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Summary record of the 2127th meeting

Topic:
State responsibility

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modest provision designed to draw attention to the importance of co-operation between watercourse States with regard to the regulation of international watercourses. If the Commission decided that the subject deserved more detailed treatment, however, he would be happy to expand on the provision.

86. Mr. KOROMA said that the articles proposed by the Special Rapporteur were most timely and relevant and had his full support. He knew how important the whole topic was for riparian and lacustrine States, since he had had the privilege of representing the Commission at a meeting on the subject held in Addis Ababa in 1988. At the same time, the obligations laid down in the draft articles should not be too restrictive, for otherwise States might be reluctant to comply with them. States should, rather, be encouraged to co-operate in the prevention of harmful effects.

The meeting rose at 12.55 p.m.

2127th MEETING

Wednesday, 28 June 1989, at 3.10 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: 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. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

[Agenda item 2]

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

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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

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

1. Mr. McCAFFREY congratulated the Special Rapporteur on his exemplary preliminary report (A/CN.4/416 and Add.1), which contained an extremely thorough analysis of the authorities in the field. He would confine his comments to the general structure proposed for the draft, the legal consequences of an internationally wrongful act, cessation and the new draft article 7 on restitution in kind.

2. With regard to the general structure, the Special Rapporteur advanced cogent arguments for giving separate treatment to provisions on "implementation" (*mise en oeuvre*) and provisions on the settlement of disputes (*ibid.*, para. 4). The analysis he gave (*ibid.*, para. 19) justified placing the rules on implementation in part 2 of the draft rather than in part 3. As Mr. Ogiso had pointed out at the thirty-seventh session, in 1985,[4] a State could only claim, or allege, that an internationally wrongful act had been committed and the legal status of that act was determined only upon completion of the claim, counter-claim or other dispute-settlement process.

3. On the other hand, he was not sure that it was appropriate to give separate treatment to international delicts and international crimes, for he simply could not accept the concept of an international crime of a State and its corollary, penal responsibility of a State. While it was true that violations of international law differed in seriousness, it was also true that they formed a continuum in which it was difficult to identify two distinct categories. Positing a dichotomy between delicts and crimes might, by opening the door to misunderstanding, do a disservice to work on the present topic. There was no doubt that separate treatment should be given to the consequences of the breach of obligations *erga omnes*, but it was precisely there that the Commission could make a real contribution, rather than in vainly pursuing the spectre of a crime of a State. He could not accept the other arguments advanced by the Special Rapporteur (*ibid.*, para. 15) to justify the distinction between two sets of consequences, one for crimes and the other for delicts; the peremptory language he used—"to impose cessation", "to inflict punishment"—did not conform to modern realities. The means of constraint provided for in the Charter of the United Nations were intended to be carried out through the Security Council and the organized international community it represented, not through actions by individual States.

4. The Special Rapporteur's approach to the legal consequences of internationally wrongful acts was the right one and he was correct in saying that "the whole subject-matter should be covered wherever possible in greater detail and depth" (*ibid.*, para. 24). If that intention was carried out, it would make a positive contribution to the elucidation of the subject, for States would be better able to determine

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* Resumed from the 2122nd meeting.

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

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

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

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

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

[4] *Yearbook . . . 1985*, vol. I, p. 121, 1895th meeting, para. 30.

the consequences of their actions and of the actions of other States. It was necessary to be as precise as possible in that area and that was exactly what the Special Rapporteur was trying to do.

5. The cessation of an internationally wrongful act must be given separate treatment, as the Special Rapporteur recommended, and not be incorporated in the articles on reparation. As Mr. Calero Rodrigues (2103rd meeting) had pointed out, the subject could well be covered in chapter I (General principles) of part 2. He welcomed the conceptual issue raised in the question whether the obligation of cessation was part of the obligation not to do something or of the consequences of committing an internationally wrongful act. Since the Commission had decided that part 1 of the draft would be concerned with the origin of international responsibility, it would be appropriate, if only for that reason, to include cessation in chapter I of part 2, especially as it appeared to involve a new obligation on the part of the State which had committed an internationally wrongful act.

6. Turning to the new draft article 7 of part 2, he said he agreed with Mr. Calero Rodrigues that what was meant by "restitution in kind" had to be defined in paragraph 1. That would obviate the need to expand on the concept in the commentary and ensure that what the Commission meant was clearly spelled out. As the Special Rapporteur stated (A/CN.4/416 and Add.1, para. 64), there were two different views, namely that restitution in kind meant re-establishing the *status quo ante* or that it meant re-establishing the situation which would have existed if the wrongful act had not been committed.

7. Paragraph 1 (*c*) of article 7 raised the thorny problem of "excessively onerous" restitution. The expression was not especially felicitous and it would have been better to use the words "disproportionate burden", mentioned by the Special Rapporteur in his quotations from the literature (*ibid.*, para. 99). The Drafting Committee could have resolved such a minor point had it not raised a major problem: the article would then have to list the cases in which restitution in kind was considered "excessively onerous", and that was tantamount to apprising a State that had committed an internationally wrongful act of the loopholes through which it might escape a claim by the injured State.

8. Two formulations were proposed in paragraph 4: "reparation by equivalent" and "pecuniary compensation". He preferred the second expression for the simple reason that it was more understandable to the average lawyer. Furthermore, pecuniary compensation was in fact the chief form of reparation by equivalent. Finally, "reparation by equivalent" sounded very awkward in English.

9. With regard to the organization of work, it would be very useful if the Special Rapporteur could be given an opportunity to introduce his second report before the end of the current session, in order to facilitate its study by members before the next session.

10. Mr. BARBOZA noted that, in his preliminary report (A/CN.4/416 and Add.1, para. 64), the Special Rapporteur proposed two ways of defining restitution in kind: "definition A" involving re-establishment of the *status quo ante*; and "definition B" involving re-establishment of the situation which would have existed if the wrongful act had not been committed. Those two definitions related to different moments in time—the moment when the violation took place and the moment of reparation, which was really the more important. If definition A were retained, all the consequences of the act would not have been wiped out at the moment of reparation: what about the interest on a sum of money claimed by the injured State, for example? That State might regard it as the subject of a new claim. Even if adopting definition B meant introducing a situation which had never existed, it would be better to do so if the possibility of integral compensation was to be preserved.

11. The relationship between cessation and restitution caused no difficulty, in his opinion, as both belonged to the secondary rule. He did not share the Special Rapporteur's view that cessation was a continuing effect of the original legal relationship, nor could he agree with him in situating cessation "in between" primary and secondary rules (*ibid.*, para. 61). Making cessation an effect of the primary rule and restitution an effect of the secondary rule would be conceptually illogical, for two States would then be linked at the same time by one legal obligation of cessation imposed by the primary rule and another of reparation imposed by the secondary rule as a consequence of the violation of the first. It must be recalled that a legal obligation was nothing more than a legal link, while its content was an entirely different thing. A primary obligation had no strength, as it was logically impossible to comply with. Once it had been violated it was extinguished, because it could not possibly be fulfilled, since the time element was essential: before time T, the obligation had not been violated; afterwards, it had. There was no third possibility: an obligation was either complied with or violated. Consequently, cessation presupposed violation.

12. The origin of the confusion was that cessation was always linked to a continuing act, the interruption of which provoked the illusion that the primary obligation had been complied with. In fact, however, it had not, because the time element was essential to the fulfilment of the obligation. The following example might serve as an illustration: in the case of diplomatic agents being taken hostage, the content of the primary obligation was that of not interfering with the freedom of persons protected by their diplomatic status. Once they had been taken hostage, however, that obligation could not possibly be fulfilled: having effectively been violated, it belonged to the past. In such cases, the law therefore imposed a second obligation, that of cessation. In the case of hostages, the obligation of cessation did not even have the same content as the primary obligation, since the release of the hostages required a positive conduct, whereas the content of the primary obligation had been an abstention. The first legal link, which had its own source, namely the 1961 Vienna Convention on Diplomatic Relations, no longer existed. It was replaced by the new obligation that would be imposed by the articles on State responsibility, together with some other elements designed to wipe out the other factual consequences of the violation, such as the interest that accumulated when a creditor was deprived of capital owed to him by a debtor who had defaulted, or injury to diplomatic hostages and damage to embassy premises.

13. Even if both cessation and restitution belonged to secondary rules, they must be conceptually separated. Although restitution implied cessation, it was different. The fact that both occurred at the same time did not mean that

cessation was absorbed by restitution or "telescoped" into it, as the Special Rapporteur had suggested. Returning to the example of hostage-taking, he said that, if the hostages were delivered to the State claiming them, the wrongful act certainly ceased; but it might also cease if the hostages were simply released, even if that act led to their death, for example if they were left to the fury of a mob.

14. Lastly, he was in general agreement with the Special Rapporteur's analysis of the question of the impossibility of restitution in kind (*ibid.*, paras. 85-90).

15. Turning to the new draft article 7, and more specifically to the concept of "excessively onerous" restitution, he said that paragraph 2 (*a*) and (*b*), which brought out that idea, related to two different elements. Subparagraph (*a*) seemed to be the application of the principle of "reasonableness", which was one of the sure guides in the application of the law. Subparagraph (*b*) dealt with something entirely different: a situation similar to that of a "state of necessity", but with the difference that, instead of precluding the wrongfulness of an act of a State not in conformity with its international obligations, the provision relieved the State of its obligation of restitution in kind. Subparagraph (*b*) therefore seemed inappropriate: its content related more to paragraph 1 (*b*) of article 33 (State of necessity) of part 1 of the draft, as provisionally adopted by the Commission on first reading. If paragraph 2 (*b*) of draft article 7 were deleted, the article as a whole would be acceptable.

16. As to the new draft article 6, he had no objection to separate treatment of cessation as long as it was clearly understood that, together with restitution, it was a form of reparation. To that end, the Commission might consider using the more explicit formula "without prejudice to the *other* responsibility it has already incurred", in order to make it clear that cessation was *also* a responsibility, and not a primary obligation. The word "remains" should be replaced by "is", and the words "action or omission" could be replaced by the word "act", which covered both ideas.

17. Mr. SOLARI TUDELA said that the reasons the Special Rapporteur had given for according separate treatment to the consequences of international delicts and those of international crimes were primarily methodological and, as he stated in his preliminary report: "If the results were to prove that the separation could partly be dispensed with, reverting to more or less integrated texts would remain a matter of drafting." (A/CN.4/416 and Add.1, para. 12 (*b*).) In those circumstances, it would be useful to know whether the Special Rapporteur intended to draw a distinction, in the chapter of the draft on the consequences of an international crime, between international crimes and crimes against the peace and security of mankind and to deal with the different consequences in those two cases, particularly in respect of reparation.

18. It was to the question of cessation that the Special Rapporteur attached the greatest importance, drawing a distinction in that connection between cessation and restitution in kind from the standpoint both of their nature and of their function. The Special Rapporteur's view was that cessation had its source in primary rules and restitution in secondary rules. Doctrine and practice did not, however, always distinguish between those two concepts. Referring from the point of view of internal law to the case of the arbitrary detention of an individual by the authorities of a State, he said that, in a State which was not subject to the rule of law, the individual's release—or, in other words, the cessation of the wrongful act—would be considered sufficient, whereas, in a State which was subject to the rule of law, the release would not be the last of the case, since the injured individual would be entitled to claim compensation from the State. It appeared that the same was true in public international law; that the difference between cessation and restitution would become increasingly marked as the international community of law grew stronger; and that the breach of an international obligation would lead more and more frequently not only to the cessation of the wrongful act, but also to reparation in due form. State practice already offered examples to illustrate those two aspects of responsibility. Some years previously, the Israeli authorities had arranged for the kidnapping in Argentine territory of the former Nazi, Adolf Eichmann, whom they had accused of the crime of genocide. As was known, Eichmann had subsequently been tried, found guilty and executed in Israel. But it would also be recalled that the Israeli Government had not denied having committed a breach of an international obligation by failing to respect Argentina's sovereignty, and had presented to the Government of that country a note to that effect which it had regarded as the equivalent of reparation.

19. The distinction between those two aspects of international responsibility and their independence from each other were, in his view, not in doubt and devoting a separate article to cessation was therefore justified. But was it the Special Rapporteur's intention to leave the new article 6 on cessation in chapter II of part 2 of the draft, on the legal consequences deriving from an international delict, or to include it in chapter I (General principles) (*ibid.*, para. 20)?

20. With regard to restitution in kind, the Special Rapporteur had made a very detailed analysis of doctrine and the practice of States. According to the report (*ibid.*, para. 64), there were two main tendencies in the doctrine: one in favour of re-establishing the situation which had existed prior to the wrongful act and the other in favour of re-establishing the situation which would have existed if the wrongful act had not been committed. Although the Special Rapporteur apparently favoured the second of those schools of thought, that preference was not reflected in the new draft article 7. Referring in connection with that article to the question of nationalization measures (*ibid.*, para. 106) and the impossibility of restitution in kind in such cases, the Special Rapporteur pointed out that contemporary doctrine questioned the right to restitution in that field. Since nationalization was a lawful act and State responsibility related to wrongful acts, the conclusion to be drawn was that nationalization as such did not come within the scope of responsibility. The fact nevertheless remained that a State which was indemnified in the event of nationalization could have problems with regard to the amount of compensation.

21. In his view, the text of draft article 7, and paragraph 3 in particular, might give rise to difficulties. However justified the rule embodied in that provision might be, it was not certain that it would be accepted, in view of past experience in other areas of law. In the case of wrongful acts which violated their internal law, States were often

prevented from enforcing the law by obstacles imposed by the internal legal system of another State. In the case of an internationally wrongful act would they accept a rule as rigorous as that contained in article 7?

22. Mr. FRANCIS, referring to the general issues dealt with in the introduction and in chapter I of the preliminary report (A/CN.4/416 and Add.1), said that he agreed with the Special Rapporteur's approach to the revision of articles 6 and 7 of part 2 of the draft. He sympathized, in particular, with the emphasis on the question of cessation, in other words on the obligation of the author State, and with the idea of devoting a separate article to the rights of the injured State. He also agreed with the way in which the Special Rapporteur proposed to deal with the question of international delicts and international crimes, on the understanding that the Commission would eventually come back to the issue to see whether the two approaches envisaged could perhaps be reconciled. He would in due course give his views on whether the Commission should be guided by Mr. McCaffrey's comments and referred in that connection to article 19 (International crimes and international delicts) of part 1 of the draft, provisionally adopted by the Commission on first reading.

23. Articles 1 to 5 of part 2 of the draft could indeed constitute a chapter I of that part, entitled "General principles" (*ibid.*, para. 9), but once the Commission had finally adopted those articles, the right place for article 5 would, in his view, be under the heading "Use of terms". The provision was essentially interpretative in nature and had no bearing on general principles. He agreed with Mr. Calero Rodrigues (2103rd meeting) that the new draft article 6 on cessation should be included among the general principles.

24. As to the outline for parts 2 and 3 of the draft proposed by the Special Rapporteur (A/CN.4/416 and Add.1, para. 20), he agreed with Mr. Yankov (2105th meeting) on the need to define the elements to be included in part 3, on the peaceful settlement of disputes.

25. He fully agreed with the Special Rapporteur's analysis and conclusions on cessation (A/CN.4/416 and Add.1, paras. 22, 31 and 61). Cessation as a consequence derived mainly from a primary obligation and, in that sense, was not really a legal consequence, but a factual consequence of an internationally wrongful act. Unlike the other consequences, it did not derive from the new legal relationships arising out of the breach of an international obligation. In the case of a State whose accidental breach of an international obligation was discovered and remedied by its own organs, cessation was not, strictly speaking, a legal consequence of the same kind as the other consequences deriving from the breach.

26. If he had understood him correctly, Mr. Bennouna (2122nd meeting) took the view that cessation corresponded to restitution. That was true in some cases where cessation was a means of remedying the breach, but cessation nevertheless differed from restitution as such in that it depended on the breach of the international obligation itself. If a State bombed a neighbouring State and then stopped doing so, it could be required to make reparation in the event of injury, but certainly not to provide restitution in kind. That was why the Special Rapporteur was right in saying 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" (A/CN.4/416 and Add.1, para. 61).

27. Referring to the drafting of the new article 6, and in particular of the expression "an internationally wrongful act [having] [of] a continuing character", he said that the Special Rapporteur should pay greater attention to article 25 of part 1 of the draft, entitled "Moment and duration of the breach of an international obligation by an act of the State extending in time".

28. On the question of excessively onerous restitution, referred to in paragraph 1 (*c*) of the new draft article 7, he thought that it would be useful to bear in mind the spirit of articles 31, 32 and 33 of part 1, relating to *force majeure* and fortuitous event, distress and state of necessity, which did not preclude the wrongfulness of an act if the author State had contributed to the occurrence of the situation. Article 7 should indicate that, if the excessively onerous character of restitution was a consequence of the breach, the author State should not derive any advantage from it.

29. Draft article 7 of part 2 as submitted by the previous Special Rapporteur had given rise to a variety of reactions and he, too, had reservations about it, particularly with regard to the question of resident aliens, which should be approached cautiously and in the light of what was happening in the world. Coming as he did from a small country which had a population of only just over 2.5 million and from which another 1 million had emigrated, he was particularly sensitive to that issue. When a breach of an international obligation involving resident aliens occurred, the important thing was to find a legal solution based on humanitarian concerns which would help to improve the lot of the persons involved in the new situation arising out of the breach—an altogether different matter from restitution.

30. Mr. SHI paid tribute to the efforts made by the Special Rapporteur, who generally accepted the outline of parts 2 and 3 of the draft proposed by his predecessor, while imprinting on it his personal perception and making certain changes for reasons of methodology. New draft articles 6 and 7 of part 2 had thus been submitted to replace those already referred to the Drafting Committee, and that was a perfectly natural procedure.

31. The revised outline proposed by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1, para. 20) differed from the original outline in three major respects. First, two separate chapters of part 2 were proposed for the legal consequences of international delicts and those of international crimes. Secondly, in the treatment of each of those categories, the Special Rapporteur drew a distinction between substantive and instrumental or procedural consequences. Thirdly, he devoted all of part 3 to the peaceful settlement of disputes arising out of an alleged internationally wrongful act. It could be asked whether the proposed changes were justified. In his report (*ibid.*, paras. 16 and 18), the Special Rapporteur stressed that the suggested changes were purely a matter of method and did not imply any attempt on his part to take a stand on any of the practical or theoretical issues involved. But was it possible to separate methodology from theoretical or doctrinal issues? For example, the Special Rapporteur concluded that the legal consequences of delicts and those of crimes had to be treated separately because it was difficult to find a "lowest common denominator". In draft article 14 of part 2 as referred to the Drafting Committee, however, his predecessor had admitted, at least implicitly, the existence of

a common denominator in the legal consequences of internationally wrongful acts, with the exception of the most serious crimes, which, according to him, had their own legal consequences. The difference in treatment was thus determined not merely by method, but rather by a difference of view on theoretical issues. It would be premature for the Commission to take a decision on the changes proposed by the Special Rapporteur until he had submitted all the reports and draft articles relating to parts 2 and 3 of the draft.

32. With regard to the new draft article 6, he agreed with the Special Rapporteur that cessation should be dealt with separately from the provisions on reparation and found the arguments to that effect generally convincing. A few comments, however, were called for.

33. First, the Special Rapporteur stated (*ibid.*, para. 31) that cessation pertained to the wrongful act itself, rather than to legal consequences; that, in that sense, it was not one of the forms of reparation; and that, as an obligation and as a remedy to a wrongful act, it was to be ascribed to the continued, normal operation of the primary rule of which the wrongful act constituted a violation, not to the operation of the secondary rule coming into play as an effect of the occurrence of the wrongful act. He could not fully share that view. Like other members, he regarded cessation and restitution in kind as forms of reparation which were often combined. That was so, for example, in the case of demands by injured parties for the evacuation of a territory, the release of hostages or the restitution of objects. The Special Rapporteur was apparently aware of the difficulty of maintaining an extreme position, since he stated (*ibid.*, para. 32) that cessation fell, nevertheless, among the legal consequences of a wrongful act in a broad sense. Those were difficult theoretical issues and he agreed with Mr. Yankov (2105th meeting) that the distinction between cessation and reparation, or restitution in kind in particular, should not be taken too far.

34. Secondly, the Special Rapporteur drew a distinction between a wrongful act having a continuing character or extending in time and an instantaneous wrongful act, adding that cessation was important only in the former case. The problem lay in the definition of a wrongful act of a continuing character and the criteria to be used for such a definition. The Special Rapporteur recalled (A/CN.4/416 and Add.1, para. 34 *in fine*) that, in explaining the distinction between a continuing wrongful act and an instantaneous wrongful act in the commentary to article 18 of part 1 of the draft, the Commission had stressed that the former was "a single act [which] extends over a period of time and is of a lasting nature", while the latter was "an instantaneous act producing continuing effects", such as an act of confiscation, in connection with which the Commission had indicated that "the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting". The Special Rapporteur disagreed with the Commission on that point and supported the views of the former Special Rapporteur, Mr. Ago, and of H. Triepel (*ibid.*, paras. 35-37). Yet the definition defended by Triepel, when applied, for example, to the nationalization of certain alien property, could entail intolerable consequences for the nationalizing State. A number of States still insisted today on the so-called international standard of nationalization, as conceived in traditional international law, a breach of which would constitute a wrongful act having a continuing character in the form of an illegal take-over of foreign property. According to the Special Rapporteur's logic, that would call for cessation of the act, in other words denationalization. As the Special Rapporteur explained (*ibid.*, para. 57), cessation—unlike reparation, and more specifically restitution in kind—admitted of no exceptions. In such a case, therefore, the demand for cessation could threaten or jeopardize the social and economic system of the State concerned. The point was one which the Special Rapporteur should take into consideration.

35. As to the role of cessation in "omissive" wrongful acts, he did not object to its inclusion in draft article 6, but, like some other members—in particular Mr. Barboza (2102nd meeting) and Mr. Tomuschat (2104th meeting)—he doubted whether the demand of an injured State for the performance of the original obligation to act could be called cessation. Moreover, the Special Rapporteur admitted that there was uncertainty in the matter, both in doctrine and in practice.

36. The new draft article 7 on restitution in kind was also acceptable on the whole, but again called for a few comments. In the first place, in his analysis of the concept of restitution in kind, the Special Rapporteur identified two main interpretations (A/CN.4/416 and Add.1, para. 64): on the one hand, re-establishment of the *status quo ante*, and on the other, re-establishment of the situation which would have existed if the wrongful act had not been committed. There was nothing in article 7, however, to indicate which of the two concepts he preferred. That was an important point, since the two definitions had quite different implications, as indeed the Special Rapporteur recognized (*ibid.*, para. 67). For his own part, he would prefer to view restitution as the re-establishment of the *status quo ante*.

37. The Special Rapporteur treated the question of impossibility—whether material impossibility, legal impossibility or excessive onerousness—as a limit to restitution in kind. In the case of legal impossibility, the Special Rapporteur recognized only impossibility which derived from a peremptory norm of general international law. Accordingly, under paragraph 3 of article 7, States were precluded from using obstacles deriving from their internal law as an excuse for non-compliance with the obligation of restitution in kind. As a general principle, that proposition was justified, but that did not mean that obstacles deriving from internal law should be disregarded altogether. He agreed with those members who had pointed out that it would sometimes be difficult, if not impossible, to set aside or rescind the decisions of domestic courts, especially those of the higher courts. Under the legal systems of some States, of course, Governments could intervene in court proceedings if they considered that a treaty obligation was in danger of being violated. At the same time, however, it might be constitutionally impossible for a Government to extricate itself from the decision of a higher court. That would be a clear case of legal impossibility of restitution in kind. Moreover, the Special Rapporteur acknowledged that difficulties arising from domestic law sometimes had to be taken into account, particularly in the case of expropriation; but he viewed that not as a matter of domestic legal impossibility, but rather as a matter of impossibility deriving from excessive onerousness such as would seriously jeopardize

the political, economic or social system of the State. However, if the act of expropriation was regarded as an act of a continuing character—in the sense understood by the Special Rapporteur earlier in his report (*ibid.*, paras. 35-37)—then cessation would be called for and there would be no exception in that regard. Once again, the issue of the distinction between cessation and restitution arose.

38. Finally, he agreed with the Special Rapporteur that there was no need for a special régime for wrongful acts affecting the treatment of aliens. Draft article 7 as submitted by the previous Special Rapporteur should therefore be deleted. The reasons advanced by the Special Rapporteur (*ibid.*, paras. 104-108), particularly with regard to the irrelevance of the distinction between "direct" and "indirect" injury to a State, might be sufficient to warrant that deletion. But that distinction remained important to the régime of State responsibility so far as the treatment of aliens was concerned. Because of the distinction, it was not lawful for States to espouse the claims of their citizens before local remedies had been exhausted or where there was no manifest denial of justice.

39. Mr. DÍAZ GONZÁLEZ said that, as the draft articles submitted by the Special Rapporteur were to be referred to the Drafting Committee, he would, to save time, make known his views on points of drafting and substance in the Committee.

40. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked the members of the Commission, who, whether they agreed or disagreed with his proposals, had all provided him with precisely the guidance he had requested. In summing up the discussion, he would follow the order adopted in his preliminary report (A/CN.4/416 and Add.1), starting with the proposed outline for parts 2 and 3 of the draft and proceeding to consider first cessation and then restitution in kind.

41. With regard to the proposed outline (*ibid.*, para. 20), he noted that almost all members who had spoken on the topic had referred to the relationship between international delicts and international crimes. As he had explained, he proposed to deal with delicts and crimes separately simply because, in his view, delicts were better known and less difficult to deal with, whereas crimes represented, at least for him, a far less known and much more difficult area. As a matter of principle, he had nothing against the "in addition" device (*ibid.*, para. 11). However, given the development of international law and the distinction between international delicts and international crimes made in article 19 of part 1 of the draft, it seemed rather odd to him to deal indiscriminately from the outset with both categories of internationally wrongful acts subject to one single difference, as represented by the "in addition" formula. He continued to believe that, only after he had dealt in depth with delicts would he be able to serve the Commission properly in the most difficult part of its task, namely the devising and formulation of a régime applicable to the particular consequences that attached or ought to attach to crimes, within the framework of the progressive development of international law.

42. Of course, at certain points in the draft articles which he had prepared thus far—including those he would submit in his second report—there were elements which could perhaps apply more or less perfectly for crimes and for delicts. But he was not confident enough to commit himself to such a conclusion. For instance, he had stated in his preliminary report that the rule on cessation and its treatment in a separate article might prove to be even more important for crimes than for delicts, and the same observation applied to satisfaction, which would be dealt with in the second report. He was not sure about all the implications, however. Satisfaction, for example, might not be appropriate, in all its forms, as reparation for a crime. Nor was he sure at the present initial stage in his work as Special Rapporteur in what measure, under what conditions and in what form or forms satisfaction would be due in the case of any delict. It would be less simple to settle any differences of view if the resulting article were to deal at one and the same time not only with delicts, but also with crimes. Mr. Koroma (2105th meeting), who had seen that difficulty, had alluded to the need to explore the "grey area" of wrongful acts situated between the area of delicts and that of crimes, while Mr. Barsegov (2104th meeting) had pointed out that, in national criminal codes, the legislator defined the breaches and then indicated the penalty as a function of the gravity of the breach. But, as Mr. Barsegov had stressed, the Commission was dealing with internationally wrongful acts. Consequently, he (the Special Rapporteur) did not think that it was defining breaches—or primary rules—in that case or laying down penalties, as in a national criminal code: there were international delicts on the one hand, and international crimes on the other, and in neither case was there available a clear and uncontroversial definition of specific wrongful acts (except for certain broad and ill-defined categories of crimes), or of penalties to be applied for crimes, or of any mechanism for punishment. Nor did he believe it would be so easy to transplant into international law models that were typical of national criminal law. He, for one, was not able to do so right away as easily as Mr. Barsegov had seemed to suggest.

43. According to Mr. Graefrath (*ibid.*), no punishment of any kind, not even punitive damages, should actually be envisaged. Moreover, Mr. Barsegov had said that it was not clear to him whether *restitutio* could apply in the case of international crimes. It would apply to some degree, but it was also quite possible that not all the provisions of the new draft article 7 of part 2 would apply equally to crimes and delicts. It therefore seemed preferable for the Commission first to reach a decision on the legal consequences of delicts, as proposed in article 7, and then to see how they might be adapted to crimes.

44. He believed that Mr. Bennouna (2122nd meeting) agreed with his analysis of the distinction between international delicts and international crimes, although he might have gone too far into the consequences. According to Mr. Bennouna, article 19 of part 1 introduced a complication in the codification of the topic in that it involved categories of criminal law completely unrelated to international realities and would create difficulties in connection with the punishment of crimes. In other words, Mr. Bennouna, who rightly stressed the difficulties of the topic, seemed to want to do away with article 19. Personally, he had no intention of doing so, for the very reasons, *inter alia*, which made Mr. Barsegov anxious to see the consequences of crimes set out forthwith. Mr. Graefrath agreed in principle with the method he had adopted—namely with the distinction in question—but was worried that separate provisions for crimes might be formulated in terms of punishment,

for in his view it would be misconceived to interpret the régime applicable to the most serious violations of international obligations as a kind of criminal responsibility. He could not agree with that view and would remind members that, according to the former Special Rapporteur, Mr. Ago, and a number of other scholars, the consequences of an internationally wrongful act were not limited exclusively to reparation. In any form of reparation there was, in addition to a purely compensatory element, a punitive element and, as was apparent from diplomatic practice, that applied even in the case of delicts. But he did realize the difficulty of conceiving punishment for a State—let alone of inflicting punishment on it. Three large States had indeed been punished at the end of the Second World War, but that punishment had consisted in defeat on the battlefield and had actually been the premiss for the punishment of individual crimes against peace and against humanity. In that connection, however, Mr. Tomuschat (2104th meeting) had rightly pointed out that certain limits to the possibilities of reparation should be considered in the interests of peoples, since a State could not be punished without punishing its people. Some form of punishment—of coercive measures—would, however, have to be envisaged. It was quite clear, for example, that, in the case of delicts, satisfaction was a form of punishment, although in that case the punishment was, in most of its forms, demanded by the injured State and it was the offending State which, in a sense, punished itself.

45. The distinction between delicts and crimes would also have to be made with regard to cessation. The provision in respect of crimes would have to be stated in much stronger terms than in the case of delicts or other internationally wrongful acts.

46. The second main question of method concerned the distinction between, on the one hand, substantive consequences, in terms of reparation and forms thereof, and, on the other, measures, in the sense of countermeasures, which he understood as being essentially instrumental in securing cessation, restitution in kind, pecuniary compensation and satisfaction. Such measures were subject to certain preconditions, which could be termed "pre-measures", as represented by the steps the injured State should take before resorting to measures. They were part of "implementation" (*mise en oeuvre*) and, although the previous Special Rapporteur had dealt with them in part 3 of the draft, he would prefer to place them in part 2, alongside measures. That was the third point on which he had departed from the outline proposed by his predecessor. It seemed to him that the last two questions of method—the distinction between the substantive consequences and the instruments used to secure them, and the distinction between measures and "pre-measures"—were less controversial than the distinction between delicts and crimes. Only one speaker, Mr. Graefrath, had expressed reservations concerning the distinction beween substantive and procedural consequences, and very few had done so concerning his conception of implementation or, in other words, "pre-measures".

47. Mr. Graefrath had accepted the first of those distinctions on condition that it was not regarded as absolute and he was quite ready to agree on that point. Of course, reparation was not exclusively substantive and measures were not exclusively procedural. Mr. Graefrath was concerned, as with regard to the distinction between crimes and delicts, that such a distinction would lead to the "criminalization" of States for serious violations. On that point, he (the Special Rapporteur) considered—and Mr. Razafindralambo (2102nd meeting), among other members, seemed to share his view—that reparation was mainly substantive and acquired a procedural character, for example with regard to satisfaction or punitive damages, only where there was wilful intent or negligence—in which event it then came close to punishment, as in the case of the most serious forms of delicts and, *a fortiori*, of crimes. Measures were mainly instrumental and, in that sense—but only in that sense—were procedural, for they were not an end in themselves, but served a purpose, which was to make reparation or to punish. To regard them as substantive would be to imply that they were always punitive and an expression of revenge, and a right of the injured State. He would prefer to regard them as the instruments to be resorted to for a certain purpose, namely to secure reparation for the most common delicts and perhaps punishment for more serious acts.

48. With regard to implementation and the way in which he conceived part 3, his intention to place "pre-measures" in part 2 and only dispute settlement in part 3 appeared to have been approved by a number of speakers, including Mr. Razafindralambo, Mr. Calero Rodrigues (2103rd meeting) and Mr. Al-Qaysi and Mr. Al-Khasawneh (2122nd meeting). His approach was based on the belief that the steps taken by States as pre-conditions for the lawfulness of measures had to be considered at the same time as the measures themselves. He failed to see how measures could be dealt with without making it clear within the same context in what cases and in what circumstances measures could not be resorted to without some prior steps. As to the question whether the provisions concerning such conditions should be placed before or after those relating to measures such as reciprocity or reprisals, it would seem reasonable that they should come immediately after them, in order to indicate the general conditions for the lawfulness of those measures. To relegate those conditions to part 3, as if they represented a minor matter of implementation, could be dangerous. It must be made clear that immediate resort to measures by an allegedly injured State on the mere basis of an exclusive, sovereign unilateral opinion, without even an exchange of diplomatic notes, should not be the rule. In that connection, he strongly disagreed, as a matter both of codification and of progressive development, with the well-known sweeping *dictum* of the arbitral tribunal in the *Air Service Agreement* case.[5] With all due respect to the eminent arbitrators who had handed down that award, he found that it left the door far too wide open for practices which only the "powerful" could afford and which the Commission would do well to condemn.

49. Although it was very unlikely that part 3 of the draft would contain revolutionary steps forward in the area of the peaceful settlement of disputes, he would do his best to revive the proposal he had submitted on behalf of Italy, together with the Netherlands, Japan, Madagascar and

[5] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 417).

Dahomey (now Benin), during the unsuccessful negotiations on the formulation of the principle of the peaceful settlement of disputes in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[6] He also recalled the protest document which he had submitted to the Committee entrusted with the drafting of that instrument precisely because the principle of peaceful settlement had been obstinately understated in the formulation that had finally prevailed. It was, however, necessary to be realistic in considering the problem of third-party settlement procedures in the context of a set of articles on responsibility. It should not be overlooked that the acceptance by States of any compulsory third-party settlement procedure in such a wide area as that of State responsibility would imply their subjection to such procedure for the alleged breach of *any* obligation deriving from *any* rule of international law in *any* field, however serious the conflict of interests involved. It would clearly be very difficult for States to accept such a heavy commitment.

50. Concluding his comments on the proposed outline, he noted that Mr. Yankov (2105th meeting) and Mr. Francis had rightly stated that the outline was precise and detailed for part 2 of the draft, but not for part 3, only the title of which was given. He explained that that was due not to negligence, but to the fact that he was proceeding step by step and that, for the time being, he was not sure exactly what the structure of parts 2 and 3 would be or exactly what they would contain.

51. Another comment had related to the submission of reports. He agreed that the reports should be submitted on time and stressed that he had taken all necessary steps to avoid any delay. At the same time, he could not be expected to cover in one stroke, i.e. in one report, all the questions dealt with in draft articles 6 to 16 of part 2, which were now before the Drafting Committee. The topic of State responsibility was an enormous one and so, too, was his responsibility to the Commission and to the Sixth Committee of the General Assembly. The rules which would ultimately be embodied in the draft articles, and possibly in a convention, would cover the breach of any rule of international law and would continue to be in force for a long time after their adoption. Moreover, any set of draft articles prepared not only by the Commission, but also by a special rapporteur, attracted the attention of Governments and scholars long before it had taken its final shape and sometimes even before its first reading had been completed. Much to his regret, he believed that, despite their undeniable merits, the draft articles to which he had just referred were still unsatisfactory from the point of view of the codification and progressive development of the law on the topic. The amount of material collected so far and still to be collected and analysed was huge: a sample was to be found in his preliminary report, and a more substantial sample, on compensation, damages, interest and satisfaction, was contained in the forthcoming second report, which would complete the consideration of the question of reparation. The Commission would therefore not be justified in saying that it had before it only the first two draft articles on the substantive consequences of an internationally wrongful act, because it could already have a fairly detailed general idea of all of those consequences. At the next session, it would have before it draft articles on measures and "pre-measures" and, hopefully at the following session, draft articles on the consequences of crimes.

52. Turning to the question of cessation, he noted that three issues had been raised: its nature and relationship to reparation; the placing of the provisions relating to it in the draft; and the wording of the new draft article 6.

53. On the first point, he noted that his tentative definition of cessation as distinct from reparation had been questioned by Mr. Barboza and, to a lesser extent, by Mr. Tomuschat and Mr. Bennouna. He believed, however, that what those members had said did not contradict his own position. He recalled that he had admitted that the obligation to cease the wrongful act, while deriving from the original primary rule, was also a consequence of the fact that the breach of that rule had already commenced; in that sense, the obligation of cessation was in a broad sense a consequence of the wrongful act. That was the point he had tried to explain in his preliminary report, while stressing that cessation was often not visible because it was absorbed into restitution in kind. He therefore did not deny that cessation presupposed the commencement of the wrongful act: that was absolutely obvious.

54. Of course, he had not failed to draw the Commission's attention to the telescoping between remedies which occurred in practice before arbitral tribunals, a point which Mr. Hayes (2105th meeting) and Mr. Al-Qaysi had well understood from the report. His reference in that connection to the *SNCF* case (A/CN.4/416 and Add.1, footnote 59) had been particularly well understood by Mr. Al-Qaysi and should not be construed in the manner suggested by Mr. Barboza (2102nd meeting).

55. It should, however, be pointed out that that process of absorption of cessation into reparation did not always occur and that in some cases—one illustration being the case concerning *United States Diplomatic and Consular Staff in Tehran*[7]—cessation definitely took first place. Surely it was possible to imagine other situations in which cessation would be the main concern of the interested Government: for example, the gradual extension of the occupation of a territory or the gradual restriction of the rights and freedoms of aliens in a State in violation of treaty law or general international law or, again, a continuing violation of human rights which was attributable to, or consubstantial with, a régime and therefore constituted a permanent and systematic violation of treaty law or general international law.

56. As to the distinction between "primary" and "secondary" rules which some speakers had accused him of calling into question, he stressed that it was precisely on that distinction that he had based the separate, although not necessarily isolated, role of cessation. Of course, he did not want to make a fetish of that distinction and it was for that reason that he had spoken of a "grey area". If some passages of his report, as cited by Mr. Solari Tudela and Mr. Shi, might have created doubts on that point, those doubts should be dispelled by paragraph 32 of the report. In that connection, Mr. Shi's comment on the question of

[6] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[7] See 2104th meeting, footnote 7.

nationalizations as seen from the point of view of cessation and restitution was very relevant and he had taken careful note of it.

57. With regard to the location of the provisions on cessation, he believed that they should come before those on the various forms of reparation, but after part 1 of the draft. He was therefore in favour of Mr. Calero Rodrigues's suggestion that they should be included among the general principles in chapter I of part 2.

58. On the wording of the new draft article 6, he pointed out that he had used the word "remains" rather than "is" in order to stress the permanence of the State's obligation and the lasting nature of the primary rule, which no number of breaches should cause to disappear.

59. The wording proposed by Mr. Graefrath for article 6 (2104th meeting, para. 31), which amounted to saying that the State which was the author of the act was bound by the obligation of cessation subject to a claim by the injured State, would have the defect of weakening the rule stated in the article. He had actually considered, at the time of drafting article 6, a formulation requiring a claim by the injured State. He had set it aside in view of the implications which such a formulation might have on the problem of acquiescence. Would not the adoption of Mr. Graefrath's proposal imply that the silence of the injured State be too easily interpreted as acquiescence? He noted that he could accept the other suggestion which had been made, particularly by Mr. Razafindralambo (2102nd meeting, para. 60), concerning the concept of wrongful acts "extending in time".

60. Referring finally to restitution in kind, he explained that, unlike Mr. Graefrath, Mr. Barboza and Mr. Shi, but like Mr. Calero Rodrigues, Mr. Al-Qaysi, Mr. Hayes, Mr. McCaffrey and Mr. Solari Tudela, he was in favour of the broad interpretation of the concept of restitution. In that connection, draft article 8—to be submitted in his forthcoming second report—made it abundantly clear that reparation was to be understood in the broadest sense, namely in the sense that it should result in the re-establishment of the situation which would have existed if the wrongful act had not been committed. He hoped that misgivings about the various limitations on the obligation of restitution in kind which were provided for in paragraphs 1 and 2 of the new draft article 7 would be dispelled, at least in part, by the subsequent draft articles, and in particular the article on pecuniary compensation. It would then be seen that a State which released itself from its obligation of restitution in kind by invoking one of the reasons set out in article 7, paragraphs 1 and 2, was still bound to repair the damage by means of pecuniary compensation.

61. In reply to Mr. Al-Baharna's suggestion (2122nd meeting) that the Latin expression *restitutio in integrum* should be used in article 7, he explained that that could cause confusion, particularly since that expression did not have exactly the same meaning in Roman law, in civil law and in the common law. In reply to a comment by Mr. Tomuschat, he indicated that the question of damages, as well as interest, would be dealt with in his second report.

62. As to the question of nullity raised by Mr. Al-Khasawneh in connection with paragraph 3 of draft article 7, he said that he failed to see how an international court could directly declare null and void an internal legislative provision or the judgment of a national court. An international court could only declare the international unlawfulness of the presence or the effects—according to the case—of a piece of national law and address an injunction to the State. It would be for the latter to repeal the provision or reverse the judgment which stood in the way of restitution or other forms of reparation.

63. In conclusion and in reply to a question by the CHAIRMAN, he said that he was in favour of referring the new draft articles 6 and 7 to the Drafting Committee.

64. Mr. EIRIKSSON said that he had no objection to referring the articles to the Drafting Committee, but asked what the Committee was expected to do with them.

65. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 6 and 7 as submitted by the Special Rapporteur to the Drafting Committee.

It was so agreed.

The meeting rose at 6.10 p.m.

2128th MEETING

Thursday, 29 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. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Njenga, in his capacity as Observer for the Asian-African Legal Consultative Committee, to address the Commission.

2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee greatly valued its traditional links with the Commission, which dated back to the 1960s. As its Secretary-General for the past two years, he was convinced of the commitment of all its members to the strengthening of the ties between the two bodies.