Document:-
A/CN.4/SR.2081

Summary record of the 2081st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

the summary records of the session, which appeared in final form in volume I of the Commission's *Yearbook*.

73. He suggested that the secretariat should inform the conference services of the Commission's wish to receive the summary records punctually during its sessions. In the event of some summary records not being circulated by the end of the session, the competent services would be urged to adopt a flexible approach regarding the time-limit for corrections. Those services would also be asked to take due account of corrections submitted by members in their own working languages before finalizing the records in the other languages.

74. Mr. KALINKIN (Secretary to the Commission) said that the best way for the secretariat to deal with the matter would be to insert an appropriate paragraph in the Commission's report on the current session. That paragraph would reflect the views expressed during the present discussion on the problem of the circulation of summary records and the submission of corrections to them.

75. Mr. BEESLEY said that perhaps matters should be brought to the attention of the Economic and Social Council, which was at present meeting in Geneva and was responsible for co-ordination in the United Nations.

76. Mr. KALINKIN (Secretary to the Commission) pointed out that, since the Commission was a subsidiary body of the General Assembly, the appropriate way to deal with organizational matters was to record the views of members in the Commission's report to the Assembly. The Legal Counsel would then be in a position to make representations to the Under-Secretary-General having responsibility for all the conference services of the United Nations.

77. The CHAIRMAN suggested that the Commission should adopt that course, and request its Rapporteur and the Chairman of the Planning Group to draft a paragraph for inclusion in the report. The Commission would have an opportunity of discussing the text of that paragraph when it considered its draft report. If there were no objections, he would take it that the Commission agreed to adopt that suggestion.

It was so agreed.

The meeting rose at 1 p.m.

2081st MEETING

Tuesday, 19 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/L.420, sect. F.2)

[Agenda item 3]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the topic (A/CN.4/415).

2. Mr. OGISO (Special Rapporteur), after giving a brief account of the history of the topic, recalled that, at its 1972nd meeting, on 20 June 1986, the Commission had provisionally adopted on first reading a complete set of draft articles on jurisdictional immunities of States and their property,[3] and that the draft articles had been transmitted, through the Secretary-General, to Governments, with a request for them to submit their comments and observations by 1 January 1988.

3. By 24 March 1988, comments and observations had been received from 23 Member States and Switzerland.[4] In his preliminary report (A/CN.4/415), he analysed those comments and recommended some amendments to the draft articles which would enable a consensus to be reached on the texts. In preparing his report, he had also taken into consideration national and international instruments on State immunity and the diverse views expressed in the Sixth Committee of the General Assembly.

4. The previous Special Rapporteur had submitted to the Commission eight reports based upon the idea that there were two kinds of acts of States, namely *acta jure imperii*, to which immunity from jurisdiction applied, and *acta jure gestionis*, to which it did not apply. On that point, the discussion in the Sixth Committee, as well as written comments by Governments, revealed certain basic differences of opinion between those who favoured the so-called "restrictive" theory of State immunity and those who supported the theory of "absolute" immunity. Thus Belgium, the Federal Republic of Germany, the United Kingdom and Switzerland believed that there was a tendency in international law to limit the immunity of a State from the jurisdiction of the courts of another State and therefore held that recent international and national practice should be reflected in the draft articles. It should be noted that the legal position in question was not confined to theoretical writings and court decisions; it was also reflected in legal instruments, such as the 1972 Euro-

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

[2] *Ibid.*

[3] See *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

[4] These comments and observations, together with those received from five other Member States during the present session, are reproduced in document A/CN.4/410 and Add.1-5.

pean Convention on State Immunity,[5] and in a number of national legislations, in particular those of the United States of America, the United Kingdom, Canada, South Africa, Pakistan, Singapore and Australia.

5. The opposite view was held by States such as Bulgaria, China, the German Democratic Republic, the USSR and Venezuela, which considered that the goal of the future convention was to reaffirm and strengthen the concept of the jurisdictional immunity of States, subject to certain clearly stated exceptions. In their view, replacing that principle by the concept of functional immunity would considerably weaken the effectiveness of the basic principle, and they advocated keeping the number of exceptions to a minimum.

6. As he recalled, members of the Commission had agreed during the first reading of the draft articles not to plunge too deeply into a theoretical and abstract debate on the respective merits of the two theories of immunity and to concentrate rather on concrete problems, trying to identify the activities to which immunity from jurisdiction should apply and those to which it should not. The problem in that connection was that, at the present stage in the development of international law, it was not possible to classify all State activities into one or other of those categories, so that some grey area would inevitably remain. Nevertheless, that approach was the surest, and perhaps the only, way of reconciling two opposite positions and achieving the objective of the future convention, namely, as stated by China, "to strike the necessary balance between the limitation and prevention of abuses of national judicial process against foreign sovereign States and the provision of equitable and reasonable means of resolving disputes" (A/CN.4/410 and Add.1-5).

7. The views of Governments diverged in particular with regard to article 6 (State immunity) and the title of part III of the draft, "[Limitations on] [Exceptions to] State immunity". Article 6, after enunciating the principle of State immunity, indicated that it applied subject to the provisions of the other articles, in other words of part III of the draft. However, the Commission would now have to decide whether to retain or delete the words "and the relevant rules of general international law", which had been placed in square brackets at the end of the article. Ten States supported retention of the words, while nine were in favour of deleting them. The former, including the United Kingdom, adduced "the need to maintain sufficient flexibility to accommodate further developments in State practice and the corresponding adaptation of general international law" (*ibid.*). The latter pointed to the risk of the expression "the relevant rules of general international law" being interpreted unilaterally. He himself had some sympathy for the arguments of the first group, but, in view of the fact that a grey area would remain between two categories of State activities, the fears of the second group were justified from the practical standpoint. The draft should endeavour to establish in a clear-cut and balanced way the principle of immunity, on the one hand, and the appropriate limitations or exceptions, on the other. The words in question could lead to controversy not only on matters pertaining to the grey area, but also on matters relating to limitations or exceptions. He therefore proposed that those words be deleted. However, since international law in the present field was undoubtedly at the stage of development, one solution would perhaps be to follow the suggestion of Spain (*ibid.*) and deal with the question in the preamble to the future convention. Moreover, deletion of the words in question should be viewed in conjunction with article 28 (Non-discrimination) and the possible future articles on the settlement of disputes: acceptance of those articles could to some extent help to maintain a balance between the two different points of view.

8. As to the title of part III of the draft, the Commission had retained two alternatives. One, "Limitations on State immunity", was preferred by Cameroon, the Nordic countries and the United Kingdom. The latter, in particular, considered that part III was intended to deal with cases in which international law did not recognize that the State had jurisdictional immunity. The other alternative, "Exceptions to State immunity", was supported by Brazil, the Byelorussian Soviet Socialist Republic, the German Democratic Republic, Thailand and Yugoslavia, for whom it was a logical consequence of the doctrine of absolute immunity. In his opinion, during first reading the Commission had attached disproportionate importance to the choice of a title, perhaps because some members feared that that choice might influence the doctrinal orientation of the discussions on other aspects of the topic. It would be easier to make a choice after all the concrete and individual issues had been settled, without prejudice to the doctrinal position of various Governments.

9. Having made those general remarks, he wished to touch on the main problems arising from the various articles, starting with the problem of definitions.

10. In that connection, he agreed to the suggestion by Australia and the Byelorussian SSR to merge articles 2 and 3. In his report, he recommended a new combined text for article 2 (A/CN.4/415, para. 29).

11. As to the substance of the new article 2, the question remained as to the definition of the term "State" (para. 1 of former article 3) and of the expression "commercial contract" (para. 1 (*b*) of former article 2 and para. 2 of former article 3).

12. Governments had raised three problems regarding the definition of the term "State". First, the Federal Republic of Germany had pointed out that the draft contained no specific provisions for federal States, unlike the 1972 European Convention, for example. He had no objection to including in the future convention a provision of that kind, but would like to have the Commission's opinion on the matter. The second question raised by Governments was that of the conditions under which political subdivisions of a State, or agencies or instrumentalities of a State, should enjoy immunity from jurisdiction. In that regard, he pointed out that the Federal Republic of Germany, for example, considered that such entities could invoke immunity only when acting in the exercise of sovereign authority (*acta jure im-*

[5] Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

perii), and that the United Kingdom asserted that those entities were entitled to jurisdictional immunity only *ratione materiae*. The other position was that any such entity, if it was invested at all with sovereign authority, automatically became invested also, *ratione personae*, with all the jurisdictional immunity of the parent State. He could accept either interpretation, but the point had not been extensively discussed during first reading and he would welcome comments from members. Moreover, if his proposal to introduce a new article 11 *bis* (*ibid.*, para. 122) dealing with the third problem raised by Governments, namely that of State enterprises with segregated State property, was accepted, a new provision would have to be added at the end of paragraph 1 (*b*) (iii) of the new article 2. For that provision, he proposed the following wording, drawn from article 27 of the 1972 European Convention on State Immunity:

> "A State enterprise which is distinct from the State, which has the right to possess and dispose of segregated State property and which is capable of suing or being sued shall not be included in the agencies or instrumentalities of that State, even if that State enterprise has been entrusted with public functions."

That proposal would appear in his next report.

13. The Drafting Committee had chosen the expression "commercial contract" in preference to "commercial activity", the formula used by the previous Special Rapporteur in his second report.[6] He did not deem it necessary to reintroduce the term "transaction": whether one spoke of "contract", "activity" or "transaction", the substance was the same. Thailand and Switzerland had criticized the definition of "commercial contract" as being tautological. He accepted that criticism and proposed that the adjective "commercial" be deleted from paragraph 1 (*b*) (i) of former article 2.

14. Many Governments had criticized paragraph 2 of former article 3 because it made the purpose of the contract the test of its commercial character. Those Governments felt that the only test should be the nature of the contract, and he drew attention in that connection to the arguments put forward by Australia, Qatar and the United Kingdom (A/CN.4/410 and Add.1-5). A review of the position taken with respect to those tests in recent national legislation showed, for example, that, in United States law, the commercial character of an activity was determined by reference to its nature and not its purpose. The law of the United Kingdom and the 1972 European Convention contained no express provision on the question. Nevertheless, it was the practice of European courts to apply the test of the nature, and not the purpose, of the activity. The clearest example was the decision in 1963 by the Federal Constitutional Court of the Federal Republic of Germany in a case concerning a claim against Iran, in which the court had stated that the distinction between acts *jure imperii* and acts *jure gestionis* could only be based on the nature of the act of the State or of the resulting legal relationship, not on the motive or purpose of the State activity.[7] Another much-quoted example was the judgment rendered in 1961 by the Austrian Supreme Court in which it had decided to adopt as a criterion not the purpose of the act, but its "inherent nature".[8] In a recent lecture, Professor Schreuer of the University of Salzburg had said that recent court practice revealed that, in nearly all cases, the wider context or purpose of the transaction in question had been discarded in favour of the type of transaction or the nature of the activity.

15. Personally, he had no fundamental difficulty in setting aside the purpose test and leaving only the test of the nature of the contract. He would point out, however, that the matter had been discussed at length both in the Commission and in the Sixth Committee and that paragraph 2 of former article 3 was the result of a compromise proposed by the previous Special Rapporteur. Moreover, a number of developing countries preferred the purpose test. He therefore feared that complete elimination of the purpose test, although theoretically justifiable, might give rise to further difficult discussions. For example, in the case of a contract for the implementation of a development-aid project, or a contract implementing emergency famine relief, the purpose criterion could be helpful. Accordingly, in view of the criticism of the wording of paragraph 2 of former article 3, criticism levelled largely at the reference to the practice of the State, which was held to be ambiguous, subjective and therefore inapplicable, he had reformulated the purpose criterion in paragraph 3 *in fine* of the new article 2 (A/CN.4/415, para. 29). He would welcome comments on that matter at the next session.

16. A final point raised with regard to commercial contracts related to article 11 (Commercial contracts) and to the new article 11 *bis* (Segregated State property) (*ibid.*, para. 122). Article 11 stipulated the most important exception to State immunity by providing that a State did not enjoy immunity when it entered into a commercial contract with a foreign natural or juridical person. He believed that the article posed no fundamental difficulties, subject to some drafting changes he proposed in paragraph 1 (*ibid.*, para. 121) in order to take account of the observations of certain Governments and also to simplify to some extent the present text, which had been framed under the influence of the theory of consent.

17. Article 11 *bis* was built round a concept that was new in the draft, namely that of "segregated State property", and drew on the observations of the Governments of socialist countries, in particular the Soviet Union and the Byelorussian SSR. Notwithstanding article 11 of the USSR constitution of 1977, which was cited in his report (*ibid.*, para. 14), he believed he could infer from those observations that, in the event of a

[6] See *Yearbook . . . 1980*, vol. II (Part One), p. 206, document A/CN.4/331 and Add.1, para. 33 (draft article 2, para. 1 (*f*)), and pp. 211-212, para. 48 (draft article 3, para. 2).

[7] Judgment of 30 April 1963 in *X* v. *Empire of . . .* [Iran] (*Entscheidungen des Bundesverfassungsgerichts* (Tubingen), vol. 16 (1964), p. 62; trans. in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 288).

[8] Judgment of 10 February 1961 in *X* [Holubek] v. *Government of the United States* (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 44; trans. in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 205).

dispute relating to a commercial contract, a State enterprise, like a natural person, was subject to the jurisdiction of a court of the forum State with respect to the segregated property placed in its possession. It was in the light of those considerations that he proposed article 11 *bis*, with regard to which he would welcome the views of members and which no doubt called for drafting improvements. The article, which had to be read together with the new article 2, could help to strike a proper balance between the "restrictive" and "absolute" theories of State immunity.

18. As to other important articles, he proposed to delete from article 12 (Contracts of employment) the reference to social security provisions, which did not seem essential. In view of the comments by Belgium and the Federal Republic of Germany, he also proposed to delete paragraph 2 (*a*), as well as paragraph 2 (*b*), since he agreed with the observation by the Government of the Federal Republic of Germany that paragraph 2 (*b*) cast doubt on the usefulness of article 12 itself. He therefore proposed an amended text for article 12 (*ibid.*, para. 133).

19. With regard to article 13 (Personal injuries and damage to property), he drew attention to the proposals on transboundary injury or damage made by Australia, the Federal Republic of Germany and Thailand. He doubted whether the presence of the author of the act or omission in the territory at the time of the deed could be legitimately considered as a necessary criterion for the exclusion of State immunity and had therefore eliminated that criterion in the amended text he proposed for article 13 (*ibid.*, para. 143).

20. In his fifth report,[9] the previous Special Rapporteur had made it clear that paragraph 1 (*c*), (*d*) and (*e*) of article 14 (Ownership, possession and use of property) mainly concerned the legal practice in common-law countries. In his own opinion, it was doubtful whether they reflected universal practice. If the Commission wished the practice of common-law countries to prevail, he would propose that the subparagraphs in question be amended so as better to reflect existing practice, and he accordingly recommended a new text for paragraph 1 (*ibid.*, para. 156). If, however, the Commission took the same view as the USSR, namely that paragraph 1 (*b*), (*c*), (*d*) and (*e*) could open the door to foreign jurisdiction even in the absence of any link between the property and the forum State (A/CN.4/410 and Add.1-5), he would propose that the four subparagraphs be deleted. In practice, it would always be possible for the common-law countries to solve the problem by applying the principle of reciprocity provided for in article 28 (Non-discrimination). That question could be examined at the next session.

21. Article 15 (Patents, trade marks and intellectual or industrial property), article 16 (Fiscal matters) and article 17 (Participation in companies or other collective bodies) had not been the subject of any comments as to substance and they appeared to be generally acceptable, subject to some possible drafting changes.

22. In connection with article 18 (State-owned or State-operated ships engaged in commercial service), the United Kingdom, the Federal Republic of Germany and the five Nordic countries (*ibid.*) were opposed to the term "non-governmental", which had been placed in square brackets in paragraphs 1 and 4. Thailand, on the other hand, was in favour of retaining it. Personally, he found that the term "non-governmental" introduced an element of ambiguity and therefore proposed that it should be deleted. In that regard, the 1926 Brussels Convention[10] (art. 3) and the 1982 United Nations Convention on the Law of the Sea (especially arts. 32, 96 and 236) had drawn a distinction between State-owned commercial and non-commercial vessels, but not between government vessels and non-government vessels. The Federal Republic of Germany had made detailed suggestions for the article which he proposed to refer to the Drafting Committee for further examination.

23. Article 19 (Effect of an arbitration agreement) had been the subject of many critical comments and he wished to clarify its meaning. First, the article related to the so-called "implied waiver" whereby a State agreed in writing to submit a dispute to arbitration in the forum State. Accordingly, he proposed that the words "that State cannot invoke immunity from jurisdiction" be replaced by "that State is considered to have consented to the exercise of jurisdiction", so as to make it clear that the effect of the arbitration agreement was considered as implied consent. Secondly, the court of the forum State had to be construed as a court of another State on the territory—or according to the law—of which the arbitration had taken or would take place. It should be noted that the same limitation was contained in article 12 of the 1972 European Convention on State Immunity. Thirdly, the proceedings referred to in article 19 had to relate to the three matters mentioned, namely (*a*) the validity or interpretation of the arbitration agreement; (*b*) the arbitration procedure; (*c*) the setting aside of the award. Hence the question whether a State could invoke immunity from jurisdiction before a court of the forum State in a proceeding with respect to the recognition and enforcement of the arbitral award remained open, and the answer depended on the arbitration agreement itself. As to the words placed between square brackets, he believed that the expression "civil or commercial matter" was preferable to "commercial contract", in view of the comments made by a number of Governments.

24. For the reasons he had already stated in connection with article 18, the term "non-governmental" in square brackets in subparagraph (*a*) of article 21 (State immunity from measures of constraint) and in paragraph 1 of article 23 (Specific categories of property) should be deleted. He was also in favour of deleting from article 21 the phrase "or property in which it has a legally protected interest", which appeared between square brackets, because its meaning was not clear. His proposal for a new article 11 *bis* and

[9] *Yearbook . . . 1983*, vol. II (Part One), pp. 48 *et seq.*, document A/CN.4/363 and Add.1, paras. 116 *et seq.*

[10] International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 173 *et seq.*).

the consequential amendment to article 2 (see para. 12 above) might perhaps meet the objections of the USSR and the German Democratic Republic to article 21.

25. He proposed a new formulation for paragraph 2 of article 23 (A/CN.4/415, para. 240) in view of the comments by the German Democratic Republic. As he recalled, the previous Special Rapporteur had proposed article 23 in order to protect the developing countries from giving consent to measures of constraint on their property as a result of a misunderstanding. He therefore suggested that property in any of the five categories listed in paragraph 1 should not be the object of enforcement measures, even with the consent of the defendant State. In addition, to avoid extending immunity to all property of central banks, he proposed to add the words "and serves monetary purposes" at the end of paragraph 1 (*c*).

26. Contrary to his original intention, lack of time meant that he would not submit specific proposals at the present session on the question of the settlement of disputes. He would do so in an addendum to his preliminary report at the next session.

27. Mr. BARSEGOV thanked the Special Rapporteur for his preliminary report (A/CN.4/415) and for his introduction.

28. He wished to point out that the USSR had to be added to the nine States listed as being in favour of deleting the words "and the relevant rules of general international law" in square brackets in article 6 (State immunity) (*ibid.*, para. 61). Accordingly, there were 10 Governments in favour of retaining them and 10 against. He would also like to know whether the Special Rapporteur intended, in his next report, to make specific proposals on reducing the number of exceptions to immunity. Lastly, with regard to segregated State property, he would pass on to the Special Rapporteur all the relevant legislative texts and asked whether the Special Rapporteur could, in his report to the next session, introduce that notion into the draft articles as a whole, not confining it to article 11 *bis*.

29. Mr. OGISO (Special Rapporteur) thanked Mr. Barsegov for his offer. He did, of course, intend to make specific proposals on reducing the exceptions to immunity and would do so in an addendum to his preliminary report to be submitted at the next session. His proposal on the question of segregated State property would be worked out in the light of the discussion at the next session.

30. Mr. BENNOUNA thanked the Special Rapporteur for his preliminary report (A/CN.4/415). With regard to the presentation, he would have liked the Special Rapporteur to annex to the report the texts of all the draft articles adopted on first reading, and to indicate in the report the references for the sources cited and the extent to which his proposals took account of the comments made in the Commission and in the Sixth Committee of the General Assembly. It would also have been helpful if the Special Rapporteur had provided a consolidated analysis of the comments made by Governments. He expressed the hope that the Special Rapporteur would supplement the preliminary report before the next session, so as to make it a more comprehensive document and one that was easier to consult.

31. Mr. KOROMA congratulated the Special Rapporteur on his endeavours to reconcile views and to arrive at compromise solutions. His preliminary report (A/CN.4/415) moved in the right direction.

32. In view of the large number of developing countries that were interested in the topic and had had to defend cases in the courts in developed countries, it would have been useful to take account not only of the judgments—the relevance of which was not challenged—but also of the arguments advanced by the developing countries, so as to provide a general picture of their position.

33. It was gratifying that the Special Rapporteur had not given in to the temptation to engage in a doctrinal debate on the principle of the immunity of States, which was not contested. The Commission should confirm the principle, together with some exceptions.

34. As to the criterion for a commercial contract, the best test was the purpose, rather than the nature, of the contract. In that connection, he noted the exception the Special Rapporteur admitted, for example, in the case of contracts for the emergency supply of foodstuffs in the case of famine, and contracts for the implementation of development-aid projects (see para. 15 above). Such contracts could not be regarded as profit-making.

35. The CHAIRMAN thanked the Special Rapporteur for his excellent introduction of his preliminary report, which would without doubt help the Commission in its future work. He was confident that the Special Rapporteur would take due note of the comments made.

State responsibility (A/CN.4/414,[11] A/CN.4/416 and Add.1,[12] A/CN.4/L.420, sect. F.1)

[Agenda item 2]

Parts 2 and 3 of the draft articles[13]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

36. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the topic (A/CN.4/416 and Add.1), as well as the new articles 6 and 7 of part 2 of the draft contained therein, which read:

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

[12] *Ibid.*

[13] 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 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.

Article 6. Cessation of an internationally wrongful act of a continuing character

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

Article 7. Restitution in kind

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

(*a*) is not materially impossible;

(*b*) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(*c*) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

(*a*) represent a burden out of proportion with the injury caused by the wrongful act;

(*b*) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (*c*) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would confine himself to the essential elements of his preliminary report (A/CN.4/416 and Add.1), giving priority to chapter II, which dealt with the problem of cessation of an internationally wrongful act and restitution in kind, and chapter III, which contained new draft articles 6 and 7 for part 2 of the draft. Only then would he endeavour to illustrate the points of method raised in chapter I.

38. The new draft articles 6 and 7 represented the minimum coverage for two of the elements of the progressive development and codification of the law on the present topic, namely the obligations of the wrongdoing State and the rights of the injured State in regard to cessation and reparation, as distinguished from the latter State's powers to take any measures to obtain reparation or impose a penalty on the wrongdoing State. That distinction, obviously a relative one, was explained in his report (*ibid.*, paras. 14-15 and 18), but he would have to revert to it. At the present stage, the distinction made it clear that he was dealing for the time being with what the wrongdoing State was bound "to do" or "to give" and what the injured State was entitled "to get", regardless of the means to which it was entitled to resort in order to secure cessation of the act or reparation of the injury, or to inflict any sanction. It was still too early to think of "measures", or "countermeasures" as some called them. The difficulties encountered so far in connection with the consequences of an internationally wrongful act stemmed precisely from disregard of that distinction, and from the tendency, quite widespread among publicists, to "rush" into the realm of measures before covering such vital substantive matters as cessation, reparation and/or punishment.

39. The substantive consequences of an unlawful act, namely cessation and the various forms of reparation, were dealt with all together in draft articles 6 and 7 of part 2 as submitted by the previous Special Rapporteur. Nevertheless, since article 7 was intended merely to set forth an exception—admittedly a major exception—to the general obligation to provide restitution in kind, the whole set of substantive consequences (restitution in kind, compensation, and so on) was covered by paragraph 1 of article 6, while paragraph 2 covered the relationship between restitution in kind and pecuniary compensation. However commendable the conciseness of those provisions, they had therefore seemed inadequate in terms of codification, let alone progressive development, of the law. Moreover, at the Commission's thirty-eighth session, in 1986, the Drafting Committee had not been able to agree on wording for article 6, despite the endeavours to disentangle cessation from reparation, and particularly from restitution in kind. Better results might be achieved if separate and more articulate provisions were worked out on cessation of the unlawful conduct, and on the various forms of reparation. Within such a wider framework, the Commission could make better use of the legal materials available, whether in the literature or in practice concerning international responsibility, as well as the analyses made by the previous Special Rapporteur.

40. A critical analysis of the literature and of practice concerning cessation of an internationally wrongful act was to be found in his report (*ibid.*, paras. 29-52) and demonstrated three points: first, cessation should be expressly provided for in the draft; secondly, the scope of the corresponding obligation should be expressly formulated; thirdly, the provision in question should be separate from the articles on the various forms of reparation, and notably on restitution in kind.

41. The need to cover cessation among the consequences of an internationally wrongful act, and especially a continuing wrongful act, stemmed from the fact that any wrongful conduct, in addition to specific consequences detrimental to the injured State, constituted a threat to the very rule violated by the wrongdoing State. International law was made up of rules created by the very entities to which they applied, and any violation of a rule inevitably endangered the survival of the rule itself. That was so even if the wrongdoing State did nothing explicitly or implicitly to contest the existence of the rule or the interpretation thereof, or again, if it proposed to modify or abrogate it. The continued existence of the rule was jeopardized all the more when the wrongful act was accompanied, as was not infrequently the case, by an attack on the rule itself or its interpretation. It was also evident that the longer the unlawful conduct lasted, the more the rule was jeopardized. For that reason, it was essential for the draft to stipulate that, whenever a State was guilty of a wrongful act of a continuing character, it remained—despite, but also because of, the breach—under the obligation to desist from the unlawful conduct. Such a provision

would serve not only the interests of the injured State, but also the more general interest of preserving the rule of law, in other words the interests of all States, hypothetically.

42. It had been argued that a provision on cessation had no place in the draft because the obligation was not, strictly speaking, among the legal consequences of a wrongful act, covered as such by the so-called "secondary" rules applicable to responsibility. However, all things considered, the distinction between "primary" and "secondary" rules was relative. The rule of cessation could be conceived as situated, so to speak, in between the former and the latter. As to the former, it would in a sense "concretize" the primary rule that the wrongdoing State was infringing. With regard to the secondary rules, it would contribute to determining the quality and quantity of the reparation.

43. There were other arguments for a separate express rule on cessation. First, there was no generally applicable institutional mechanism comparable to the system of criminal law and procedure or to the civil procedures to which an injured party could resort at the domestic level to secure protection of its rights. Secondly, the express obligation to discontinue the wrongful act or omission was of practical importance in the case of delicts of particular gravity, as well as of international crimes. In that connection, he had in mind certain cases mentioned in his report (*ibid.*, paras. 50-51). Thirdly, non-compliance with a claim for cessation, or with an injunction to that effect by an international body, could justify resort to immediate individual, collective or institutional measures against the wrongdoing State.

44. As to the scope of the provision on cessation, it should be considered that internationally wrongful acts extending in time might consist of "omissive" as well as "commissive" conduct, in which connection he would refer members to his report (*ibid.*, paras. 34-38).

45. For a number of reasons, the way to formulate the duty of cessation suggested that it should form the subject of a provision separate from those on other consequences of an internationally wrongful act. The first reason was, obviously, the unique function of cessation, as distinguished from any form of reparation. As stated in the report (*ibid.*, paras. 39-41 and particularly para. 54), cessation was not a form of reparation. Unlike the various forms of reparation, and particularly restitution in kind, the obligation of cessation did not form part of international responsibility stemming from a secondary rule. A State engaging in wrongful conduct was under an obligation to desist by virtue of the very same rule imposing on it the initial obligation that was violated by the unlawful conduct.

46. The second reason, as explained in his report (*ibid.*, para. 55), had to do with the formulation of a rule on cessation either in terms of the rights of the injured State or in terms of the obligations of the author State. In so far as the various forms of reparation were concerned, a formulation in terms of the rights of the injured State was preferable in that it was the initiative of that State which set in motion a "secondary" legal machinery. That was not so in the case of cessation: even though the initiative by the injured State was both lawful and opportune, the obligation of cessation should be considered as being in operation on the mere strength of the primary rule. There was no accessory or secondary machinery to be "started". The part of the wrongful act that was a *fait accompli* fell within the provisions governing reparation, but the article on cessation should simply emphasize that the wrongdoing State was still subject to its primary obligation, with no demand by the injured State for respect thereof being necessary.

47. The third reason, as explained in his report (*ibid.*, para. 56), lay in the relatively limited sphere of application of the remedy, which was conceivable only in the case of wrongful acts extending over a period of time. It would be confusing to deal with cessation in a general provision covering, as did the previous Special Rapporteur's formulation of article 6, reparation for the consequences of instantaneous as well as continuing wrongful acts.

48. The fourth reason for differentiating cessation from reparation was that such a distinction was needed to prevent the limitations and exceptions characteristic of the régime of restitution in kind from extending to cessation, where they would be inconceivable. The obligation to discontinue any wrongful conduct was not and should not be subject to the same considerations, since its purpose was precisely to prevent future wrongful conduct, namely conduct that would further extend the wrongful act.

49. One of the key words of the new draft article 6 he had submitted was "remains", which was used instead of "is". It was preferable to stress the lasting character, rather than the mere existence, of the State's obligation so as better to convey the article's raison d'être, which was preservation of the primary rule despite infringement by the wrongdoing State. The article was easy to understand, and the words "without prejudice to the responsibility it has already incurred" had been added simply to underline the fact that the article dealt only with stopping the breach. It would also have been possible to add that the wrongdoing State's obligation was not conditional upon a claim by the injured State, but it had seemed preferable not to mention that point.

50. With the problem of restitution in kind, one entered the realm of reparation, namely that of the consequences, in the strictest and most technical sense, of an internationally wrongful act. As a form of reparation, restitution differed sharply from cessation in several respects, as discussed in his report (*ibid.*, paras. 69-70). The first difference was that restitution followed upon an unlawful act in order to make good the consequences. The second difference, an obvious corollary of the first, was that restitution in kind applied to any wrongful act, whether instantaneous or lasting. The third difference was that restitution in kind was, like other forms of reparation, a "secondary" obligation deriving from a "secondary" rule.

51. A study of doctrine and practice revealed two different concepts of restitution in kind (*ibid.*, para. 64). According to one definition, *restitutio in integrum* would consist in re-establishing the *status quo ante*. Ac-

cording to the other, it would consist in establishing or re-establishing the situation that would have existed had the wrongful act not been committed. He then summarized the difference between the two concepts—discussed in his report (*ibid.*, para. 67)—in terms of the purpose, scope, functions and practical application of reparation. In any event, restitution was the form of reparation that was closest to the general principle of law whereby the wrongdoer should wipe out all the consequences of his act. To do so, it was not enough to compensate the injured party: the original situation should first be restored. Restitution in kind was the foremost of all forms of reparation *lato sensu*.

52. At the same time, the literature and practice indicated that restitution in kind was not necessarily an adequate, comprehensive and self-sufficient form of reparation for the consequences of any internationally wrongful act. Again, reparation often took the form of pecuniary compensation, either because it was difficult or impossible to wipe out the consequences of the act, or because the parties preferred such a solution. Statistically, pecuniary compensation seemed to prevail.

53. Accordingly, while maintaining the logical and chronological primacy of restitution in kind among the various forms of reparation, it would be theoretically and practically inaccurate to define *restitutio* as the form of reparation that was preferable in all cases. On the other hand, there was no contradiction between the fact that reparation by equivalent was statistically more frequent and the fact that restitution in kind was still the first remedy to be sought. As a matter of codification as well as progressive development of the law, it therefore seemed indispensable to formulate the obligation of restitution in kind not only as one of the forms of reparation, but also as the primary form, by specifying its scope, the exceptions thereto and the conditions of application. He would discuss those three points in some detail.

54. To begin with the matter of scope, the obligation to provide restitution in kind should be formulated as a general obligation. It should be obvious that it was a form of redress applicable in principle for any kind of wrongful act and that any attenuating considerations were not directly dependent on the nature of the obligation violated or on the kind of rights or interests of the injured party. The only possible obstacles to the obligation lay in the nature and circumstances of the specific injury and the means of restitution actually available. From the analysis of doctrine and practice in his report (*ibid.*, paras 105-106), it seemed that it was essential to avoid any formulation envisaging "special" régimes for certain categories of wrongful acts. That applied in particular to the primary obligations relating to the treatment of foreign nationals, a subject on which the previous Special Rapporteur had submitted a provision in draft article 7 that made a distinction between "direct" and "indirect" injury to a State (*ibid.*, paras. 107-108). That distinction did not seem acceptable. As explained in the report (*ibid.*, paras. 108 and 122), a provision entitling the wrongdoing State to choose unilaterally between restitution in kind and pecuniary compensation in the case of "indirect" injury would not be justified. To begin with, the distinction was arbitrary. Again, it should be remembered that the values involved in the protection of foreign nationals were not just of an economic nature: they also concerned civil, social and cultural rights. Economic interests themselves, once guaranteed by law, were an essential part of human rights.

55. In addition, even if *restitutio* applied less frequently to wrongful acts committed against foreign nationals, that did not warrant the conclusion that such wrongful acts were subject, *de lege lata*, to the special treatment envisaged in draft article 7 as submitted by the previous Special Rapporteur. Setting aside the obvious but not inconsiderable fact that some decisions or agreed solutions might not conform to the general rule, it should be remembered that cases in which *restitutio* had not been applied in the past had in fact been part of situations in which restitution in kind was totally or partly excluded, not because of any "special" effect of the primary rules, but simply because of the concrete obstacles created by the wrongful act itself and recognized as such by the parties: physical impossibility, excessive onerousness, choice made by the injured State, and so on. The true exception to the obligation to make restitution was the one in which the obligation ceased to exist because restitution was physically impossible—destruction of an object, sinking of a ship, loss of human lives, and so forth (*ibid.*, paras. 85 and 123).

56. Less simple, and in some ways controvertible, were the legal obstacles to restitution, namely those deriving from rules of municipal or international law which the wrongdoing State would have to violate in order to comply with its obligation to provide restitution.

57. The difficulties regarding municipal law lay in the nature of the State and the particular relationship between municipal law and international law. To begin with, the nature of the State was such that there was hardly an action, activity or operation intended to provide restoration that could actually be carried out without a law or legal provision for that purpose being adopted in the State's legal system. Unlike a private individual, a State wishing to give back annexed territory, to rectify a wrongly modified boundary or to restore freedom to an unlawfully arrested person had to arrange for some legal provision at the constitutional, legislative, judicial or even administrative level if the restitution was to be essentially and in all cases "legal". Physical *restitutio* was merely the *exécution*, the translation into fact, of a legal action. In practice, therefore, restitution in kind was in international law essentially a form of "juridical" restitution accompanying or preceding physical restitution. Secondly, the relationship between municipal law and international law was very different from that between the national law of federal States and the law of each constituent State. On the one hand, the primacy of international law was not sufficient to invalidate, as a directly superior legal system would, any rule of municipal law that might be incompatible with the international obligations of the State in question. The internal legal system could be adapted to international legal obligations only by some legislative, judicial, administrative or constitutional ac-

tion by the State itself (*ibid.*, paras. 77-84, especially paras. 80 and 82). On the other hand, the primacy of international law in relations between States meant that a State could not plead its own municipal law in order not to honour its international obligations.

The meeting rose at 1 p.m.

2082nd MEETING

Wednesday, 20 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*concluded*) (A/CN.4/414,[1] A/CN.4/416 and Add.1,[2] A/CN.4/L.420, sect.F.1)

[Agenda item 2]

***Parts 2 and 3 of the draft articles*[3]**

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur), continuing his introduction of his preliminary report (A/CN.4/416 and Add.1), reminded members that, at the end of the previous meeting, he had begun to discuss obstacles to restitution, in particular the legal obstacles arising from rules of internal or international law.

2. With regard to obstacles arising from internal law, since all States lived under a legal system, no restitutive operation could be carried out within a State without some legal act or provision being made within that system. A State spoke to its agents and officials through the law, so that restitution could not be carried out *de facto*; it would always require some legal steps.

3. At the same time, the relationship between internal law and international law was quite different from that between the federal law of a federal State and the law of one of its component units. In the first place, the primacy of international law did not go so far as to invalidate any rule of the internal law of a State which stood in the way of that State's compliance with its international obligations. The content of a State's legal system could be adapted—for the purposes of compliance with international legal obligations—only by some legislative, judicial, administrative or constitutional action by the State itself (*ibid.*, paras. 77-84). On that point, the European Community offered an interesting example: the enactments of the Community had the force of law in the member States, but some action by each member State was necessary to introduce them into its own legal system.

4. The primacy of international law in relations between States meant that a State could not validly invoke an obstacle arising from its internal law as an excuse for non-compliance with an international obligation. That was undoubtedly true of any national legal rule or ruling—legislative, administrative, judicial or constitutional—which might be invoked as an impediment to restitution in kind. The rule to that effect was set out in paragraph 3 of the new draft article 7[4] he proposed. It was an obvious corollary of the principle embodied in article 4 of part 1 of the draft, which provided that "An act of a State may only be characterized as internationally wrongful by international law" and that "Such characterization cannot be affected by the characterization of the same act as lawful by internal law". That was tantamount to concluding that the obligation to make restitution could not be affected by any legal obstacle in the internal law of the author State. It was, indeed, incumbent on that State to remove any such legal obstacles, which were disregarded as such by international law. Any difficulty which the author State might have in removing internal legal obstacles should be assessed on its merits under international law, as a possible factual obstacle. His report accordingly dealt with internal legal obstacles under the rubric of excessive onerousness in a wide sense (*ibid.*, paras. 102 and 127).

5. In the case of international legal obstacles, the legal impediment was within the same legal system as that under which restitution was due, that was to say within international law itself. At first sight, that would seem to create a situation similar to that of an impediment to restitution arising under the private law of a country, from a rule of superior rank such as a constitutional rule. But the validity of the analogy was reduced very considerably by the high degree of relativity of international legal rules, situations and relationships.

6. As noted in the report (*ibid.*, para. 87) that analogy would apply in a situation in which restitution en-

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

[2] *Ibid.*

[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.

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] See 2081st meeting, para. 36.