Document:-
A/CN.4/SR.2168

Summary record of the 2168th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

also wished to know whether the Special Rapporteur intended to submit any provisions on the settlement of disputes. Lastly, he asked whether the Special Rapporteur, having recommended the referral of draft article 3, paragraph 1, and draft article 4 of annex I to the Drafting Committee, had given up the other provisions of the annex. Did he intend to incorporate them in the body of the draft and to set the annex aside for the question of the settlement of disputes? Those were important questions and the progress of work on the topic would depend on the answers to them.

62. The CHAIRMAN said that, as he understood the situation, the Special Rapporteur had not recommended that all the draft articles submitted in annex I should be referred to the Drafting Committee because he wished to have more time for reflection, possibly with a view to submitting new draft articles at the next session.

63. Mr. McCAFFREY (Special Rapporteur) said that he did wish to give further consideration to the draft articles in annex I whose referral to the Drafting Committee he was not recommending, but he was not sure that he would be able to submit revised texts at the next session.

64. Replying, in particular, to Mr. Bennouna, he said that he had not given up the other provisions of annex I and had in fact submitted to the Secretariat a chapter IV of his sixth report (A/CN.4/427 and Add.1) containing several articles on the settlement of disputes. He hoped that that part of the report could be made available during the current session so that members would have time to study it with a view to discussing it at the next session.

65. Mr. BARBOZA said that the reason given by the Special Rapporteur as justification for his decision not to recommend the referral of draft article 2 of annex I to the Drafting Committee applied even more to paragraph 1 of draft article 3, which would undoubtedly require changes in national legislations. If draft article 3, paragraph 1, and draft article 4 of annex I were to be referred to the Drafting Committee, draft article 2 should also be so referred in order to give the Committee all the elements it needed to find a solution concerning the principle of non-discrimination.

66. Mr. KOROMA said that, if the Commission so decided, he would have no objection to draft article 2 of annex I also being referred to the Drafting Committee, without prejudice, of course, to the place it would ultimately occupy in the future instrument.

67. Mr. McCAFFREY (Special Rapporteur) said that he was, of course, not opposed to draft article 2 of annex I being referred to the Drafting Committee, especially if that were done on the understanding that it was without prejudice to the article's final place in the future instrument—in the body of the instrument, in an annex or in an optional protocol. Such a course would in fact be compatible with his recommendation that draft article 3, paragraph 1, and draft article 4 of the annex should be referred to the Drafting Committee.

68. He did not agree with Mr. Barboza's comment concerning paragraph 1 of draft article 3 of annex I.

69. Mr. BENNOUNA said that the discussion had shown that the time was not yet ripe for the referral of draft article 2 of annex I to the Drafting Committee. That article, which had not yet been thoroughly discussed, gave rise to some very thorny problems and, as some members of the Commission had pointed out, did not even deal with non-discrimination. He supported the original recommendation which the Special Rapporteur had made in concluding his summing-up (see para. 52 above).

70. Mr. TOMUSCHAT said that he agreed with Mr. Bennouna.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the Special Rapporteur's recommendation that draft articles 24 to 28, as well as draft article 3, paragraph 1, and draft article 4 of annex I, should be referred to the Drafting Committee, without prejudice to the final place of the last two provisions in the future instrument.

It was so agreed.

The meeting rose at 11.50 a.m. to enable the Drafting Committee to meet.

2168th MEETING

Tuesday, 5 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

later: Mr. Juri G. BARSEGOV

later: Mr. Julio BARBOZA

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

Welcome to a new member

1. The CHAIRMAN extended a warm welcome to Mr. Pellet, the newly elected member of the Commission.

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

[Agenda item 3]

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

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

Part 2 of the draft articles[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

NEW ARTICLES 8 TO 10

2. The CHAIRMAN recalled that the Special Rapporteur had submitted his second report on the topic (A/CN.4/425 and Add.1) at the previous session, but that it had not been considered by the Commission due to lack of time. He invited the Special Rapporteur to introduce the report, as well as the new articles 8 to 10 of part 2 of the draft contained therein, which read:

Article 8. Reparation by equivalent

1 (ALTERNATIVE A). The injured State is entitled to claim from the State which has committed an internationally wrongful act pecuniary compensation for any damage not covered by restitution in kind, in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed.

1 (ALTERNATIVE B). If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind in accordance with the provisions of article 7, the injured State has the right to claim from the State which has committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.

2. Pecuniary compensation under the present article shall cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals.

3. Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act.

4. For the purposes of the present article, damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.

5. Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly.

Article 9. Interest

1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

(*a*) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

(*b*) shall run until the day of effective payment.

2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result.

Article 10. Satisfaction and guarantees of non-repetition

1. In the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State which has committed the wrongful act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.

2. The choice of the form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence and degree of wilful intent or negligence of the State which has committed the wrongful act.

3. A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction.

4. In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act or a violation of that State's sovereign equality or domestic jurisdiction.

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, following the treatment of cessation and restitution in kind in his preliminary report (A/CN.4/416 and Add.1), the second report (A/CN.4/425 and Add.1) should have dealt primarily with reparation by equivalent. However, the study of the existing law of State responsibility indicated that two further sets of consequences of an internationally wrongful act, functionally distinct, must be taken into account: the forms of reparation generally grouped under the concept of "satisfaction and guarantees of non-repetition" and under the single concept of "satisfaction".

4. Chapter I of the second report dealt with the relationship and distinction between compensation and satisfaction. The notion that the specific function of reparation by equivalent was essentially to compensate material damage was ambiguous and called for important qualifications. Admittedly, reparation by equivalent did not ordinarily cover moral, or non-material, damage to the injured State, but it was not true that it covered only material damage to the persons of nationals or agents of the injured State.

5. The most frequent among internationally wrongful acts were those which inflicted damage upon natural or legal persons connected with the State. Such damage, which affected the State directly even though it affected the persons in question in their private capacity, was not always exclusively material. It was also frequently or exclusively moral damage, in respect of which a claim for compensation was no less valid than it would be for material damage. Despite lack of uniformity among national legal systems with regard to moral damage, the practice and literature of international law showed that moral losses caused to private parties by an internationally wrongful act were to be compensated as an integral part of the principal damage suffered by the injured State.

6. One of the leading examples in that regard was the "*Lusitania*" case, decided by the United States-German Mixed Claims Commission in 1923 (*ibid.*, para. 10), in which the umpire had stated that there should be reasonable compensation for any mental suffering or shock caused by the violent severing of family ties. International tribunals had always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties. Further examples were found in the report (*ibid.*, paras. 11-12).

7. Moral injury to human beings, including not only private parties but also State agents in a private

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

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook ... 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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

capacity, should be distinguished from injury to the aggrieved State's honour, dignity and prestige, something which was at times considered to be a consequence of any wrongful act, regardless of specific material damage. It seemed evident that moral injury to the State was a distinct kind of injury, for three reasons: (*a*) it was not moral damage in the sense in which that term was used within inter-individual legal systems, but moral damage in the specific sense of an injury to the State's dignity; (*b*) it was one of the consequences of any internationally wrongful act, regardless of whether the act had caused material, moral or other non-material damage to the injured State's nationals or agents; (*c*) in view of its distinct nature, it found remedy not in pecuniary compensation *per se*, but in one or more of the special forms of reparation generally classified under the concept of "satisfaction" in the technical, narrow sense of the term.

8. Those considerations were more fully supported in the part of the report on satisfaction as a remedy distinct from compensation (*ibid.*, paras. 106 *et seq.*). For the moment, it must be noted that they seemed to be contradicted by the fact that reparation for the offended State's moral injury at times appeared to be absorbed, in practice, into the sum awarded by way of pecuniary compensation. One example was the ruling of 6 July 1986 by the Secretary-General of the United Nations in the first "*Rainbow Warrior*" case (*ibid.*, para. 134). However, there were numerous examples in international case-law and diplomatic practice, especially where the injured State's moral prejudice was manifestly covered by the specific kinds of remedies that were classed as "satisfaction". It should be noted that there were frequent instances of international judicial decisions on moral damage to human beings in which arbitrators had expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation: examples were the *Janes* and *Francisco Mallén* cases (*ibid.*, para. 17). The tendency to use the concept of "satisfaction" with regard to such situations was also clearly present in the literature.

9. Nevertheless, the practice and literature to which he had referred did not in his view contradict the distinction between moral damage to persons, which could be the subject of pecuniary compensation, on the one hand, and moral damage to the State as a possible object of the specific remedy of satisfaction in a technical sense, on the other. The term "satisfaction", as used in some of the cases and literature cited in paragraph 17 of the report, was to be understood either very generally, as a synonym of reparation in the broadest sense, or in a sense closer to the technical meaning of the term and in a context within which moral damage to an individual was identified with moral damage to the State. Again, those examples of practice, which at first sight appeared to contradict the autonomy of the role of satisfaction, did not actually do so, in his opinion. Moral damage to the State, which was more exclusively typical of international relations, was a matter for satisfaction in a technical sense and was dealt with as such in chapter III of the report.

10. Chapter II of the report dealt with reparation by equivalent, as distinct from satisfaction. The concept was governed by the well-known principle that the result of reparation in a broad sense should be the "wiping out", to use the dictum of the *Chorzów Factory* case (Merits), of "all the consequences of the illegal act" in such a manner as to re-establish, in favour of the injured party, "the situation which would ... have existed if that act had not been committed" (*ibid.*, para. 21). In view of the incompleteness that frequently characterized restitution in kind, it was obviously through pecuniary compensation that the so-called *Chorzów* principle could eventually be effectively applied.

11. Reparation by equivalent was qualified by three features that distinguished it from other forms of reparation. The first was that it could be used to compensate for damage which could be evaluated in economic terms, including moral damage. The second was that, although some measure of retribution was present in any form of reparation, reparation by equivalent performed an essentially compensatory function by nature. The third was that the objective of reparation by equivalent was to compensate for all the economically assessable damage caused by the internationally wrongful act, but only for such damage. Indications to that effect were to be found in the relevant literature and in case-law, for example the "*Lusitania*" case (*ibid.*, para. 24) and the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (*ibid.*, para. 25).

12. The issues which arose in connection with reparation by equivalent, and which should be covered either by articles or by commentaries, were set out in the report (*ibid.*, para. 22). Notwithstanding the relative abundance of case-law and State practice covering most of those issues, most authors were inclined not to recognize the existence of any rules of general international law more specific than the *Chorzów* formulation. The lack of international rules more specific than the *Chorzów* principle was probably not so radical as a considerable part of the doctrine believed. Even in the less recent literature, there were indications that the field was not lacking in regulation. The authors cited in paragraph 27 of the report noted the evident similarity of international dicta with the rules of the law of tort in municipal legal systems and the natural tendency of international tribunals and commissions to have recourse to rules of private law, especially of Roman law. More persuasively, they applied international legal principles modelled on municipal principles or rules. In other words, on the basis of what Lauterpacht had called "private-law analogies" in international law, States had, through case-law and their own diplomatic practice and through the process known as international custom, developed rules that were part and parcel of international law, however similar to rules of municipal law they might be.

13. Such rules could not be expected to be very specific. Inevitably, in matters such as pecuniary compensation, everything depended on the facts and circumstances of each case, which would be decided by an international tribunal or commission or by diplomacy.

It should be stressed, however, that the fact that the rules were bound to be relatively general and flexible did not imply that they were mere "guiding principles" and could not be codified. They were rules setting forth the rights of the injured State and the corresponding obligations of the wrongdoing State. Moreover, in the field of international responsibility more than in any other, the Commission was not entrusted with the task of codification alone. Whenever the study of doctrine and practice indicated a lack of clarity, uncertainty or a "gap" in existing law, the Commission should not necessarily declare a *non liquet*. An effort should be made to examine the issue *de lege ferenda* and find out whether the uncertainty might be removed or the gap filled by developing the law.

14. In fact, he believed that the incorporation of elements of progressive development into the draft articles seemed to be particularly appropriate because of the nature of the subject-matter of State responsibility in general and of pecuniary compensation in particular. It was normally more difficult to achieve progressive development with regard to primary rules because the conflicts of interests between States were more direct. In the field of State responsibility, however, despite distinctions between States there was a greater chance that States would agree on general principles of pecuniary compensation for the simple reason that any State might find itself in the position either of injured State or of author State. Because secondary rules were at issue, the field of State responsibility provided the possibility of going beyond strict codification.

15. Once it was agreed that all the injuries and only the injuries caused by a wrongful act must be indemnified, efforts must be aimed at identifying the consequences which might be considered as having been caused by the wrongful act, and hence as indemnifiable. In that connection, one might discuss the controversial and controvertible distinction between "direct" and "indirect" damage. Both writers and case-law occasionally referred to the difference between direct and indirect damage and justified the non-award of damages by the argument that the damage had been indirect. In his view, it was probably causation that was at issue: what was really being contested was not whether the damage caused by the wrongful act had been direct or indirect but whether there had been an uninterrupted chain of causation between the wrongful act and the damage. The lengthy section of the report that dealt with direct and indirect damage and causation (*ibid.*, paras. 34 *et seq.*) might be summarized as follows: (*a*) damages must be fully paid in respect of injuries that had been caused immediately and exclusively by the wrongful act; (*b*) damages must be fully paid in respect of injuries for which the wrongful act was the exclusive cause, even though they might be linked to that act not by an immediate relationship but by a series of events each exclusively linked with each other by a cause-and-effect relationship. Bollecker-Stern's discussion of the problem in algebraic terms was to be found in paragraph 43 of the report.

16. The report also dealt with the question of causal link and concomitant causes (*ibid.*, paras. 44 *et seq.*), including the injured State's conduct (*ibid.*, paras. 47 *et seq.*), in respect of which practice and doctrine on the matter were merely an application of the rule of causation and of the criteria governing any case of multiplicity of causes.

17. The scope of reparation by equivalent had to cover the totality of the material injury suffered by the aggrieved State, including moral damage to the persons of private parties or State agents. Accordingly, pecuniary compensation must cover both direct damage to the State, such as that caused to its territory in general, its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft and spacecraft, and also indirect damage to the State, such as that caused through the persons, natural or legal, of its nationals or agents. As he had already explained in his preliminary report (A/CN.4/416 and Add.1), he did not accept the distinction between direct and indirect damage and would refer members to the statement by the late Paul Reuter cited in his second report (A/CN.4/425 and Add.1, footnote 110). Damage to private parties, of course, included damage to State agents to the extent that such agents were regarded as private persons.

18. Within that context, a distinction could be drawn between patrimonial damage and personal damage. The latter included physical and moral damage to persons and involved such injuries as unjustified detention or any other restriction on freedom, torture or other physical injury to the person, and death. In international case-law and State practice, injuries of that kind were treated, in so far as they were capable of economic assessment, according to the rules and principles that applied to pecuniary compensation for material damage to the State. There was no need for him to refer again to the "*Lusitania*" case (*ibid.*, para. 56) and the *Corfu Channel* case (*ibid.*, paras. 57-58), in which death and physical injury to persons had clearly been issues.

19. "Patrimonial damage" meant damage involving the assets of a natural or legal person, including possibly the State, but extraneous to the person. Patrimonial damage had always been the area in which pecuniary compensation had found its most natural scope, and it was in connection with such damage that the principles, rules and standards for the application of the remedy of pecuniary compensation had been developed by judicial decisions and diplomatic practice. It was mainly in relation to patrimonial injury that judicial decisions and doctrine had had recourse to distinctions and categories typical of private law—whether civil or common—and had adapted them to the peculiar features of international responsibility.

20. Moreover, it was within that framework that the distinction lay between *damnum emergens* and *lucrum cessans*, a distinction drawn by virtue of the fact that *lucrum cessans* was part and parcel of reparation by equivalent. The difficulties to which compensation for *lucrum cessans* had at times given rise, in both case-law and doctrine, explained why the question had been dealt with at some length in the report (*ibid.*, paras. 63-76).

21. The first question discussed concerned the role of causation in the determination of *lucrum cessans*, in which connection it had been necessary to dispel some confusion about the distinction between direct and indirect damage, for *lucrum cessans* had been wrongly qualified as involving indirect damage, whereas, as Bollecker-Stern had explained (*ibid.*, para. 65 *in fine*), what was involved was causation.

22. The second question concerned the method of evaluation of lost profits. The more commonly used *in abstracto* method was to levy interest on the amounts due by way of compensation for the principal damage —a method that was often the outcome of a negotiated settlement between the parties. Other methods of assessing *lucrum cessans* were less abstract, being based on paradigms that seemed to be more concrete than the mere application of interest to capital. Such methods were based either on the profits earned by the same natural or legal person as had been dispossessed or had suffered damage, or on the profits earned during the same period by similar business concerns. The so-called *in concreto* method was used when the estimate was, in the words of Gray, "based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question" (*ibid.*, para. 70).

23. A further matter dealt with under the heading of *lucrum cessans* was the evaluation of lost profits in the case of unlawful expropriation of foreign industrial or commercial assets as going concerns. Practice in the matter, which was not very clear and was at times highly technical, was reviewed in the report (*ibid.*, paras. 71-76), and he had examined a number of cases, ranging from the *Chorzów Factory* case (Merits) to some of the cases decided by the Iran-United States Claims Tribunal. It was not easy to arrive at a definite conclusion, and he would welcome the Commission's guidance in the matter.

24. The last issue which arose in connection with reparation by equivalent was interest, and the first question to be considered was whether interest was due as a matter of general law (*ibid.*, paras. 77-81). The minority, and negative, position had been rejected by both doctrine and practice. That interest was due was deemed to be an application of the principle of full compensation and of the consequent logical tenet expounded by Subilia, according to whom interest, being an expression of the value of the utilization of money, was nothing more than a means open to the judge for determining the injury sustained by a creditor from the non-availability of the principal for a given period (*ibid.*, para. 78).

25. On the question of *dies a quo*, three positions had emerged in judicial practice: that *dies a quo* was the day on which the damage occurred; that it was the day on which the final decision as to *quantum* was handed down; and that it was the day on which the claim for damages had been filed at the national or international level (*ibid.*, paras. 82-84). Practice in the matter was briefly reviewed in the report (*ibid.*, paras. 85-87).

26. Decisions in most cases tended to favour the time of the claim as *dies a quo* in order not to burden the responsible State with payment of interest for a period during which it might have had no knowledge of the existence of its obligation. In most of the cases considered, however, there were additional considerations specific to each case which suggested giving preference to the date of the claim (*ibid.*, para. 89). For his own part, he was inclined to believe that *dies a quo* should be the date of the damage, and he agreed with Brownlie that: "In the absence of special provision in the *compromis* the general principle would seem to be that, as a corollary of the concepts of compensation and *restitutio in integrum*, the *dies a quo* is the date of the commission of the wrong" (*ibid.*, para. 92).

27. Judicial practice regarding *dies ad quem* was somewhat more uniform, the general idea being that it should be the date of the decision or final award.

28. He had not reached any firm conclusion on the question of the rate of interest (*ibid.*, paras. 95-97). So far as practice was concerned, it had been noted that it was not possible to determine why arbitrators had adopted one rate rather than another. In many instances, and particularly in cases decided by claims commissions, the interest awarded was assessed on the basis of the statutory rate adopted in the respondent State. In other cases, the rate in force in the claimant State, the commercial rate or the creditor's home rate had been adopted. In that regard, it was interesting to compare the conflicting decisions in the "*Lord Nelson*" case and the *Royal Holland Lloyd* case (*ibid.*, para. 96). He would welcome members' views on the matter.

29. A number of decisions concerning the controversial issue of compound interest versus simple interest were analysed in the report. Thus, although the possibility of compound interest had been considered in the *Norwegian Shipowners' Claims* case (*ibid.*, para. 98), it had not been awarded, on the ground that the claimants had failed to put forward sufficiently cogent reasons for making such an award. However, in two other cases—*Compagnie d'électricité de Varsovie* (Merits) and *Chemins de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan* (*ibid.*, para. 99)—compound interest had been awarded; and, in the *Fabiani* case (*ibid.*, paras. 99-100), compound interest had not been rejected in principle although it had in fact been refused. No clear explanation as to principle had been given in any of those cases. On the other hand, in the *British Claims in the Spanish Zone of Morocco* case (*ibid.*, para. 101), the arbitrator had stated that there would have to be particularly strong and quite special arguments to justify a decision that went against prevailing case-law. Also, in the *Portugese Colonies* case (Naulilaa incident) (*ibid.*, para. 102), Portugal had filed a claim for compound interest, yet the tribunal had awarded simple interest for the reason quoted in the report, apparently rejecting compound interest because the result would have been to award a sum far in excess of the *lucrum cessans*. His own tentative conclusion was that compound interest should be awarded whenever it was proved to be indispensable in order to ensure full compensation for the damage suffered by the injured State.

30. Chapter III of the report dealt with the second form of reparation—satisfaction—and was divided into four sections dealing respectively with the literature on the subject, jurisprudence, diplomatic practice, and the nature of satisfaction and its relationship to other forms of reparation. So far as the first section was concerned (*ibid.*, paras. 106 *et seq.*), most writers regarded satisfaction as a specific remedy for injury to a State's dignity, honour or prestige, and perhaps also as a remedy for injury caused by a breach of the subjective right of the aggrieved State. That latter element was stressed in particular by Bluntschli and Anzilotti. Thus satisfaction, though somewhat underestimated in his view, was recognized in the literature as an autonomous remedy, distinct from reparation. That did not, however, preclude a combination of satisfaction with, and even its absorption into, other forms of reparation. For that reason, he was not convinced by the negative attitude to such autonomy recently adopted by Dominicé (*ibid.*, para. 108). Satisfaction was also identified in the literature by its typical forms, which differed from *restitutio in integrum* and compensation and were mentioned in the report (*ibid.*, para. 107). One crucial issue was whether the nature of satisfaction was punitive or afflictive or, on the other hand, compensatory. While many writers regarded satisfaction as purely reparatory, others recognized its afflictive nature. Linked to the latter idea was the notion that satisfaction should be proportional to the gravity of the offence or to the degree of fault of the responsible State. Another question was whether the injured State had a choice as to the form the satisfaction should take, which in turn raised the question of the limitations that should be placed on such choice in order to prevent abuse. A number of authors pointed out that practice, especially prior to the First World War and also, in some instances, between the two world wars, showed that powerful States tended to make requests that were not compatible with the dignity of the wrongdoing State or with the principle of equality.

31. While he had not referred in the report to the entire body of diplomatic practice, his conclusion was that both judicial decisions and diplomatic practice provided overwhelming proof of the existence of various forms of satisfaction as a mode of reparation in international law. They confirmed in particular the prevailing doctrine according to which the remedy for the moral, political or juridical wrong suffered by the injured State was satisfaction, in other words a form of reparation of an afflictive nature distinct from compensatory forms of reparation such as *restitutio in integrum* and pecuniary compensation. In that regard, while the award in the first "*Rainbow Warrior*" case (*ibid.*, para. 134) had been construed as including an element of satisfaction, the more recent award, in the second "*Rainbow Warrior*" case,[4] was marked by two new features: recognition by the arbitral tribunal of the non-conformity of the conduct of the defendant State with the agreement that had followed the 1986 ruling by the Secretary-General of the United Nations concerning the detention of two persons on a Pacific island; and a recommendation that the two States concerned should devote a fairly substantial sum to the development of friendly relations between their respective peoples.

32. The punitive or afflictive nature of satisfaction was not in contrast with the sovereign equality of the States involved. The question might, of course, arise at a later stage of a sanction to be inflicted upon the offending State by direct conduct on the part of the injured State, for example in the form of reprisals. That would be the stage at which, demands for reparation and/or satisfaction having been unsuccessful, there would be a move from the substantive or immediate consequences of the wrongful act to the consequences as represented by the reaction of the injured State to non-compliance by the offending State with its so-called "secondary" obligation to make reparation. Prior to that more crucial stage, satisfaction did not involve direct measures of that kind. Although the demand for satisfaction would normally come from the injured State—unless happily preceded by the offending State's own initiative—the satisfaction would consist of action taken by the offender itself. There was therefore no need to fear that satisfaction would entail the notion of a sanction applied by one State against another, which would be a serious encroachment upon the offending State's sovereign equality. It was not so much a question of a sanction inflicted upon the offending State as one of a "self-inflicted" sanction intended to cancel, by the deed of the offender itself, the moral, political and/or legal injury suffered by the offended State. In that connection, he referred members to the statement by Morelli cited in the report (*ibid.*, para. 144 *in fine*).

33. Guarantees of non-repetition, though dealt with separately in chapter IV of the report, were a particular form of satisfaction. There were various degrees to which States would go in that respect, but there seemed to be three possibilities. In one set of cases, the request for guarantees took the form of a demand for formal assurances from the offending State that it would in future respect given rights of the aggrieved State or that it would recognize the existence of a given situation in favour of the aggrieved State. On other occasions, the injured State asked the offending State to give specific instructions to its agents. In a third set of instances, the injured State asked the offending State to adopt certain conduct regarded as likely to prevent the creation of the conditions that had allowed the wrongful act to take place. In a number of cases, that even included the adoption or abrogation by the offending State of specific legislative provisions. In his view, that extremely useful study of practice indicated that the remedy was part and parcel of the consequences of an internationally wrongful act.

34. With regard to chapter V of the report, on the forms and degrees of reparation and the impact of fault, whatever the Commission's position on the issue of fault, some mention of it undoubtedly had to be made, expressly or by implication, within the framework of regulation of the consequences of internationally wrongful acts. It was one thing to believe that a wrongful act might exist with or without the presence of fault, but quite another to consider that

[4] Decision of 30 April 1990 by the France-New Zealand Arbitration Tribunal (*International Law Reports* (Cambridge), vol. 82 (1990), pp. 500 *et seq.*).

fault was irrelevant, either from the standpoint of the act's substantive consequences—in other words, compensation and satisfaction—or from the standpoint of measures, countermeasures, reprisals or sanctions to be adopted *vis-à-vis* the offending State, which would form the subject of his third report. Whatever position the Commission adopted on the first of those two aspects, it would have to acknowledge that fault played a major role with regard to the substantive and procedural consequences of internationally wrongful acts. Such an acknowledgement would be particularly important because the Commission was called upon to deal not only with delicts, but also with crimes.

35. Noting that doctrine on the issue was somewhat scarce, he cited the opinions of Oppenheim (*ibid.*, para. 181) and Ago (*ibid.*, para. 182). In terms of practice, a distinction as to method had to be drawn between such forms of reparation as *restitutio in integrum* or pecuniary compensation, on the one hand, and on the other, satisfaction in a distinct but broad sense, including the various forms of atonement, so-called punitive damages, guarantees of non-repetition, and so on. With regard to the impact of fault on pecuniary compensation, he drew attention to section C.1 of chapter V (*ibid.*, paras. 183 *et seq.*). But it was, of course, with regard to satisfaction, a remedy too often underestimated or neglected, that the impact of fault was most clearly felt (sect. C.2) (*ibid.*, paras. 187 *et seq.*). Fault had played a significant role in introducing satisfaction in place of, or as an important complement to, pecuniary compensation in all the cases he had studied and, in a large number of instances, it had also played a significant role in connection with the quality and number of the forms of satisfaction claimed and in most cases obtained. In that respect, he again referred to the 1986 ruling by the Secretary-General of the United Nations in the first "*Rainbow Warrior*" case (*ibid.*, para. 134).

36. While he would emphasize the distinctions between the various forms of reparation, he was sufficiently realistic and sufficiently conscious of the realities of international life and of the application of law to realize that different forms of reparation did not necessarily operate in isolation from one another. The distinction was essentially one of degree, in which some element of fault was most likely to be present. In the *Panay* incident of 1937 between Japan and the United States of America (*ibid.*, paras. 126 and 189), for example, as well as in a post-1945 case involving the USSR and the United States, the satisfaction given by the offending State could on no account be interpreted as the action of a weak State yielding to the arrogance of a big Power. In analysing the hundreds of cases of satisfaction which had occurred in direct diplomatic relations, he had not attempted to determine what those cases meant from the point of view of the presence or absence or degree of fault. The Commission should, in his view, conduct a study on that subject before dismissing the concept of the role played by fault in the matter of satisfaction.

37. Referring to the draft articles submitted in the second report, he drew attention to alternatives A and B proposed for paragraph 1 of article 8 (Reparation by equivalent). Paragraph 2 introduced the concept of economic assessability, and paragraph 3 related to loss of profits caused by the internationally wrongful act. In paragraph 4, which also dealt with causation, no distinction was drawn between direct and indirect damage. Paragraph 5 referred to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State. With regard to draft article 9 (Interest), he recalled the doubts he had expressed on the questions of the rate of interest and of compound interest versus simple interest. Lastly, in draft article 10 (Satisfaction and guarantees of non-repetition), he had endeavoured to make provision for the remedy of satisfaction while admitting that no injured State should make humiliating demands on the State which had committed the wrongful act.

Mr. Barsegov, Second Vice-Chairman, took the Chair.

38. Mr. CALERO RODRIGUES said that he wondered whether, in view of the limited number of meetings allocated to the topic, it might not be advisable to divide the debate under two separate headings: reparation and satisfaction.

39. After a brief discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), the CHAIRMAN and Mr. ILLUECA took part, Mr. CALERO RODRIGUES withdrew his suggestion.

40. Mr. BENNOUNA, noting that chapter V of the second report (A/CN.4/425 and Add.1) did not appear to have any direct bearing on the draft articles submitted, inquired whether the question of fault was to be considered at the present session or at a later stage.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the concept of fault was inherent in the wording of draft article 10, and more particularly paragraph 2. The subject had not been dealt with by previous special rapporteurs and he thought that introducing it in the context of his second report was both justified and timely.

Mr. Barboza, First Vice-Chairman, took the Chair.

42. Mr. GRAEFRATH congratulated the Special Rapporteur on his rich and well-documented second report (A/CN.4/425 and Add.1). Resisting the temptation to follow the Special Rapporteur into the jungle of a century-old discussion of principled theoretical theses and dubious decisions by arbitral tribunals, he would confine himself to some brief comments on questions which had a direct bearing on the wording of the draft articles submitted.

43. As the PCIJ had stated in 1927, it was "a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[5] Draft article 7, submitted by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1), and draft articles 8 and 10 dealt with different forms of reparation. There was a certain interdependence between those forms, and some conformity was needed so that the reparation would wipe out all the consequences of the illegal act. Conformity was also needed in order to ensure that com-

[5] *Factory at Chorzów, Jurisdiction*, Judgment No. 8 of 26 July 1927, *P.C.I.J., Series A, No. 9*, p. 21.

pensation could be claimed only for "the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it".[6] That much was common ground since the PCIJ's famous *Chorzów Factory* decision. The trouble with draft articles 7 and 8 was that the relationship between restitution in kind and pecuniary compensation was not brought out clearly. Article 7 did not define the content of restitution, and it was therefore difficult to determine the scope of pecuniary compensation in article 8. That would seem to be the reason why the Special Rapporteur was submitting two alternatives for paragraph 1 of article 8. It was not apparent, however, whether those alternatives were based on different concepts of restitution in kind.

44. Both alternatives were somewhat ambiguous, possibly because in alternative A the Special Rapporteur tried to imply, and in alternative B explicitly spelled out, a definition of restitution in kind that was based not on the re-establishment of the situation as it had existed before the wrongful act but on the establishment of a theoretical or hypothetical situation which would have existed if the breach had not occurred. That point, however, was blurred by the wording used in alternative A, which simply spoke of "any damage not covered by restitution in kind", without giving any explanation about the meaning of that phrase. In alternative B, the confusion was compounded by the use of the term "re-establish" for a situation which had never existed earlier. If such a broad definition of restitution in kind was used, restitution in kind necessarily covered the whole range of the reparation claim and always comprised a certain amount of pecuniary compensation, that being the usual method of paying for loss of profit. He was none the less afraid that such use of terms in article 8 would only cause confusion, especially if article 8 could not be based on article 7, since it failed to provide any definition of what was understood by the expression "restitution in kind".

45. For those reasons, he could not support either alternative A or alternative B and would prefer a text which made it clear that, within the claim for reparation, pecuniary compensation could be claimed to the extent that reparation had not been made or could not be made by restitution. That would include two aspects, namely a request for pecuniary compensation in place of restitution, and payment of damages for loss sustained which was not covered by restitution in kind. Such a provision would presuppose that restitution in kind meant the re-establishment or restoration of the situation which had existed prior to the wrongful act. That, he believed, had been the Commission's understanding when it had decided at its thirty-sixth and thirty-seventh sessions to refer the previous Special Rapporteur's draft articles 6 and 7 to the Drafting Committee.[7] A differentiation of that kind between restitution and the broader claim of reparation would also be in keeping with the structure and approach adopted for part 1 of the draft, which was based on the breach of an international obligation rather than on the damage caused. In his view, it was also more in keeping with modern State practice, as could be seen from the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities and from article XII of the 1972 Convention on International Liability for Damage Caused by Space Objects.

46. Such an interpretation would also take into account that there might be a number of different injured States. If an *erga omnes* obligation was breached, and if all States parties to the legal relationship concerned were considered to be injured States, it followed that all those States could claim cessation of the wrongful act and restitution, in particular legal restitution. But reparation by equivalent for damage not already covered by restitution could be claimed only by a State which had actually suffered from such damage. A general reference to the injured State was therefore insufficient in such cases. A clear statement would have to be made to the effect that the injured State was entitled only to claim compensation not covered by restitution for damage it had suffered itself, directly or through its nationals. That, as far as he could see, had not so far been made explicit in the draft.

Mr. Shi resumed the Chair.

47. In terms of environmental protection, too, it was obvious that there were many cases where there might be several injured States entitled to claim cessation and restitution. Very often, however, only one or two States might actually have suffered harm not covered by restitution and therefore be entitled to make a claim for compensation, which was not justified in the case of other injured States. A certain parallel existed between such a situation and that covered by article 60, paragraph 2 (*b*), of the 1969 Vienna Convention on the Law of Treaties.

48. It had to be made clear whether draft article 8 was meant to cover pecuniary compensation for any damage caused, including compensation in place of restitution, or only for such damage as was not already covered by restitution of the situation existing before the breach. The distinction between those two different elements was a basic issue in terms not only of the amount of compensation, but also of the concept of the wrongful act and of the injured State entitled to claim compensation. He did not believe that all injured States which had a right to claim cessation and restitution also had a claim to pecuniary compensation.

49. The draft as a whole was based on the assumption that it was the breach of an international obligation, not the damage caused, which entailed State responsibility and determined its content. Damage was not listed in article 3 of part 1 as a constituent element of an internationally wrongful act entailing State responsibility. Nevertheless, damage not covered by restitution was a *sine qua non* for an injured State to claim compensation. It was sufficient for an injured State to prove that its rights had been infringed by the breach of the obligation in order to require cessation of the wrongful act or re-establishment of the situation as it

[6] *Factory at Chorzów, Merits*, Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17*, p. 47.

[7] See footnote 3 above.

had existed before the act. However, in order to claim compensation for damage not covered by restitution, that additional damage and the causality of the wrongful act had also to be proven. With regard to a claim for compensation for damage not covered by restitution, the actual occurrence of the damage could, indeed, be considered to be a constituent element of the claim. In that connection, it might facilitate the Commission's work if the Drafting Committee reverted to the method used in earlier reports by avoiding Latin terminology, which was not common to all legal systems and was open to widely differing interpretations.

50. Paragraphs 2, 3 and 4 of draft article 8 raised many complex problems, mainly because they went too far into the details of damage assessment or took those details for granted without clearly defining what kind of damage was covered by the compensation claim and what the legal criteria were for assessment. If the Commission wanted to do more than affirm the principles of restitution and reparation by equivalent, it would have to be far more precise than was proposed in those paragraphs. What, for instance, was the meaning of the expression "economically assessable damage" (para. 2)? The answer largely depended on the philosophical approach adopted and, of necessity, controversial interpretations emerged. The expression was neither explained in the report nor made clear in the article itself. No indication was given whether it excluded moral damage to the State itself or included costs of preventive measures or economic losses actually sustained as a direct result of such measures. Obviously, the expression did not refer to quantifiable economic losses alone. But was it sufficient for a loss to be economically quantifiable in order to be regarded as economically assessable damage? Or did the loss have to have been actually sustained? Such questions, which took on particular importance in environmental law, were unlikely to be reflected in decisions of arbitral tribunals dating back to the nineteenth century.

51. He was not convinced that a draft of a general convention on State responsibility ought to go into so much detail, but if it did so, it should at least meet the level already covered by specific conventions. In that connection, he referred, by way of example, to the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. That Convention, of course, represented an extremely narrow approach inasmuch as it was limited to accidents. Still other issues arose in the case of damage caused by permanent activities. The question of what could or should be understood by the expression "economically assessable damage" gave rise to many complex issues, many of them of a specifically modern nature, which the second report and the draft articles failed to elucidate. Admittedly, material damage suffered by the injured State's nationals was generally considered to be covered by a reparation claim, but it might prove difficult, if not impossible, to find generally accepted criteria for economic assessment of damage of that kind.

52. The statement in the report (A/CN.4/425 and Add.1, para. 59) that courts had been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim seemed somewhat exaggerated. The measuring by arbitral tribunals of non-material damage had been described by highly respected authors as presenting a patchwork of seemingly arbitrary determinations. Unfortunately, the report failed to draw attention to the problems which surrounded the decisions of such tribunals and thus cast doubt on the value of many of the examples cited. What had been true in the nineteenth century still applied today. For example, the United States of America had been prepared to pay $75,000 for each victim of the Iranian airliner shot down by a United States Navy vessel in 1988, but had itself claimed $800,000 per victim when another United States Navy vessel had been hit by missiles fired from an Iraqi aircraft in 1987. Nor was there any consistency in the compensation awarded by arbitral tribunals for unlawful arrest or imprisonment, for grief and indignity or for death. Damages for unlawful detention, for instance, had varied between $8 a day, $2,000 for one and a half hours and $25,000 for four hours of arrest. The Bhopal disaster, in relation to which the amount of damages available to victims in the United States could be up to 10 times as much as in India, was another case in point. The expression "economically assessable" was thus devoid of specific content, and it was overoptimistic to believe, as did the Special Rapporteur (*ibid.*, para. 29), that relatively uniform solutions could be identified and corresponding rules or standards could be assumed to exist. That, of course, would not prevent the Commission from establishing such standards if it deemed it possible, necessary and wise to do so: he, for his part, would not be in favour of such a course. Failing a definition, based on legal criteria, of the expression "economically assessable", the Commission should refrain from adopting paragraph 2 of draft article 8, or should at least separate moral damage to the injured State's nationals from economically assessable damage to the State. The word "including" did not seem particularly helpful in paragraph 2.

53. The formula "any profits the loss of which derives from the internationally wrongful act", in paragraph 3, was much too broad and loosely formulated. It could encompass all possible profits without any qualification, whereas care should be taken to cover only the lost profits which could be clearly defined and were more than a mere possibility or hope, or again, were speculative profits. In connection with damage caused by pollution, it had often been held that the loss of profits had to be a direct result of the pollution or at least that the loss should have been foreseeable. He failed to see why the Special Rapporteur had not introduced into the text of draft article 8 any of the qualifications discussed in the report (*ibid.*, paras. 65-76).

54. With regard to methods of assessment, most of the methods discussed had been taken from nationalization cases and did not result in any clear-cut measurement. There were of course differences, depending on whether the measure of compensation was the net book value or assets minus liabilities or whether a company's value was measured as the value

of a going concern. Even when the going-concern method had been applied, as in the *American International Group, Inc.* v. *Iran* case (1983), there had been a difference of $20 million between the claim and the compensation awarded. One writer had pointed out recently that, despite—or perhaps because of—the vast number of claims dealt with by the Iran-United States Claims Tribunal, the Tribunal had made only a small contribution to the question of remedies in international law. Perhaps less weight ought to be given to such procedures and more attention to treaty regulations on international transport and pollution. In any case, not all lost profits had to be compensated for, only those which were "normal and foreseeable" and which would "in all probability have been obtained" if the wrongful act had not been committed (*ibid.*, para. 65 *in fine*).

55. It was difficult to accept the formula "uninterrupted causal link", in paragraph 4. When and under what conditions was a causal link uninterrupted? The question also arose whether the length of the chain was material. Such wording was even broader than the concept developed by the Special Rapporteur in the report (*ibid.*, paras. 37-42). It would have been more reasonable to use the formula "the causality link exists whenever the objective requirement of 'normality' or the subjective requirement of 'predictability' is met" (*ibid.*, para. 37).

56. In cases of international delicts, the general interest was to limit the scope of consequences that would be covered by damages. In order to avoid a causal link growing to infinity, decisions and scholars usually spoke of "proximate cause", "adequate causality" or "ordinary course of events", or stated that "the cause must not be too remote or speculative" or that there must be "a sufficiently direct causal relationship". The term "foreseeability" was also used to describe a causal relationship which was considered to be normal. That was the meaning of *proxima causa*, a well-established expression which was more precise and acceptable than the reference to an uninterrupted causal link, "however long" (*ibid.*, para. 43). The question was whether, from the course of events, a court got clear and convincing evidence, to borrow the language used in the *Trail Smelter* case. In his opinion, it was against the practice of all systems of civil and criminal law to rely without any limitation on an uninterrupted chain of events, however long. All legal systems, and also many arbitral decisions, relied on "proximate causation" to get adequate results and did not reduce that expression to closeness in time or to the series of events forming the causal chain.

57. With regard to paragraph 5, he had doubts as to whether it was compensation, or rather the claim to compensation, that was reduced in the case of a contributory act—not only negligence—by the injured State.

58. A special provision on interest, as in draft article 9, might be useful, but he questioned the advisability or helpfulness of paragraph 2, on compound interest. The rule embodied in the paragraph was not supported by international practice and, moreover, could well make the resolution of reparation claims more difficult.

59. The structure of draft article 10 differed from that of draft articles 7 and 8 in that, instead of stressing that the injured State was entitled to a claim, it said that the wrongdoing State was under an obligation to give adequate satisfaction. That presentation appeared to be an attempt to introduce the concept of fault. There was undoubtedly a certain relationship between the extent to which an internationally wrongful act caused damage and the satisfaction a State was under an obligation to provide. That proposition, however, could not be reduced to fault. The forms of satisfaction, like reparation in general, corresponded to the specifics of the unlawful act. Paragraph 2 of article 10 was therefore much too narrow in that it took into account only wilful intent and negligence. For example, the reparation claim in the case of a terrorist attack against an embassy would always contain an element of satisfaction. Much would depend on whether the receiving State had taken all the usual measures of protection. Quite different measures would be necessary if the attacks were prepared or executed by certain organizations, as had been the case some years previously with attacks against Yugoslav consuls in the Federal Republic of Germany. In such cases, apart from apologies and punishment of the persons responsible, demands could be made for measures against the organizations involved. However, the main element of satisfaction was to forestall continuation or repetition of the wrongful conduct.

60. Contrary to that approach, the Special Rapporteur's whole concept of satisfaction was based on the assumption that it had a punitive function. The Special Rapporteur even admitted punitive damages as a form of satisfaction, when that idea had no support in international practice. The examples cited in the report were mostly drawn from diplomatic activity and it was an open question whether they reflected a legal rule or merely diplomatic practice. Personally, he tended to relate satisfaction not to moral or political damage alone: it also meant all measures taken by the author State to acknowledge that certain conduct was wrongful, to affirm the existence of the obligation affected and to prevent continuation or repetition of the wrongful act. Satisfaction therefore had a place in modern international law and constituted an essential part of the claim to reparation. However, he was strongly opposed to any punitive elements being introduced into the notion of satisfaction. As explained by the umpire, Edwin B. Parker, in the "*Lusitania*" case, "as between sovereign nations the question of the right and power to impose penalties . . . is political rather than legal in its nature" (*ibid.*, para. 114). With regard to satisfaction, the point was restatement of the law and a guarantee that the obligation would be observed in the future. If satisfaction was understood in that way and one did not look back on how it had been used and misused in the nineteenth century, then satisfaction would seem to be more a non-pecuniary form of reparation than a form of reparation for non-material damage. If one considered environmental cases, measures against repetition and guarantees to avoid

future damage were in the forefront and were closely tied in with the material damage caused. Thus satisfaction could not be limited to moral damage. Guarantees of non-repetition largely determined the concrete forms of satisfaction.

61. With regard to the forms of satisfaction, thought should be given to adopting some general terms to cover the various measures which might be necessary, or which were used, to restate the law and to guarantee non-repetition. That would involve more than apologies, punishment of responsible individuals or assurances: it could include acknowledgement of the breach by the author State as well as a declaration or finding by a competent international body, legislative or administrative measures, and so on.

62. Accordingly, draft article 10 should be recast so as to bring it into line with the structure of draft articles 7 and 8. The reference to punitive damages should be deleted from paragraph 1 and general terms should be used to point to the purpose of satisfaction. Paragraph 2 should be deleted or reworded. Paragraph 3 should be broadened and made part of paragraph 1, because it described only one possible form of satisfaction. Paragraph 4, though perhaps superfluous, might none the less be desirable because of the humiliating practices of the past in connection with satisfaction. However, a much better protection against such practices would be unambiguously to reject the concept of a punitive function. He knew of no case in which a small State had made humiliating demands or claims for satisfaction against a strong State. The punitive function was a one-way street of power politics and openly contradicted the prohibition of collective punishment.

63. During the Commission's discussion of the topic of the law of the non-navigational uses of international watercourses, serious objections had been raised against quoting old opinions or cases which no longer corresponded to the present state of international law. With that in mind, he urged that the Commission's documents should not mention, as alleged evidence of existing rules of modern international law, such examples as the claims raised in connection with the *Boxer* case against China or the *Tellini* case against Greece, to which the Special Rapporteur referred in paragraphs 124, 158(*c*) and 159 of the report.

64. Mr. ILLUECA noted that draft articles 8 and 10 related to restitution in kind, which had already been dealt with in draft article 7 submitted by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1), and that they set forth the scope of compensation and satisfaction, which were modalities for the reparation of damage caused to the injured State. The texts thus proposed by the Special Rapporteur took into account the basic principles governing reparation, as laid down by the PCIJ in 1927 in the *Chorzów Factory* case (Jurisdiction):

> . . . It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. . . .[8]

65. In 1928, in the same case, dealing with the merits, the PCIJ had ruled

> that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[9]

In that ruling, pride of place had been given to restitution in kind as the normal and logical means of reparation; only where restitution in kind was not possible did payment of compensation apply. In cases where an arbitration agreement was entered into, however, the arbitral tribunal was empowered to take into account the practical difficulties of restitution in kind and resort to the modes of reparation set out in draft articles 8 and 10, namely reparation by equivalent, satisfaction and guarantees of non-repetition, thereby exercising the same discretion that Judges of the ICJ had under Article 36, paragraph 2(*d*), of the Statute of the Court to decide on "the nature or extent of the reparation to be made for the breach of an international obligation". The Special Rapporteur was no doubt right to draw a functional distinction between satisfaction, on the one hand, and restitution and pecuniary compensation, on the other; as he pointed out in his second report (A/CN.4/425 and Add.1, para. 137), however, both in jurisprudence and in diplomatic practice satisfaction was often accompanied by pecuniary compensation.

66. With regard to the formula "moral or legal injury" used in paragraph 1 of draft article 10, he himself would not speak of "legal" injury, an expression which was unsuitable. As for moral injury, paragraph 1 envisaged "nominal or punitive damages", and there appeared to be some contradiction in the paragraph, since it was not possible to ignore the pecuniary character of punitive damages or divorce pecuniary damages from the deterrent effect, or sanction, attributed to them. Moreover, draft article 8, on reparation by equivalent, set forth the right to claim from the wrongdoing State pecuniary compensation in an amount that would "cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals" (para. 2). Could it perhaps be argued that article 8 dealt with economically assessable damage and article 10 with damage that was not economically assessable? In any case, the question still arose, as the Special Rapporteur himself pointed out, whether "satisfaction is punitive or afflictive, or compensatory in nature" (A/CN.4/425 and Add.1, para. 108).

67. As a matter of prudence, he would suggest that paragraph 1 of article 10 and paragraphs 1 and 2 of article 8 should be revised in order to avoid the predicament to which the umpire, Edwin B. Parker, had referred in the "*Lusitania*" case, in declaring:

> The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. . . . (*Ibid.*, para. 114.)

[8] See footnote 5 above.

[9] See footnote 6 above.

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

The meeting rose at 1 p.m.

2169th MEETING

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

Chairman: Mr. Jiuyong SHI

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

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

[Agenda item 3]

Part 2 of the draft articles[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

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

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

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

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

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

---

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

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

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

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook ... 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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

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