questions, that of the *dies a quo* and the *dies ad quem* of the interest and the problem of compound interest. After reviewing various decisions and doctrinal analyses, the Special Rapporteur came to the conclusion that the *dies a quo* should be the date of the damage and the *dies ad quem* the date on which compensation was actually paid (*ibid.*, paras. 92 and 94). While the *dies ad quem* was clearly indicated in paragraph 1 (*b*) of article 9, the definition of the *dies a quo* in paragraph 1 (*a*) was a good deal less clear.

30. As to compound interest, paragraph 2 of article 9 stated that it should be awarded "whenever necessary in order to ensure full compensation" and that "the interest rate shall be the one most suitable to achieve that result". That formulation would be of little use to States or courts except as an indication that the possibility of including compound interest in an award was not excluded. In section A.3 of chapter II of the report (*ibid.*, paras. 26 *et seq.*), the Special Rapporteur reviewed the problems relating to the determination of rules of general international law regarding reparation by equivalent and the role which the Commission could play in the codification of such rules and in the progressive development of international law through the draft articles under consideration. His optimism could be shared, but with some caution. It could thus be asked whether the provisions on interest were not too detailed to be included in the draft, even if some of them—paragraph 2 of article 9 in particular—did not establish very clear rules. Paragraph 3 of article 8, with regard to which he had confessed to some embarrassment, might perhaps be recast in such a way as to incorporate a reference to interest. In that case, article 9 could be dispensed with altogether.

31. In conclusion, he said that he would devote the remaining part of his analysis to draft article 10, on satisfaction and guarantees of non-repetition. He would continue his statement at a later meeting.

32. Mr. JACOVIDES said that, while the topic of State responsibility belonged to the category of classical international law and was firmly based on long practice and a wealth of judicial decisions, it had particular topical significance at the present time. It was therefore doubly important to examine the topic in earnest in order to complete its consideration as soon as possible.

33. He wished to make two points by way of general observations. The first was that, once the Commission had completed its work on the topic, many of the problems encountered in the preparation of the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on international liability of injurious consequences arising out of acts not prohibited by international law would have been solved or would be seen in a different light. That was yet another reason for proceeding at a more rapid pace with the study now in progress.

34. The second point was that the days were gone when State responsibility had concentrated on injury done to aliens and had catered to the needs of a small number of powerful developed States, often at the expense of weaker and less developed States. With the development and acceptance of the concept of *jus cogens* in the 1969 Vienna Convention on the Law of Treaties and the existence of hierarchically superior rules as set out in the Charter of the United Nations, the topic of State responsibility now had a much broader foundation. Moreover, the ICJ also recognized that there were obligations *erga omnes* and that the interests of the international community as a whole needed to be duly taken into consideration. The present topic was thus an illustration of the progressive development of international law.

35. The Commission should ensure that the expectations of the international community and, in particular, of new States which had come into existence after the classical rules of international law on the topic had been formulated were not disappointed. It had to keep pace with contemporary concepts in international law, such as that of international crimes, as well as with current developments on the international scene, and should not be slow in recognizing the opportunities provided by recent positive shifts in the attitudes of the major Powers, which now accepted the concept of compulsory third-party dispute settlement. That effective and expeditious procedure, which, for reasons of political reality, had in the past eluded the international law community in such areas as the law of treaties and the law of the sea, was now within reach. The Commission should aim at including such a system in part 3 of the draft articles under consideration, dealing with implementation and the settlement of disputes, or even in the body of the draft convention itself.

36. To the earlier draft articles on cessation of an internationally wrongful act (art. 6) and restitution in

kind (art. 7)—and, there, he entirely agreed with the idea that restoration of a situation through restitution in kind should be given priority wherever restitution was practical and legally possible or, indeed, indispensable where there had been a violation of *jus cogens*—the Special Rapporteur had, in his second report (A/CN.4/425 and Add.1), added three draft articles accompanied by a wealth of material and an excellent analysis of that material.

37. Of the alternative texts proposed for paragraph 1 of draft article 8, on reparation by equivalent, he would opt for alternative A. The issues involved in the proposed articles had given rise to an interesting and, in some respects, lively debate. Mr. Graefrath (2168th meeting) had thus given some thought-provoking facts and figures to illustrate the problems involved in the use of the words "economically assessable damage" in paragraph 2 of article 8. He had also made a cogent case against incorporating in draft article 10 the concept of "punitive damages", which, although based on past practice, might not have a place in contemporary law. That example illustrated the comment he had made earlier about the relationship between the draft Code of Crimes against the Peace and Security of Mankind and State responsibility. The element of punishment and, consequently, of punitive damages in the case of an international crime would come more naturally under the draft code than under reparation or satisfaction as dealt with in the context of State responsibility.

38. In conclusion, he reserved the right to make additional comments at a later stage in the debate.

The meeting rose at 11.20 a.m. to enable the Drafting Committee to meet.

2170th MEETING

Thursday, 7 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/425 and Add.1,[2] A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)[4] (*continued*)

1. Mr. TOMUSCHAT said that the Special Rapporteur's analysis in his excellent second report (A/CN.4/425 and Add.1) was largely based on the precedents of arbitral awards as from the beginning of the nineteenth century. The report was almost exhaustive inasmuch as some very little known cases had been unearthed. In that strength, however, lay a weakness: the subject-matter of most of the arbitral proceedings in question consisted of claims in respect of alleged damage to the property of aliens or alleged bodily harm or loss of life affecting aliens. Thus, in terms of private law, the bulk of the cases referred to in the report were cases of tort. The report contained very little material on different situations, in which there had been simply a violation of a rule of international law not directly related to harm done to a concrete good. An example would be the conclusion of a disarmament treaty between States A and B, following which State A scrapped, among other equipment, 1,000 tanks. It then discovered that State B had failed to keep its disarmament promises. Thus State A's legally justified hopes of savings on armaments were confounded. It was not certain how that situation, where the aggrieved party had caused the damage itself, was to be assessed in the light of the draft articles. Certainly, injured State A could suspend or terminate the treaty or resort to reprisals, but the question was whether it had a right to financial compensation. Practice did not seem to support such a right.

2. One could imagine another example in which two States agreed to merge, but, at the last moment, before actual implementation of the plan, one of them decided to remain a separate entity. Could the other, which had hoped for a substantial increase in gross national product, raise a claim for the resultant loss? It was

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

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook ... 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) 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.

[4] For the texts, see 2168th meeting, para. 2.