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Summary record of the 2122nd meeting

Topic:
<multiple topics>

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the limitations or exceptions provided for under that legislation were not contained in the draft articles.

69. The first possible solution was that the paragraph suggested by Spain (A/CN.4/410 and Add.1-5) be included in the preamble to the future convention. While a few members had expressed their willingness to go along with that idea, more members had been opposed to it. In addition, the preamble was, by tradition, dealt with at the diplomatic conference. The second possible solution was to include the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), to provide for the exceptions that might arise in future as a result of changes or developments in customary international law and also to fill any possible gaps between the present articles and domestic legislation. The second solution had not been accepted by any member and, accordingly, neither of the proposals could serve as a basis for discussion. He had not taken up Australia's proposed reformulations of the bracketed phrase in article 6 (A/CN.4/410 and Add.1-5) because they seemed to differ little in substance from the phrase itself. He trusted that the Drafting Committee would try to find a formula that would bridge the gap, at least for the time being, between the draft articles and domestic legislation, for example by way of an additional protocol.

70. Most members who had spoken on article 7 supported the proposed new text (A/CN.4/415, para. 79), apart from some comments concerning drafting and the possible deletion of paragraph 3. That paragraph had already been simplified by comparison with the adopted text, but he would have no objection if it were further simplified in the Drafting Committee.

71. With regard to article 8, while several members had supported his proposal concerning subparagraph (*c*) (*ibid.*, para. 93), others had proposed that it be reformulated in a less restrictive manner to provide for express consent through diplomatic channels. Although subparagraph (*a*) seemed to him to suffice in that regard, he had no objection to the matter being referred to the Drafting Committee. Mr. Koroma (2118th meeting), who did not accept the explanations concerning subparagraph (*b*) given in the preliminary report (A/CN.4/415, para. 89), had suggested that a fundamental change of circumstances due to *force majeure* should be contemplated. He personally was not very much in favour of that theory, because it placed undue reliance on the unilateral assessment of one party and because, historically, it had been abused before and during the Second World War, albeit in another context. He therefore maintained the views he had expressed in his preliminary report in that connection.

72. Lastly, with regard to article 9, the reservation which he had proposed should be added to paragraph 1 (*ibid.*, para. 100), namely "However, if the State satisfies the court . . . provided it does so at the earliest possible moment", applied only to subparagraph (*b*) and had been accepted by several members. A number of members had also accepted the proposed new paragraph 3 concerning the effect of the appearance of a representative of a State as a witness before a court of another State. A few members had opposed that paragraph, although the reasons for their objection were not apparent. For his own part, he continued to regard the additional paragraph as necessary. The suggestions of a drafting nature made with regard to the article could be considered in the Drafting Committee.

The meeting rose at 1 p.m.

2122nd MEETING

Wednesday, 21 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

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

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*concluded*)

1. Mr. OGISO (Special Rapporteur), continuing his summing-up of the debate, said that one member had supported the suggestion by Australia (A/CN.4/410 and Add.1-5) to combine paragraphs 1 and 2 of article 10. It was a drafting matter and the best course would be to refer it to the Drafting Committee.

2. Some members had expressed doubts about the applicability of the proposed new paragraph 4 (A/CN.4/415, para. 107), which had its origin in a suggestion by the Government of Thailand. The purpose was to limit the effect of a counter-claim against a foreign State. Article 10 as adopted applied to counter-claims against a foreign State which brought suit, or intervened in an action, in a court of another State. Paragraphs 1 and 2 specified that, if a foreign State which was itself entitled to immunity instituted, or intervened in, a proceeding in the forum State and a counter-claim was entered against it, it would not be immune from that counter-claim if the matter arose out of the same legal relationship or facts as the principal claim.

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

[2] *Ibid.*

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

[4] For the texts, see 2114th meeting, para. 31.

Under the proposed paragraph 4, the legal effect of the counter-claim against the foreign State would be limited to the amount of the principal claim. If the amount of the counter-claim exceeded that of the principal claim, the legal effect of the counter-claim would in practice be a set-off. If, however, the claim or counter-claim became the subject of litigation, the evaluation of the claim or counter-claim would constitute a complicating factor. He was not an expert in the field of claims litigation and he would be prepared to withdraw the proposal if there was strong opposition to it. Nevertheless, one could cite as an example the case of a foreign State A which instituted, or intervened in, a proceeding in a court of the forum State. The defendant B might then purchase from various sources debts attributable to State A and use them to present a counter-claim against State A in an amount far exceeding the original claim of that State. His intention had been to prevent such a possibility with the new paragraph 4, which did, admittedly, require drafting improvements.

3. The majority of members preferred the wording "Exceptions to" in the title of part III of the draft, but he still believed that the question should not be decided until the second reading was completed, when the entire picture would become much clearer. In that connection, Mr. McCaffrey's interesting suggestion to reword the title as "Cases in which State immunity may not be invoked before a court of another State" (2117th meeting, para. 91) could be referred to the Drafting Committee.

4. There was wide support for his recommendation to replace the last part of paragraph 1 of article 11, reading "the State is considered to have consented to the exercise of that jurisdiction . . .", by the words "the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial contract". Some members disagreed with the concept of a jurisdictional link contained in the words "by virtue of the applicable rules of private international law". On that point, he maintained his original position, because of the possible differences between various forum States on the applicable law for transnational commercial contracts. It had been suggested that the proviso "Unless otherwise agreed . . ." might be added, but since the provision in question was a basic one, it was highly undesirable to allow any deviation, whether by bilateral or regional agreement or by written contract. As he understood it, there were no rules of customary international law which required a sufficient nexus between the commercial contract and the local jurisdiction. The requirement set out in article 7, paragraph 1, of the 1972 European Convention on State Immunity was much too strict. For present purposes, therefore, it was sufficient that the local court usually had its own ordinary rules on jurisdiction in regard to a commercial contract concluded between a national and a foreign person or entity.

5. He had no objection to the suggestion by Mr. Al-Qaysi to the effect that "a provision in a commercial contract that it is to be governed by the law of another State is not to be deemed a submission to the jurisdiction of the court of that State". It should be considered by the Drafting Committee, in connection with either article 11 or article 8.

6. The new article 11 *bis*, on segregated State property (A/CN.4/415, para. 122), which he had proposed in response to comments made by the USSR and the Byelorussian SSR, had raised some questions. The request for clarification of the concept of a "State enterprise" had, to a large extent, been answered during the discussion by Mr. Barsegov (2116th and 2117th meetings) and Mr. Graefrath (2120th meeting). As Special Rapporteur, he would endeavour to formulate some general definition of "State enterprise" and of "segregated State property" on the basis of the Soviet Union's 1988 law on State enterprises if it were made available. Some members had criticized the use of the words "on behalf of a State" on the grounds that State enterprises would enter into a commercial contract on their own behalf with a foreign national or corporation. In the light of the explanations given in the course of the discussion, he agreed that it was preferable to delete those words.

7. Some members had pointed to the difficulty of separating a State enterprise from the State itself, and he hoped that a study of the Soviet law on State enterprises would help to clear up that problem. Mr. Al-Baharna (2119th meeting, para. 1) had made an interesting proposal for a new title for article 11 *bis*, namely "State enterprises". Some members had expressed doubts about the need to include article 11 *bis* at all. That matter was tied in with the definition of the term "State" in the new draft article 2, on the use of terms. In his opinion, more research should be done with a view to submitting the necessary materials to the Drafting Committee for it to consider various options, including the formulation of definitions of a "State enterprise" and "segregated State property".

8. Two alternative texts similar to article 11 *bis* had been proposed, one by Mr. Shi (2115th meeting, para. 24) and the other by Mr. Barsegov (2117th meeting, para. 1), and they would be referred to the Drafting Committee along with his own proposal. Both the proposed alternatives emphasized that a State enterprise was a legal entity separate from the State itself. Accordingly, no action could be brought against the State itself with regard to a commercial contract entered into by the State enterprise. If such an action was initiated, the State could invoke its immunity. Several members had considered the two proposals useful, but had taken the view that they called for further examination. In particular, some had voiced doubts concerning the extent to which the practice of the socialist countries should be reflected in an instrument intended for the international community at large. On that question of the general applicability of article 11 *bis*, others had urged a careful and detailed study of the legal implications for the developing countries.

9. Two members had considered article 12 to be necessary, whereas two others had deemed it superfluous. Some members had supported his recommendation to delete paragraph 2 (*a*) and (*b*) (A/CN.4/415, para. 132), but others had opposed the deletion. Actually, article 12 as adopted, after declaring the non-application of State immunity with respect to employment contracts in general in paragraph 1, went on to revive a great deal of that immunity in paragraph 2 (*a*) to (*e*). In particular, paragraph 2 (*b*) narrowed down the possibility of applying the local labour law by removing the "recruitment, renewal of employment or reinstatement of an individual" from the operation of paragraph 1, thereby making it very difficult to protect the position of the employee under that law. It should be noted that neither the 1972 European Convention on State Immunity nor the United Kingdom *State Immunity Act 1978* contained any

comparable provisions. In a recent case tried by the Tokyo District Court, a Japanese employee of the Commission of the European Communities had brought suit against her employer for annulment of her dismissal. She had sought a temporary order for wage payments, but the employer had objected that if the court issued such an order it would be infringing the immunity from execution stipulated in article 32 of the 1961 Vienna Convention on Diplomatic Relations. In its decision, rendered in 1982, the court had ruled that the Commission of the European Communities had waived its immunity by specifying in the employment contract that Japanese law was the applicable law governing the contract. As to the merits, the court had found that the dismissal had been reasonable in the light of the employment contract, which had provided for trial employment or temporary employment of the plaintiff. As Mr. Graefrath had noted, a foreign State could not be compelled by the State of the forum to employ a particular individual. In order to meet that concern, the word "recruitment" in paragraph 2 (*b*) could be deleted.

10. In his second report (A/CN.4/422 and Add.1, para. 22), he had said that the scope of article 13 should be reconsidered. Some members had suggested that the article be deleted altogether—some because the relevant cases were very few, others because the situations envisaged in the article were governed by bilateral agreements or by other international treaties. One member had pointed out that personal injury or damage to property would usually be insurable and another that the only real legal basis for the article lay in recent legislation in a very small number of countries.

11. With regard to the question of State responsibility, it had been said that the attribution of an act or omission to a State would prejudge the matter of State responsibility and that the scope of article 13 should therefore be clarified. In that connection, it had been pointed out that a possible range of the article connected with a certain area of activity attributable to the foreign State and that the extent to which a domestic court could enter into that area had to be elaborated much more. Several members, however, had supported the idea of retaining the article, since it was intended to permit normal proceedings and to provide relief for an individual who suffered physical damage as a result of action on the part of a foreign State in the forum State.

12. One way out of the difficulties stemming from article 13 might be to narrow its scope to traffic accidents, as he had in fact suggested. With regard to the so-called "presence requirement", it had been urged that the phrase "and if the author of the act or omission was present in that territory at the time of the act or omission" be kept, as he had also suggested, because the article did not deal with cases of transboundary harm. He had an open mind on that point. The proposed new paragraph 2 (A/CN.4/415, para. 143) had been criticized as being unnecessary, but no reasons had been given. In any case, further examination of the article would be required with respect to the basic question of its relationship with State responsibility. In the light of the variety of views expressed on the subject, he would like to withhold further comment until the next session.

13. His recommendation to reconsider paragraph 1 (*c*), (*d*) and (*e*) of article 14 had enlisted considerable support. In that connection, it had been claimed that there was no link between the property mentioned in paragraph 1 (*b*), (*c*), (*d*) and (*e*) and the forum State. The comment was perhaps valid for subparagraphs (*c*), (*d*) and (*e*), but he had doubts regarding subparagraph (*b*). Some members had suggested deleting paragraph 2 because it might conflict with paragraph 3 of article 7. It had also been said that the word "interest" could be replaced by a more suitable term. Both those proposals should be referred to the Drafting Committee.

14. Some members had been in favour of retaining article 16, while others had questioned its usefulness. He would prefer to comment on the subject after hearing other views.

15. Article 17 reiterated an established rule of sovereign immunity, and the only question concerned the need to use a more general form of language in paragraph 1 (*b*), a matter that could be discussed in the Drafting Committee.

16. All but two of the members who had addressed the point had endorsed his recommendation to delete the term "non-governmental" in paragraphs 1 and 4 of article 18. Mr. Mahiou (2119th meeting) had said that there was a clear difference between the expressions "commercial [non-governmental]" and "government non-commercial", suggesting that the former expression could be understood in the context of article 18 to cover the case of "commercial but also government" service. Yet that argument had been criticized as having excessively complex legal implications. A further point to be noted in connection with article 18 was that a number of members had agreed with his suggestion (A/CN.4/422 and Add.1, para. 31 *in fine*) that the question of the immunity of State-owned or State-operated aircraft should be dealt with under existing international agreements. In addition, paragraph 6 of the article seemed to be open to misinterpretation: it might be taken to apply only to ships, whereas in reality States could, of course, plead all measures of defence available to private persons with respect to property other than ships. It was because of that potential misunderstanding that he proposed deleting the paragraph.

17. In his view, the Commission had tended to attach too much importance to the choice between the expressions "commercial contract" and "civil or commercial matter" in article 19. The scope of arbitration and the extent of a waiver of State immunity resulting from an arbitration agreement depended on the content of the agreement in question. The Commission should focus attention on the extent of waivers of immunity by a foreign State with respect to arbitration agreements, which might come to play an increasingly important role in resolving differences arising from various transnational activities. Opinion on his proposal to add a new subparagraph (*d*) reading: "the recognition of the award" had been divided. The problem of determining the proper place for the subparagraph could be resolved by an understanding to the effect that it was not to be interpreted as implying a waiver of immunity from execution.

18. He had originally recommended that article 20 be retained without change and had done so simply because it had been left almost intact on first reading. Naturally, if the majority of members favoured deleting it he would abide by their wish. On the other hand, he would be

reluctant to accept the suggestion that the article—which, after all, was only a general reservation clause—be placed among the introductory provisions; the subject of article 20 was not the main subject of the draft, and moving the article to a more prominent position would be misleading.

19. One member had suggested that article 21 be reformulated along the lines of article 23 of the 1972 European Convention on State Immunity in order to reflect more explicitly the principle of State immunity from measures of constraint. Another member had suggested that the article be formulated as a general provision rather than as an exception, and had also favoured the inclusion of a provision making it obligatory for States to abide by final court decisions rendered against them on the basis of the future convention. He would examine those suggestions further. Views had differed on the question of deleting the phrase "or property in which it has a legally protected interest", and also the term "non-governmental" in subparagraph (*a*). Moreover, it had been suggested that the words "in which it has a legally protected interest" be replaced by "to which it has an effective right". He hoped for more comments at the next session on the question of deleting the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (*a*), and on the possibility of adding the phrase "Unless otherwise agreed between the States concerned" at the beginning of the article as an alternative.

20. His recommendation to omit the bracketed phrase in paragraph 1 of article 22 had met with support; however, one member had suggested using the words "effective right" instead of "legally protected interest". Another member had proposed a new text for article 22 in consequence of his proposal for amending article 21.

21. As to article 23, he had in his preliminary report (A/CN.4/415, para. 240) proposed an amended paragraph 2 with the intention of excluding some of the categories of property mentioned in paragraph 1 from measures of constraint. However, in his second report, he had endorsed the adopted text of paragraph 2, which had also been supported by two members. Two members had disagreed with the idea of adding the words "and serves monetary purposes" at the end of paragraph 1 (*c*), on the grounds that any bank account, including a central bank's account, was established for monetary purposes and that the proposed addition would therefore give rise to confusion. His own view on that point was that a central bank's account was usually presumed to be established for monetary purposes and that the account enjoyed immunity from execution unless it was allocated or being used for commercial purposes.

22. The amended text which he had proposed for paragraph 1 of article 24 (*ibid.*, para. 248) had been considered acceptable by two members, who had also suggested deleting the words "if necessary" in paragraph 3. The same members had also proposed deleting those words from paragraph 2 of article 25, one of them suggesting, in addition, that paragraph 1 of article 25 be reviewed as a matter of prudence in order to ensure that no default judgment could be entered by a court without establishment of jurisdiction and right to relief based upon evidence by the plaintiff. With regard to the same paragraph, another member had pointed out that documents should not be assumed to have been received.

23. One of the members opposing his proposal that paragraph 2 of article 27 be amended so as to apply only to a defendant State had argued that the proposed limitation would discourage States from instituting proceedings as claimants.

24. It had been maintained that article 28 was not really concerned with the question of discrimination. The necessity of article 28 as a whole and especially of paragraph 2 had been discussed in connection with the possible deletion from article 6 of the bracketed phrase "and the relevant rules of general international law". Some members had said that article 28 should be retained if that phrase were removed from article 6, whereas others had doubted the advisability of including article 28, fearing that a restrictive application based on reciprocity would lead to departures from the future convention and detract from the purpose of codification. One member had also pointed out that, since almost all the provisions of the draft on exceptions began with the words "Unless otherwise agreed . . . ", article 28 was not needed. Clearly, a further exchange of views, especially as to the legal effects of article 28, was required.

25. Lastly, he proposed that the Commission refer articles 1 to 11 *bis* to the Drafting Committee, on the understanding that the Commission would take up articles 12 to 28 as the first item for discussion at the next session with a view to referring them to the Drafting Committee at that time.

26. Mr. REUTER, supported by Mr. McCAFFREY, said he generally agreed with that proposal but wondered whether the dividing line should not be drawn at article 11, rather than at the new article 11 *bis*. The Commission had not yet had time to consider the highly interesting texts proposed for article 11 *bis* by Mr. Barsegov and Mr. Shi.

27. The CHAIRMAN pointed out that it would be difficult to dissociate article 11 *bis* from the rest of the articles to be referred to the Drafting Committee because it was closely related to article 2.

28. Mr. CALERO RODRIGUES said that he would be prepared to accept the Special Rapporteur's proposal on the understanding that any decision by the Drafting Committee on article 11 *bis* would be provisional and that the Commission would reconsider the article at the next session.

29. The CHAIRMAN assured members that that would be the case.

30. Mr. NJENGA, supported by Prince AJIBOLA and Mr. BENNOUNA, suggested that the new article 6 *bis*, which had not been considered on first reading and for which no support had been expressed in the Commission, should not be referred to the Drafting Committee.

31. Mr. REUTER said that he was opposed in principle to removing any text which had been discussed in the Commission.

32. Mr. DÍAZ GONZÁLEZ said that he deprecated the tendency to assign to the Drafting Committee matters that were properly the concern of the Commission.

33. Further to a discussion in which Mr. KOROMA, Prince AJIBOLA and Mr. AL-BAHARNA took part, the

CHAIRMAN suggested that articles 1 to 11 be referred to the Drafting Committee for their second reading, together with the new articles 6 *bis* and 11 *bis* proposed by the Special Rapporteur. The Commission would consider articles 12 to 28 at the beginning of the next session.

It was so agreed.

34. Mr. KOROMA, referring to the earlier part of the Special Rapporteur's summing-up at the previous meeting, said he wished to place on record that, in advocating a more universal approach, he had not criticized the Special Rapporteur's approach as being based on the judicial decisions in a particular region. His point was that it would not be advisable for the draft articles to rely on decisions that were not universally accepted. As to his suggestion to the effect that the draft should include a provision based on the principle *rebus sic stantibus*, he had no opinion concerning the possible abuses of that principle mentioned by the Special Rapporteur, but continued to believe that the principle had firm legal foundations recognized by almost all modern writers on international law. It should be reflected in the draft as one of the principles under which a commercial contract could be invalidated.

State responsibility (*continued*)* (A/CN.4/416 and Add.1,[5] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

35. Mr. AL-BAHARNA thanked the Special Rapporteur for his scholarly preliminary report (A/CN.4/416 and Add.1), in which he proposed new articles on cessation and restitution in kind against the background of both legal doctrine and State practice.

36. The question of cessation raised three sub-questions: What was the nature and scope of cessation? At the contemporary stage of international law, was it feasible to prescribe that obligation? What was its relationship to reparation?

37. The term "cessation" was not a term of art, and hence it called for a definition. Cessation as a remedy intended to put an end to the consequences of an internationally wrongful act seemed to be equated by the Special Rapporteur with discontinuance (*ibid.*, para. 29). But discontinuance in the Special Rapporteur's view covered what he designated as both "commissive" and "omissive" wrongful acts. The scope of cessation or discontinuance was elucidated thus:

> . . . In the case of commissive wrongful acts, cessation will consist of the (negative) obligation to "cease to do" or "to do no longer". . . . In the case of omissive wrongful acts, cessation should cover the author State's thus far undischarged obligation "to do" or "to do in a certain way". . . . (*Ibid.*, para. 58.)

38. Although the term "cessation" did not seem to convey the dual sense the Special Rapporteur attributed to it, there was no particular legal obstacle to placing such connotations on it. In national legal systems that he knew of, the remedy of "injunction" included both "to refrain from doing" and "to do a particular act or thing". Whether the term "cessation" had been used in that dual sense in international theory and State practice, however, was another matter.

39. Contemporary international law did not seem to have developed to the point of recognizing the obligation of cessation of a wrongful act in the sense of "to do" or "to do in a certain way". As Gunnar Lagergren, sole arbitrator in the *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic* case, had stated, "the case analysis also demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages" (*ibid.*, para. 46). States probably resorted to damages because it was far more practical to do so. But there could be exigencies when the remedy of damages was either useless or inadequate, as in the case of wrongful detention of nationals of an injured State. Consequently, international law must be developed to cover such an eventuality. Therein lay the merit of the proposal to include "omissive" wrongful acts within the concept of "cessation". That proposal was worthy of examination, and possibly of support. As to whether States would comply with such an obligation in the absence of institutional mechanisms in the international sphere, that was a matter which concerned the whole range of international law, and not only the postulated rule; even so, it was worth examining.

40. Cessation and reparation were logically distinct, although in some cases they might be inextricably linked. In municipal law, they were certainly distinct. The Special Rapporteur was apparently developing international law on the basis of analogy. There was ample authority for such an approach, for example in the *Trail Smelter* arbitration cited by the Special Rapporteur (*ibid.*, footnote 65). He supported the Special Rapporteur's statement that "the two remedies either are factually separate or appear in combination but are nevertheless distinct" (*ibid.*, para. 52).

41. Considering the need for rules and procedures to strengthen international legal order, he supported the Special Rapporteur's departure from his predecessor's approach in proposing a new article 6 of part 2 of the draft under the title "Cessation of an internationally wrongful act of a

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* Resumed from the 2105th meeting.

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

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

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

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

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

continuing character", subject to two reservations: (*a*) that the obligation to refrain from the illicit acts and to act in a manner in conformity with the obligations of international law should be drafted more precisely; (*b*) that the term "cessation" should be replaced either by "discontinuance" or by a better alternative.

42. The Special Rapporteur had proposed a text for the new article 7, on restitution in kind, that appeared in some respects to be ingenious and in others controversial. The leading case on the subject, the *Chorzów Factory* case,[8] had laid down the principles of law regarding reparation. Two points were apparent from the case: first, that the object of reparation was to wipe out, in so far as possible, all the consequences of a wrongful act by re-establishing the situation that would have existed had the wrongful act not been committed; and secondly, that if that was not possible, compensation, with or without damages, should be granted. But, as Eduardo Jiménez de Aréchaga, formerly a Judge of the ICJ, had written: "although restitution in kind remains the basic form of reparation, in practice, and in the great majority of cases, monetary compensation takes its place".[9]

43. The Commission should therefore take the practical exigencies into account when formulating the applicable rules, and he was glad to see that the Special Rapporteur had adopted a flexible approach to the remedies to which the injured State could resort. The Special Rapporteur was right in holding the view (*ibid.*, para. 117) that the remedy prescribed should match the injury, and in going on to affirm (*ibid.*, para. 126) that the principle of proportionality between injury and reparation should be borne in mind in formulating the rule on restitution in kind.

44. Against the background of such principles, it could be seen that draft article 7 was well-conceived. However, it required deeper examination, especially paragraphs 1 (*b*) and 2 (*b*).

45. Paragraph 1 (*b*) suggested that there was no need for restitution in kind if it would violate a peremptory norm of general international law. Such a provision would render the operation of restitution in kind problematic and indeterminate. The specification of peremptory norms of general international law was controversial, and the drafting of such a rule on State responsibility was of doubtful validity. He therefore wondered whether there was any reason to retain that subparagraph.

46. As to paragraph 2 (*b*), which spoke of mitigating circumstances arising from the "political, economic or social system of the State which committed the internationally wrongful act", he doubted whether that proposition was supported by either principle or State practice. Anzilotti's statement, cited by the Special Rapporteur (*ibid.*, para. 98), that "there may be obstacles of an internal nature which ... States are prepared to take into account to replace restitution in kind by compensation" was no authority in that regard. Anzilotti had been referring to the contingency of States taking obstacles of an internal nature into consideration in arriving at one remedy or another, but that statement could not be interpreted as meaning that a "political, economic or social system" could be a mitigating factor.

47. Moreover, since a State could not, under international law, avoid international responsibility by invoking its municipal law, it was questionable whether it was really necessary to retain paragraph 3; it could well be deleted.

48. For paragraph 4, on reparation by equivalent, he would prefer a far simpler formulation which, like the judgment in the *Chorzów Factory* case, referred (*a*) to compensation, and (*b*) to damages, and spelled them out in a separate article, under the generic title of "pecuniary compensation".

49. In general, article 7 could be improved by drafting changes. For example, he would prefer the Latin expression *restitutio in integrum* to "restitution in kind", and would like also to see "excessively onerous" and "reparation by equivalent" replaced by more suitable expressions.

50. Mr. BENNOUNA said that he greatly appreciated the Special Rapporteur's preliminary report (A/CN.4/416 and Add.1), which was well documented and scholarly and displayed great subtlety. He agreed with all the technical points advanced by the Special Rapporteur, although he sometimes differed with him in regard to matters of approach and the distinctions drawn.

51. The Special Rapporteur had suggested an outline for part 2 of the draft (*ibid.*, para. 20). It was unfortunate, however, that article 19 of part 1 would serve as the basis for the rest of the draft, for he believed it would greatly complicate the progressive development and codification of international law on State responsibility. The article was a typical intellectual projection, based on categories of penal law that were completely unrelated to international realities, and it would create difficulties in connection with punishment for various delicts and crimes. Dangerous tendencies could already be observed from the report (*ibid.*, para. 15), where the Special Rapporteur introduced a new category of delicts, namely those "of particular seriousness". Such delicts would presumably call for particularly onerous forms of punishment, yet it was hard to see how the Commission would succeed where the Security Council had failed in imposing any such punishment. The Special Rapporteur wisely pointed out (*ibid.*, para. 16) that his suggestion did not imply an attempt to take a stand on any of the practical or theoretical issues involved in the treatment of delicts and crimes.

52. The distinction between cessation of an internationally wrongful act and restitution in kind was entirely artificial, both from the theoretical point of view and as regards the practical consequences. At the beginning of his argument, the Special Rapporteur indicated that cessation was to be ascribed to the continued, normal operation of the primary rule (*ibid.*, para. 31). Yet by the end, he came to the conclusion that a rule on cessation could well be conceived as a provision situated "in between" the primary and the secondary rules (*ibid.*, para. 61).

53. The only case the Special Rapporteur could cite in support of the proposed distinction between cessation and restitution in kind involved the wrongful detention of a State's nationals: the case concerning *United States Diplomatic and Consular Staff in Tehran*.[10] Yet the example

[8] See 2105th meeting, footnote 5.

[9] E. Jiménezz de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sorensen, ed. (London, Macmillan, 1968), p. 567.

[10] See 2104th meeting, footnote 7.

was by no means convincing, for the measures ordered by the ICJ in resolving that case were measures not of cessation, but simply of restitution in kind. The Government of Iran had been enjoined to restore the premises of the United States Embassy in Tehran, to release all United States nationals and to recognize their privileges and immunities.

54. Continuing his argument, the Special Rapporteur maintained (*ibid.*, para. 57) that none of the difficulties which might hinder or prevent restitution in kind was such as to affect the obligation to cease the wrongful conduct. In other words, the allowable exceptions to restitution in kind did not apply in their entirety to cessation. But the obligations in respect of cessation were often the same as those in respect of restitution in kind. Consequently, if an article on cessation was incorporated in the draft, all the exceptions to the operation of restitution in kind provided for in the new draft article 7 would be rendered meaningless. In practical terms, a State would do better to ask for cessation—to which no exceptions were permitted—than to request restitution in kind. If a judge believed that a wrongful act was being committed, he could impose interim measures pending a final judgment. Once the judgment was rendered, there was no need for cessation, as restitution in kind or compensation would be provided for. Hence there was no point in interposing measures of cessation between interim measures and restitution in kind or compensation. The new draft article 6 on cessation therefore served no useful purpose: in fact, instead of clarifying matters, it only added to confusion. As for article 7 on restitution in kind, it was admirably drafted.

55. Mr. AL-QAYSI, commending the Special Rapporteur on his excellent preliminary report (A/CN.4/416 and Add.1), said that on the whole he agreed with the proposals for the outline of parts 2 and 3 of the draft (*ibid.*, para. 20). Those proposals included two points on which the Special Rapporteur intended to depart from the outline previously envisaged by the Commission.

56. The first point related to the need to make a distinction between the legal consequences of international delicts and those of international crimes, and the convincing arguments adduced by the Special Rapporteur in that connection (*ibid.*, paras. 10-15) reflected a clear and pragmatic approach which deserved unanimous approval.

57. He agreed with Mr. Graefrath (2104th meeting), who, though acknowledging that the distinction between substantive and instrumental consequences was not absolute, could not accept the idea that reparation should be regarded as a substantive consequence and the right to take reprisals as procedural inasmuch as it served to secure cessation, reparation and guarantees against repetition. Nevertheless, the report seemed to contain no indication that the Special Rapporteur was making such a categorization. For example, the Special Rapporteur stated that "in a sense, measures are viewed . . . as essentially instrumental", but only "as compared with the substantive role of the various forms of reparation (and of cessation)". (A/CN.4/416 and Add.1, para. 14). The Special Rapporteur had therefore apparently had in mind the type of provision proposed by his predecessor in draft articles 1 to 3 of part 3, particularly in view of his explanation concerning his use of the term "substantive" (*ibid.*, footnote 11).

58. The second point on which the Special Rapporteur intended to depart from the previous outline was his suggestion that the content of part 3 should be viewed in terms of the peaceful settlement of disputes rather than of "implementation" (*mise en oeuvre*), the justification being that implementation embraced both measures and any *onera* incumbent upon the injured State or States as a condition for the lawful resort to measures. He could agree to that suggestion, at least for the time being. Accordingly, as suggested by Mr. Calero Rodrigues (2103rd meeting), articles 1 to 3 of part 3 as proposed by the previous Special Rapporteur should be incorporated in part 2 in an appropriate form.

59. The new draft article 6 of part 2 was at once more concise and more satisfactory than the corresponding text of draft article 6 submitted by the previous Special Rapporteur. He was fully persuaded by the arguments in the report (A/CN.4/416 and Add.1, paras. 39-60) to the effect that cessation should form the subject of an express provision and be distinguished more clearly from the provisions on other aspects of the consequences of violations of international law. Consequently, he did not agree with Mr. Barboza (2102nd meeting) that the Special Rapporteur's views would introduce a conceptual cleavage in the distinction between primary and secondary rules. According to the Special Rapporteur, cessation was "to be ascribed . . . to the continued, normal operation of the primary rule" and not to operation of the secondary rule (A/CN.4/416 and Add.1, para. 31). Mr. Barboza's view would certainly have been justified had it not been for the statement in the report that "While thus falling outside the realm of reparation and of the legal consequences of a wrongful act in a narrow sense, cessation nevertheless falls among the legal consequences of a wrongful act in a broad sense" and, moreover, that cessation was "not irrelevant even from the point of view of the consequences of the wrongful act and of reparation *stricto sensu*" (*ibid.*, para. 32).

60. The new article 6 should remain where it was, in chapter II of part 2, despite the link between cessation and the primary rule. He took that view for the very reasons given by the Special Rapporteur in his report (*ibid.*, para. 55) on which some members had relied in advocating that the article should be placed in chapter I, on general principles. The purpose of that reasoning was to demonstrate the need for an independent provision on cessation, if nothing else. Cessation was a consequence of the wrongful conduct; without such conduct there would be no need for cessation. At the same time, while cessation was independent of other consequences, because of its relationship to the original obligation violated, it was not unrelated to those consequences, since it was in the nature of a prelude. In that connection, the Special Rapporteur urged that a provision on cessation "should not be excluded by such considerations of a theoretical nature", since the distinction between primary and secondary rules was itself relative and since "it follows that a rule on cessation could well be conceived as a provision situated, so to speak, 'in between' the primary rules and the secondary rules" (*ibid.*, para. 61).

61. The doctrinal aspects of the debate prompted two further remarks. First, was it possible to speak of cessation in relation to "omissive" wrongful acts? Some members

had said it was not, rightly considering specific performance to be relevant in such cases. It was also true, however, that omissive acts might well fall into the category of wrongful acts having a continuing character, as explained by the Special Rapporteur (*ibid.*, paras. 42-43). Bearing in mind that both specific performance and cessation related to the primary obligation, was it not the continuing character of the wrongful act that was the determining factor?

62. His second remark concerned the "initial phase" in relation to the timing of a claim for cessation (*ibid.*, para. 38). While he agreed with Mr. Mahiou (2103rd meeting) that the underlying problem was one of prevention, it was one of prevention of the completion of a wrongful act—not prevention of the injurious consequences arising out of acts not prohibited by international law, which were covered by another topic on the Commission's agenda.

63. Like Mr. Razafindralambo (2102nd meeting), he considered that the wording of article 6 should be brought into line with that of article 25 of part 1 of the draft. The amended wording, which would involve using the expression "an act or omission extending in time", would be sufficiently comprehensive to cover single, composite and complex acts or omissions.

64. With regard to the new draft article 7, he fully agreed with the Special Rapporteur that restitution in kind came "foremost, before any other form of reparation *lato sensu*, and particularly before reparation by equivalent" (A/CN.4/416 and Add.1, para. 114). Of the two possible means of restitution—restoration of the *status quo ante* or establishment of the situation as it would have been had there been no wrongful act—he preferred the latter. It was in keeping with the concept recognized in the *Chorzów Factory* case, according to which the author State was bound to "wipe out" all the legal and material consequences of its wrongful act (*ibid.*, footnote 235). Consequently, the injury must be remedied in a "natural", "direct" and "integral" manner (*ibid.*, para. 114).

65. Article 7 did not indicate which meaning should be attributed to *restitutio*, as had draft article 6 as submitted by the previous Special Rapporteur. Whether article 7 was to be criticized on that account, however, depended to a large extent on how paragraph 4 was construed and on how the Special Rapporteur would draft the relevant articles on reparation by equivalent. It would none the less help to dispel doubts if the meaning of restitution were spelt out in the draft, for, as noted in the report, that would indicate "an 'integrated' concept of restitution in kind within which the restitutive and compensatory elements are fused" (*ibid.*, para. 67). It would also accommodate the position of Mr. Graefrath, who would prefer to define *restitutio* as restoration of the *status quo ante*, "which could be clearly determined without prejudice to any compensation of *lucrum cessans*" (2104th meeting, para. 32).

66. He fully endorsed the arguments advanced by the Special Rapporteur with regard to the treatment of aliens (A/CN.4/416 and Add.1, paras. 104-108 and 121-122). Although *restitutio* applied to all wrongful acts, it did not, for instance, apply in situations of physical or legal impossibility. It was right, therefore, that draft article 7 as submitted by the previous Special Rapporteur should be deleted.

67. The need to provide for "material impossibility", as in paragraph 1 (*a*) of the new article 7, was self-evident. Legal impossibility could, of course, derive from international law or municipal law; but only one kind of legal impossibility—deriving from international law—was dealt with in the article, namely in paragraph 1 (*b*), on the case in which restitution would involve a breach of an obligation arising out of a rule of *jus cogens*. He shared the Special Rapporteur's views in that respect, but the practical problem touched on in the report (*ibid.*, para. 87)—namely where an obligation of State A to provide *restitutio* to State B conflicted with a treaty obligation between States A and C—merited further reflection. The problem could not simply be dismissed as a case of factual rather than legal impossibility, since its source derived from obligations under international law and not municipal law. Moreover, as the Special Rapporteur noted, "the juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law" (*ibid.*, para. 98). Nor did it suffice, in such a situation, simply to conclude (*ibid.*, para. 124) that State A must resolve the impasse.

68. As to whether legal impossibility could derive from the concept of domestic jurisdiction, he fully endorsed the Special Rapporteur's cogently explained dismissal (*ibid.*, para. 89) of any limitation on *restitutio* on the basis of that concept. He also fully concurred with the Special Rapporteur's views concerning impossibility deriving from municipal law (*ibid.*, para. 98).

69. He further agreed with the substance of the third limitation on *restitutio*, namely excessive onerousness, as set forth in paragraph 1 (*c*) of article 7, and it was particularly gratifying to note the interrelationship between that limitation and the dismissal of legal impossibility deriving from municipal law as reflected in paragraph 3. In that regard, he failed to see how it was possible to rely on article 33 of part 1 of the draft, dealing with a state of necessity, as advocated by Mr. Calero Rodrigues (2103rd meeting), instead of on the standard of excessive onerousness. Under article 33, a state of necessity was a circumstance precluding wrongfulness, which meant that the internationally wrongful act was never complete, whereas under paragraph 1 (*c*) of draft article 7 the standard of excessive onerousness was a limitation on an obligation to provide *restitutio* which would not arise in the absence of a complete internationally wrongful act.

70. Lastly, the topic of State responsibility had been in the Commission's programme of work for 40 years, including 9 years spent on considering part 2 of the draft. No less than 16 draft articles were now before the Drafting Committee, and more were to come. While there were good reasons for that state of affairs, it might nevertheless generate further criticism of the Commission. He was convinced, however, that, with the Special Rapporteur at the helm, the Commission would be able to make the vigorous effort required to achieve progress.

71. Mr. AL-KHASAWNEH expressed his appreciation to the Special Rapporteur for a meticulously researched and closely argued preliminary report (A/CN.4/416 and Add.1), which ranked alongside the reports of his predecessors.

72. With regard to method, he had no difficulty in accepting the Special Rapporteur's suggestion for separate

treatment of the consequences of international delicts and those of international crimes. Although such a distinction might result in delays and repetition, that would be offset by the greater precision that would ensue. The same was true of the Special Rapporteur's suggestion to devote part 3 of the draft exclusively to the settlement of disputes and, as a consequence, to incorporate the articles on "implementation" (*mise en oeuvre*) in part 2. In the final analysis, it was perhaps a question of legal taste rather than of an established technique, and it should not be forgotten that *de gustibus non disputandum est.*

73. The Special Rapporteur had referred to cessation as the "Cinderella" of the doctrine of the consequences of internationally wrongful acts (*ibid.*, para. 30), and a measure of the obscurity into which that Cinderella had fallen was to be gleaned from the preliminary report of the previous Special Rapporteur.[11] By 1984, however, it had emerged from obscurity to warrant inclusion in paragraph 1 (*a*) of draft article 6 as submitted by the previous Special Rapporteur, and the present Special Rapporteur had now decided to rescue that Cinderella completely with his proposal for a separate article. Personally, he agreed on the whole with that approach, which established a logical link between a specific remedy in part 2 and the corresponding category of wrongful acts in part 1. He noted in that connection that cessation had apparently been classified by Combacau and Alland under what they termed "obligations whose breach leads to a substitution of primary obligations".[12] If incorporating cessation in a separate article would enable more restricted categories to be distinguished, that was an added reason for supporting the Special Rapporteur's approach.

74. The scope of a wrongful act of a continuing character was, according to the Special Rapporteur's interpretation, quite wide. For instance, the Special Rapporteur said he disagreed with the Commission's stated view that, with regard to confiscation, "the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting" (*ibid.*, para. 34) and maintained that cessation was applicable in the case of both commissive and omissive wrongful acts, although he admitted that prevailing doctrine and practice did not support such an interpretation (*ibid.*, para. 42).

75. If the concept of a wrongful act of a continuing character was given a wide scope, the effect would be to make cessation and restitution overlap to such an extent that, despite treatment in separate articles, any distinction between the two would be artificial. That was borne out to some extent by the views of Balladore Pallieri and Dominicé (*ibid.*, para. 69), who had opined that *restitutio in integrum* was not one of the modes of reparation, and as such one of the facets of the new relationship coming into being as a consequence of the wrongful act, but rather a continuing "effect" of the original legal relationship. Although that was a minority view, it was not without force. Yet the Special Rapporteur went on to dismiss it with the words: "[That view], while helpful in preserving the notion that the original obligation (and the rule from which it originates) survives the violation, has a negative impact on the distinction between *restitutio in integrum* and cessation of the wrongful conduct" (*ibid.*, para. 70). And he added: "Cessation and restitution in kind should be maintained as two distinct remedies against the violation of international obligations." One was tempted to ask whether the distinction had become an end in itself.

76. Another drawback to giving wide scope to cessation was that it might confine another remedy—specific performance—to obscurity, for it seemed that, in the case of omissive acts of a continuing character, cessation was simply a misnomer for belated performance. He agreed on that point with Mr. Barboza (2102nd meeting).

77. A further consequence of an internationally wrongful act was nullity, which, like cessation, could be subsumed into *restitutio in integrum* but could also be set forth, with equal force, in a separate article. The scope of nullity was, of course, delimited by the requirement that the alleged wrongful act must be a juristic one, for example legislation, an executive order or a judicial decision. Its practical relevance had been succinctly described by Lauterpacht, who had stated that "the absence of more direct means of enforcement tends to endow the principle of nullity of illegal acts with particular importance in the international sphere".[13] That importance became still clearer if one bore in mind that the political organs of the United Nations, and in particular the Security Council, rarely discussed the question of demanding or fixing reparation when considering an internationally wrongful act. The Special Rapporteur had discussed nullity in his report, but the question remained whether, in view of its importance, that remedy should not be the subject of an express provision.

78. Turning to the question of restitution in kind, the Special Rapporteur rightly stated (A/CN.4/416 and Add.1, para. 64) that the approach to the concept was not uniform in either doctrine or practice. The *Bryan-Chamorro Treaty* case[14] was usually cited in support of the definition according to which restitution in kind consisted in re-establishing the *status quo ante*, while the classic dictum of the PCIJ in the *Chorzów Factory* case[15] was usually given in support of the definition according to which it consisted in establishing the situation which, in all probability, would have existed had the illegal act not been committed. The differences between the two definitions were more than academic, for they could have an impact on the assessment of damages and hence on the integrative aspect of the second definition. Although it was difficult to provide for a theoretical situation which had never existed, he none the less preferred the second definition.

79. In any event, no matter which definition was adopted philosophically, restitution in kind was always impossible —a fact of which the previous Special Rapporteur had been

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[11] *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330.

[12] *Loc. cit.* (2103rd meeting, footnote 5), pp. 97-98.

[13] H. Lauterpacht, *Recognition in International Law* (Cambridge, The University Press, 1947), p. 421.

[14] Republic of El Salvador *v.* Republic of Nicaragua, decision of 9 March 1917 of the Central American Court of Justice (see *The American Journal of International Law*, vol. II (1917), pp. 674 *et seq.*).

[15] See 2105th meeting, footnote 5.

fully aware, as was apparent from his preliminary report[16] —for time-reversal was beyond human capacity, or, as Omar Khayyam had said, "the moving finger writes and, having writ, moves on". It was therefore a wonder to find that writers were virtually unanimous in regarding it as the normal or primary right of the injured State. Of the authors cited by Mann in that connection,[17] only Brownlie seemed to regard it as "exceptional" and only Kelsen actually denied it. Nor was that primacy likely to be seriously challenged under the various legal systems. It was of course true that, as Mann had noted, restitution in kind was "largely unknown to the common law, which, in principle and somewhat paradoxically, adheres to the rule of Roman law *omnis condemnatio est pecuniaria*".[18] But the same author had pointed out that, "even in England, for instance, the plaintiff in an action for detinue is by no means confined to monetary relief, but is entitled to delivery-up of the chattel".[19] In Islamic law, the primacy of *restitutio in integrum* could be arrived at by necessary inference from the old rule *Idha batala-l-aslu yusaru ila-l-badal* (اذا بطل الأصل يصار الى البدل), meaning "If restoration of the original situation is impossible, seek an alternative". That rule had been codified in the Ottoman Civil Code as article 53. It was also worth noting that Islamic law referred to pecuniary compensation as "imperfect reparation", *al qada'ul nackis* (القضاء الناقص).

80. Recent trends in the literature, however, challenged not only the primacy, but also the availability of *restitutio in integrum*. Notable in that regard were two works by Christine Gray published in 1985 and 1987.[20] In those works the author had arrived at the conclusion, on the basis of a review of arbitral awards and decisions by the ICJ and other tribunals, that there was little if anything to support the primacy of *restitutio in integrum* in international arbitral practice and that the dictum in the *Chorzów Factory* case could not be relied upon to support a generally applicable theory to that effect. Without taking issue with that conclusion, he believed that the availability of other modes of reparation, the fact that courts and arbitrators worked in isolation and the fact that the latter rarely granted restitution without an express provision to that effect could equally be interpreted as supporting the primacy of *restitutio*. At any rate, he did not believe that the frequency of resort to other remedies challenged the primacy of *restitutio in integrum*.

81. Similar challenges to the primacy of *restitutio in integrum* emanated from the concept of special régimes. In that connection, he too considered that there was no need, for the time being, for a special régime for the treatment of aliens, although it was a matter that called for further study, especially in view of the fact that the Special Rapporteur had ascribed a large scope to cessation and at the same time did not provide for the exception of "excessive onerousness" in the case of cessation. An injured State would, under those circumstaces, opt for cessation rather than *restitutio in integrum*, and that constituted a gap in the Special Rapporteur's strategy. Ultimately, much would depend on the extent to which the Commission was willing to allow the content and—to use Combacau and Alland's term—the "extrinsic" value of the primary rules to determine the categorization of the secondary rules.

82. He wished to reserve his position on the concept of excessive onerousness as an exception to *restitutio in integrum*, which had been introduced by the Special Rapporteur in the light of the problem of nationalizations carried out in breach of international law.

83. Another problem was that of legal impossibility. While primary rules might, of course, expressly prescribe the consequences of their breach—as did article 50 of the European Convention on Human Rights[21]—he felt that no general conclusion could be reached as to the non-availability of *restitutio in integrum* on the basis of such examples, since they were the exception that proved the rule.

84. Finally, he supported the Special Rapporteur's conclusions (*ibid.*, paras. 109-112) concerning the right of choice of the injured State. Such a right no doubt existed, but the fact that it might lead to abuse if unlimited suggested that limitations should be placed upon it. A rich State might, for instance, pollute an international river to a level above that of appreciable harm. If the injured State or States were to accept pecuniary compensation in lieu of restitution, a situation of servitude would arise. Such cases should be borne in mind in drafting article 7, so as to ensure that limitations on the freedom of a State took account not only of the interests of other States, but also of the environment.

The meeting rose at 1.10 p.m.

[16] See *Yearbook . . . 1980*, vol. II (Part One), pp. 112-113, document A/CN.4/330, para. 29.

[17] F. A. Mann, "The consequences of an international wrong in international and municipal law", *The British Year Book of International Law, 1976-1977*, vol. 48, p. 3 and footnotes 6 and 7.

[18] *Ibid.*, p. 2.

[19] *Ibid.*, p. 3.

[20] C. D. Gray, "Is there an international law of remedies?", *The British Year Book of International Law, 1985*, vol. 56, p. 25; and *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987).

[21] See 2104th meeting, footnote 10.

2123rd MEETING

Thursday, 22 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.