Document:-
**A/CN.4/SR.2170**

**Summary record of the 2170th meeting**

Topic:
**State responsibility**

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

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

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

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

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## 2170th MEETING

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

*Chairman*: Mr. Jiuyong SHI

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

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

[Agenda item 3]

***Part 2 of the draft articles***[3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

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

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

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

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

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

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

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

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

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

necessary to be aware of the difference between typical tort cases and cases in which the aggrieved party pursued an expectation. A tort case involved interference with goods, rights or interests of the injured party. An expectation was of a different nature. The aggrieved party claimed compensation for *lucrum cessans* and wished to be placed in as good a financial position as that in which it would have been if the conventional instrument concerned had been duly performed. That was conceivable only in the case of a breach of a treaty provision. He did not have an immediate answer to his question and would only note that all the cases referred to by the Special Rapporteur in support of draft article 8 were tort cases. There was not a single decision confirming that the expectation interest was to be regarded as part and parcel of the damage. Unfortunately, by virtue of articles 1 and 3 of part 1 of the draft, there was only one category of internationally wrongful acts and no distinction was drawn between tort claims and contractual claims.

3. In the European Community, no State had ever made a claim for financial compensation in instances where another member State had breached its obligations. That had not even happened when France, some 10 years previously, had prohibited imports of British mutton. It was not even clear whether in such cases the Court of Justice of the Community would have jurisdiction to adjudicate such a claim. Again, in the GATT system, none of the panels which dealt with disputes between the contracting parties had ever awarded financial damages, although the General Agreement protected economic rights and thereby created economic expectations.

4. The rules proposed by the Special Rapporteur reflected perfectly well the legal position governing liability in tort but, outside that specific field, other considerations might prevail. Of course, diplomatic practice concerning typical inter-State relationships was much more difficult to pinpoint, yet he suspected that, apart from liability in tort, financial liability played only a limited role. As regards damage caused by armed conflict, it had never been considered possible to burden the defeated State with all the costs entailed in the work of reconstruction. That example showed that the rules devised by the Special Rapporteur were well suited to individual cases of harm to property or to persons, but did not provide general answers.

5. He had doubts about the key concept of the "injured State" in paragraphs 1 and 2 of draft article 8. According to article 5 of part 2 of the draft already provisionally adopted by the Commission, there were often many injured States, but not all of them could have the right to financial compensation. A practical difficulty would arise where a person had suffered damage as a result of a violation of a human-rights treaty. Every other State party was then deemed to have been injured. But to what State could the economically assessable damage be imputed? If it were maintained that the damage caused to a national of a State was always damage to the State itself, the right to claim compensation would be denied because it was normally the home State which violated the rights of its own national. He nevertheless agreed that moral damage suffered by a national of the injured State should give rise to a right to financial compensation, although that rule should be modified to reflect the one contained in paragraph 3 of draft article 10. Individuals could not claim compensation in all cases of moral damage. The European Court of Human Rights had granted financial compensation only in special cases, such as those in which, as a result of the violation, the victim had lived in prolonged and distressing uncertainty and anxiety. Normally, the Court considered that a finding that the requirements of the European Convention on Human Rights had not been complied with constituted adequate and just satisfaction.

6. With regard to paragraph 1 of draft article 8, alternative A appeared to suggest that the status quo should be restored, whereas alternative B left room for a hypothetical assessment of a course of events had the internationally wrongful act not been committed. In both alternatives, it was necessary to determine what was meant by "damage". As he saw it, "damage" primarily meant the loss of rights, goods and concrete opportunities as a result of the act of the author State. The question was, however, whether or not to include, in the case of treaty violations, any financial drawback revealed by a hypothetical comparison of the real situation and the one which would have existed if the relevant treaty obligation had been properly discharged. In that respect, he did not believe that paragraph 2 provided the requisite solution. What was "economically assessable damage"? In particular, did it include the expectation of the aggrieved party?

7. Paragraph 3 was manifestly a tort provision. Where an object had been destroyed or a person injured, compensation for *lucrum cessans* could be justified, covering, for example, loss of earnings. In the event of damage to property, however, the chances of making a profit would normally be reflected in the market price of goods. He noted that English courts, for example, were reluctant to take into account loss of profits as an additional factor over and above the market price of the goods involved.

8. The inclusion in paragraph 4 of a rule on the necessary causal link was welcome. Of the many solutions suggested by national schools of thought, however, the Special Rapporteur had opted for the theory of an "uninterrupted causal link". Personally, he hesitated to endorse that formulation because it was devoid of substance and did not provide concrete answers. There could be occasional instances in which a causal link was truly interrupted, but other criteria were normally relied upon. The consequences were too remote or too unpredictable to warrant imputation of the damage to the potential author. Accordingly, reference to an uninterrupted chain of events might satisfy academic needs, but it would not be helpful in practice.

9. Paragraph 5 of article 8 would stand better as a separate article. Essentially, he could agree with the rule it set out, namely that compensation would be reduced in cases where the victim had contributed to the emergence of the damage. The rule corresponded to established principles of private law from time

immemorial and no different solution could be applicable in public international law.

10. As to draft article 9, the Special Rapporteur had refrained from laying down a rule on the actual obligation to pay interest, and had simply specified the point in time from which it should come into operation. The article thus dealt with only a secondary problem and it should state clearly when interest would be due to the aggrieved party. Paragraph 1 stated that interest could be "due for loss of profits", but that was only one instance of injury. There was no reason why interest should not be payable where loss of property had been caused and where the aggrieved State confined its claim to compensation for loss of substance. He agreed that interest should run until the day of effective payment.

11. It was gratifying that the Special Rapporteur had proposed a specific rule on satisfaction, but the scope of draft article 10 should be more clearly defined. The law should indeed impose specific secondary obligations on the author State for moral damage, yet moral damage was more than bureaucratic negligence: it presupposed a certain degree of gravity. Examples could be given—such as the arrest of a diplomat—in which the honour or dignity of a foreign State was encroached upon. Nevertheless, it was a totally different matter when, for instance, a watercourse State failed to inform another of planned works, thereby violating the obligations set forth in article 12 of the draft articles on the law of the non-navigational uses of international watercourses. The Special Rapporteur apparently agreed with that approach by mentioning "moral injury" alongside "legal injury" in draft article 10, but the consequences suggested in paragraph 1, namely apologies, damages, and so on, would automatically apply in all cases of a breach of an international commitment. Such a proposition was exaggerated. Because of the great increase in the volume of international co-operation agreements, breaches often constituted a mere bureaucratic phenomenon. In most cases, it was enough for the aggrieved State to remind the other State of its obligation. The question of punishment of responsible agents or safeguards against repetition did not arise. The draft articles should display some degree of moderation with respect to petty violations of that kind.

12. He categorically rejected the notion of "punitive damages" contained in paragraph 1 of article 10. Actual loss or actual damage could always be assessed; reference to the relevant economic figures was all that was necessary. Punitive damages, on the other hand, automatically called for third-party adjudication. No State would voluntarily agree to be punished. Punitive damages, apart from being contrary to the principle of the sovereign equality of States, were also a practical impossibility. Accordingly, all references to punitive damages should be deleted. The proper place for notions of punishment was in the draft Code of Crimes against the Peace and Security of Mankind. The draft code, however, laid down penalties only against individuals.

13. He agreed with members of the Commission who had stressed that assurances or safeguards against repetition could not be confined to instances of non-material damage. That remedy was also needed, and perhaps even more so, when there was a threat that acts which had caused tangible damage might be repeated. It should also be made clear that material damage and non-material damage were not mutually exclusive. Thus if a mob, which the local police deliberately chose not to contain, set fire to the premises of a foreign embassy, the destruction of the building amounted to material as well as non-material damage. The existence of two separate articles appeared to indicate at first glance that the scope of the two provisions was separated by a clear-cut dividing line.

14. He fully endorsed paragraph 3 of article 10, which reflected the rulings of the International Court of Justice and the European Court of Human Rights. The European Court had ruled that its findings—to the effect that a violation had occurred—played a major role as the appropriate remedy. The Court was extremely reluctant to grant financial compensation in cases of human-rights violations and he knew of only one case in which it had been awarded generously, namely the case of a person who had been deported illegally, in disregard of lawful procedures of extradition.[5]

15. He was opposed to paragraph 4. There had, of course, been cases of humiliating demands made on the author State and the Special Rapporteur's reference to the *Boxer* case (A/CN.4/425 and Add.1, para. 124) was relevant. There was, however, no need to mention the matter in article 10: humiliation had no place in a world of sovereign States that were equal. At most, the matter could be mentioned in the commentary.

16. In conclusion, notwithstanding his partly critical observations, he wished to emphasize his great appreciation for the Special Rapporteur's well-documented report.

*The meeting rose at 10.45 a.m. to enable the Drafting Committee to meet.*

[5] See the judgment of 2 December 1987 of the European Court of Human Rights in the *Bozano* case, *Publications of the European Court of Human Rights, Series A: Judgments and Decisions*, vol. 124, p. 42, at p. 48, para. 10.

## 2171st MEETING

*Friday, 8 June 1990, at 10.05 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. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.