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Summary record of the 2172nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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71. He had reached a different conclusion from the Special Rapporteur with regard to compound interest: he did not think that it was essential and it might even lead to unfair results. He therefore doubted whether it was wise to deal with that question in the draft articles.

72. With regard to satisfaction, dealt with in chapter III of the report and in draft article 10, he basically agreed with the Special Rapporteur's approach and with his analysis and conclusions. Satisfaction must be regarded as a specific form of reparation, along with other forms of reparation, cessation, restitution in kind and reparation by equivalent. The fact that the broad and technical meanings of satisfaction had sometimes been confused should prompt the Commission to define the concept more clearly. Once the concept had been identified, its manifestations must, of course, be defined as well, as the Special Rapporteur had done in paragraph 1 of article 10.

73. The Commission had rightly paid particular attention to punitive damages, because the afflictive and punitive aspect was controversial. If he correctly understood the explanations given by the Special Rapporteur, especially in section D of chapter III, the afflictive aspect applied only to satisfaction and was thus an element which made satisfaction autonomous *vis-à-vis* other modes of reparation. Other members of the Commission challenged that view and thought it unwise to introduce any punitive connotation. He thought that both views were correct to some extent, for the reasons he would explain. On the one hand, the basis of the rules of reparation should be as objective as possible, since responsibility in international law must be concerned essentially with reparation for damage and must not seek to introduce the idea of sanctions, with all the subjective aspects it involved and the complications it might cause in the codification and application of the relevant rules. On the other hand, however, any judgment of any kind involving an order for reparation was necessarily punitive in nature, just as the wrongful act hinged on the concept of fault. Responsibility could arise from a wrongful act which was an international crime (art. 19 of part 1 of the draft), and it was obvious that such a crime would have a bearing on the régime of reparation to be applied. It was therefore a moot point whether it was useful for the topic, and at the stage of draft article 10, to introduce the afflictive aspect or whether it would not be better to come back to that aspect when the time came to deal with the consequences of an international crime. He inclined to the latter view and thought that damages could be dealt with in paragraph 1 of article 10 without reference to their afflictive or punitive nature.

74. As for guarantees of non-repetition, he was once more broadly in agreement with the Special Rapporteur's explanations and illustrations, which, like the arguments of the previous Special Rapporteur, demonstrated the relevance of such a rule.

75. Lastly, with regard to the limits which could or should be placed on satisfaction, the Special Rapporteur was right to draw attention to some historical examples of the abuses and dangers connected with some forms of satisfaction. It was therefore appropriate to set limits on satisfaction, as had been done in paragraph 4 of article 10. Some members of the Commission had questioned whether humiliating demands should be referred to in that paragraph. His own view was that, even if such demands were rare in the modern world, care must be taken to ensure that reparation would not extend to them in future and that certain types of conduct which were thought to belong to the past were not engaged in again through certain forms of satisfaction. The problem that arose was how such a provision was to be drafted.

76. In conclusion, he said that draft articles 8 to 10 should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

2172nd MEETING

Tuesday, 12 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, 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. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, 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*)

[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.

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

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

1. Mr. BENNOUNA congratulated the Special Rapporteur on a richly documented second report (A/CN.4/425 and Add.1), which would provide the Commission with the necessary elements to complete its work on the draft articles.

2. He accepted the distinction made in the report between reparation by equivalent and satisfaction, although he was aware of certain ambiguities to which the Special Rapporteur had drawn attention (*ibid.*, para. 4). He could also accept that compensation should apply as a matter of priority to material damage but that it could go further and apply to moral damage caused to a State's national. Again, he would agree that satisfaction could apply almost exclusively to moral or legal damage caused to the State. As to the impact of fault on the forms and degrees of reparation, despite the learned attention it had attracted, he did not, *a priori*, see the interest of such theoretical analysis at the present stage in the Commission's work.

3. Chapter II of the report, which dealt with reparation by equivalent, was the most important part. It was based on the following postulate advanced by the Special Rapporteur:

> ... Normally one is ... not confronted—as is the case when one deals mainly or exclusively with the codification and development of the so-called "primary" rules—with given actual or foreseeable conflicting interests and positions, such as those that inevitably emerge when one deals (*de lege lata* or *ferenda*) with the régime of international watercourses, the régime of the sea, the régime of international economic relations or the law of the environment. ... In so far, however, as the purely substantive consequences of a wrongful act are concerned, and particularly with regard to the rules that obtain or should obtain in the field of pecuniary compensation, all States would seem roughly to share the same "prospective" or "hypothetical" interests. ... (*Ibid.*, para. 33.)

According to the Special Rapporteur, therefore, the field of reparation would—*mirabile dictu*—be excluded from the conflicting relations and the inequalities that generally marked relations between States. That postulate, no matter how attractive it might seem, was highly arguable, for it did not withstand an analysis of inter-State relations or of diplomatic practice. Indeed, the arbitral awards and judicial decisions cited in the report dated back to a bygone era and could not be viewed in isolation from their historical context. What was needed was an analysis of agreements on compensation concluded between States at different stages of development and agreements concluded between former colonies and the metropolitan Power. Such an analysis would produce the following findings.

4. First, the possibilities for violations of international law were not equal. Secondly, there were wide differences so far as the willingness of States to enter into a settlement in accordance with the law was concerned. Thirdly, reparation for an unlawful act fell within a particular context which characterized the relations between two or more States, for example between a metropolitan Power and a former colony, between a capital-exporting State and a capital-importing State, or between a creditor State and a debtor State. Fourthly, it followed that the relationship was not always reciprocal. In that connection, he quoted a remark made by William Bishop in a course given at The Hague Academy of International Law in 1965 to the effect that one of the reasons why the United States of America had found the legal institutions of State responsibility reasonably satisfactory was that it had been both a sending State and a receiving State in the matter of aliens and so had had to look at such questions as both a potential defendant and a potential plaintiff. A State whose nationals seldom lived abroad but which had many aliens on its territory was, however, much more likely to become familiar with the defendant's side of an international claim.[5]

5. It was apparent, therefore, that opposing interests could arise, depending on the particular situation of each party, and that an abstract principle in regard to reparation could often prove inadequate in dealing with those interests. Moreover, despite the traditional formula whereby a State, by espousing the claims of its nationals, was exercising its own right, and notwithstanding the explanation by Reuter cited in the report (*ibid.*, footnote 110), the interests of the State did not always coincide with those of its nationals.

6. Fifthly, States were not equal in terms of financial and economic capacity. Consequently, unless the end result was to be an absurdity, compensation must necessarily take account of the financial capacity of States. For example, in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (*ibid.*, para. 25), the tribunal had referred to article 232, paragraph 1, of the Treaty of Versailles, in which the Allied Powers had recognized that the mere reparation of the losses caused by Germany would exceed Germany's financial capacity. Also, Ignaz Seidl-Hohenveldern had concluded in a recent article[6] that the concern of arbitrators was often to reconcile an investor's legitimate expectations and the host country's capacity to pay.

7. Sixthly, reparation should take account of all the relevant circumstances, including the structure of the States concerned, which differed considerably from one country to another and could have an influence on reparation. Assuming, for example, that a country surrendered its natural resources for 50 years for a paltry sum or concluded contracts that were manifestly contrary to its national interest, should that inevitably give rise to total reparation, including reparation for loss of profits, for the next 50 years?

8. He would examine the proposed articles in the light of those general considerations. With regard, first, to draft article 8, he agreed that the notion of economi-

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

[5] W. W. Bishop, "General course of public international law, 1965", *Recueil des cours de l'Académie de droit international de La Haye, 1965-II* (Leyden, Sijthoff, 1965), vol. 115, pp. 419-420.

[6] I. Seidl-Hohenveldern, "L'évaluation des dommages dans les arbitrages transnationaux", *Annuaire français de droit international, 1987*, vol. XXXIII, p. 7.

cally assessable damage (para. 2) lacked precision and considered that the Commission could not be content with the general and abstract terms in which paragraphs 2 and 3 were couched, since those provisions dealt with two essential aspects of reparation.

9. As worded, paragraph 4 would not be much help in practice unless the uninterrupted causal link was qualified more precisely, failing which the link might be so tenuous and distant as to give rise to inequitable results. To that end, the two elements referred to by the Special Rapporteur—the objective requirement of normality and the subjective requirement of predictability (*ibid.*, para. 37)—should be included in paragraph 4. That might make it possible to mitigate the effects of an unbroken chain and provide the arbitrator or judge with some more concrete elements. The two requirements in question were also confirmed by the judicial decisions cited in the report (*ibid.*, paras. 38 *et seq.*).

10. The wording of paragraph 3, concerning *lucrum cessans*, was unduly general and seemed to cover all kinds of loss of profit. The question of causal link was, of course, connected with the determination of *lucrum cessans*, since compensation would depend on the causal link between the unlawful act and the loss of profits. Theoretically, *lucrum cessans* was merely a notional profit and should normally be awarded only when there was some minimum of certainty. Thus the requirement of certainty had to be reconciled with the aim of providing for a notional profit yet to be realized. In his view, therefore, the general rule laid down in paragraph 3 should be tempered by a reference to equity and to the circumstances of the case, equity now being cited in international jurisprudence as a basis for a rule of law. He noted in that connection that the Special Rapporteur referred in the report to the *Shufeldt* case, in which the arbitrator had held that "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (*ibid.*, para. 66). In the *Chorzów Factory* case (Merits) (*ibid.*), the PCIJ had awarded *lucrum cessans* only for the period running from the date of the expropriation to that of the judgment. In regard to the latter case, Derek Bowett had concluded in a recent article[7] that, even in the case of unlawful expropriation, profits could be recovered only for a short period. The same author had also referred to a number of modern cases on both lawful and unlawful expropriation in which *lucrum cessans* had not always been awarded.

11. In one case of expropriation, *AMCO Asia Corporation* v. *Indonesia* (*ibid.*, para. 75), the tribunal had referred to "direct and foreseeable prejudice" in connection with *lucrum cessans*. That notion of foreseeability occurred constantly and should be incorporated in the draft articles. The idea of justifiable anticipation of the licensee, introduced in certain cases such as *AMINOIL* v. *Kuwait* (*ibid.*), could also be adopted in order to arrive at appropriate and equitable compensation—the formula used in *LIAMCO* v. *Government of Libya* (*ibid.*).

12. He agreed with Mr. Shi (2171st meeting) about the notion of appropriate compensation, which had undergone considerable development over the past 10 to 15 years. In that connection, Canada's claim against the Soviet Union following the disintegration of the *Cosmos 954* Soviet nuclear satellite had stated:

> ... Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty. (A/CN.4/425 and Add.1, para. 40.)

That passage, too, contained elements which he would like to see incorporated in the draft. He would, however, leave it to the Special Rapporteur to find an appropriate form of wording.

13. With regard to draft article 9, he fully agreed with Mr. Mahiou (2171st meeting) that interest should accrue from the date of the claim and run until the date of payment. Also, he saw no need for paragraph 2, on compound interest, and he gathered from paragraph 98 of the report that the Special Rapporteur himself was not really convinced of the need for it.

14. The diplomatic practice referred to by the Special Rapporteur in regard to draft article 10, on satisfaction and guarantees of non-repetition, reflected a bygone era and should not be used as a basis for contemporary international law. It could, at most, serve as a source of reference for those who wished to write the history of colonization. On the other hand, he fully agreed that, as in the "*Rainbow Warrior*" case,[8] recognition of the wrongfulness of a State's conduct could sometimes be equivalent to satisfaction, and he was quite prepared to envisage the case of non-repetition. Other cases of satisfaction, such as satisfaction in the form of apologies, should be relegated elsewhere. Paragraph 4 of article 10 should be retained, as satisfaction should not take the form of humiliating demands on a State: the punitive element, which, as many members of the Commission had remarked, operated in one direction only—from the strongest to the weakest—must be removed.

15. The question of fault posed a problem. In the report, the Special Rapporteur stated that "doctrine is perhaps right in upholding the view that the absence, the presence and the degree of the so-called 'intentional element' should in no way affect the computation of compensation" (A/CN.4/425 and Add.1, para. 185). The Special Rapporteur also raised the question whether the fault of a low-ranking State agent could be assimilated to that of the State, concluding, somewhat naively, that the State would be exempt from fault if it gave adequate instructions to its agents, particularly the police (*ibid.*, para. 190).

16. His own view was that fault, though not a condition of responsibility, should be a factor when it came to the consequences of a wrongful act. The Special Rapporteur had in effect proposed a half measure.

[7] D. W. Bowett, "State contracts with aliens: Contemporary developments on compensation for termination or breach", *The British Year Book of International Law, 1988*, vol. 59, p. 49.

[8] See 2168th meeting, footnote 4.

Such an approach might perhaps upset the logical and theoretical balance of the draft as a whole.

17. Lastly, he suggested that draft articles 8 to 10 be referred to the Drafting Committee, which could then draw on the report to flesh them out. He trusted that the Special Rapporteur would continue along the same lines and bring one of the Commission's major undertakings to a successful conclusion.

18. Mr. BARSEGOV paid tribute to the personal qualities and eminent scholarship of the late Paul Reuter and congratulated Mr. Pellet on his election to the Commission.

19. The Special Rapporteur's second report (A/CN.4/425 and Add.1) was very interesting, both from a theoretical and from a practical point of view. With all due respect for Roman law and the Special Rapporteur's thorough knowledge of private law, he wished to warn against introducing too many concepts and rules of private law—particularly Roman law—into political and public-law relations between States. The report raised a large number of issues, which could not possibly be discussed systematically in view of the limited time available.

20. First of all, the question arose whether it was justified to introduce the concept of moral damage and corresponding moral responsibility. In the Soviet Union, Grigory I. Tunkin had spoken against the expression "moral responsibility", because it could be understood as referring to responsibility of a non-legal character; he believed that the expression "political responsibility" might therefore be more appropriate in that context, since moral satisfaction actually involved political actions. Other Soviet writers considering the expression "moral responsibility" to be inaccurate felt that the expression "political responsibility" was also inadequate. They did not view it as a distinct form of responsibility, although they did not entirely deny its political character, which stemmed from the fact that the responsibility involved was that of a political body. A distinction should therefore be drawn between material and non-material responsibility, by analogy with the distinction between material and non-material damage. Indeed, the Special Rapporteur himself often qualified "moral damage" as "non-material" damage.

21. Another question was whether it was possible in practice to translate so-called "moral damage" into a pecuniary form of reparation. It would not be easy to establish why and how moral damage should or could be expressed materially. For example, could an insult to the flag be compensated for in a pecuniary way? Pecuniary compensation for purely moral damage would be tantamount to punishment or a fine. However, a genuinely moral issue did arise inasmuch as assessing national dignity in financial terms might be considered an insult to a country. Indeed, the situation was not even clear as far as the material expression of personal damage was concerned. The cases of material assessment by courts of "personal damage" cited in the report did not provide any clear basis for the delimitation of material and non-material, i.e. moral, damage and consequent responsibility.

22. Yet another question was that of the validity of an extremely broad interpretation of the term "satisfaction", implying pecuniary expression of satisfaction for moral damage. More specific issues arising in that connection were whether it was suitable to regard lack of protection or denial of justice as moral damage. In any event, the significance of lack of protection on the part of a State, or denial of justice, would obviously increase or even assume a different character when it came to international crimes where the victims of such a denial were not individuals but entire peoples and ethnic groups. That applied to genocide, *apartheid* and colonialism, in respect of which denial of justice or lack of protection on the part of the State would often be an element of the crime itself and thereby extend beyond the limits of so-called moral damage and moral responsibility.

23. Thus the examination of major issues associated with the law of international responsibility, such as reparation by equivalent, within the narrow framework of simple offences—delicts excluding international crimes—was bound to be incomplete and even one-sided.

24. Considering that the proportions and character of the legal and material consequences of a wrongful act varied greatly, depending on whether it was a delict or a crime, the nature of, and procedure for, restitution in kind or any other form of reparation were bound to vary accordingly. Of course, the need to afford legal protection against so-called delicts must not be underestimated, yet there was a risk that conclusions based on such delicts might lead to the temptation to extend such minimum criteria and standards to entirely different legal relationships connected with responsibility for international crimes. That fear was not unfounded, since the Special Rapporteur himself, in the draft articles he had submitted, referred not to simple offences, as had been agreed, but to "internationally wrongful acts", which, according to article 19 of part 1 of the draft, included not only delicts, but international crimes as well. In that connection, he hoped that the Special Rapporteur would dispel his apprehension and confirm that the rules and standards under discussion would not be automatically extended to crimes.

25. As to chapter II of the report, on reparation by equivalent, he agreed that the purpose of reparation in a general sense should be the elimination of all the legal and material consequences of a wrongful act and the re-establishment, in favour of the injured party, of the situation that would have existed if the wrongful act had not been committed. That view was shared by a number of Soviet writers. However, in view of the wide variety of cases and specific circumstances that arose, the Commission's task would probably have to be limited by upholding the principle of removal of all the legal and material consequences of the wrongful act without going too deeply into specifics and excessive details in determining the size of pecuniary compensation for damage, including compound interest, etc. Furthermore, practical application of that principle would leave courts and arbitrators sufficient room for manoeuvre, depending on the specific cases they were dealing with.

26. The Commission should therefore adopt a more flexible approach to the matter. He supported the views expressed by the Special Rapporteur (*ibid.*, para. 28) concerning the practical impossibility of working out detailed and comprehensive rules covering all situations. However, if the Special Rapporteur succeeded in proving the existence of standard rules or in deriving from practice more specific rules to elaborate on, supplement and develop the so-called *Chorzów* principle, and if the Special Rapporteur could establish that such rules were acceptable to the international community, he (Mr. Barsegov) would welcome them. What was important in the final analysis was not the theoretical issue of the origin of such rules and principles; the main point was to establish whether they were now an integral part of general international law or whether progressive development of the law was involved. In that respect it was important to take realistic account of States' readiness to accept such new rules.

27. If the formula "all the damage and only the damage caused by the unlawful act" was to be adopted as a basis for reparation by equivalent, it would be necessary to define the scope of such damage in relation to the overall damage resulting from the wrongful act. Since compensation should be awarded only for damage related to the wrongful act by a causal link, diplomatic and judicial practice made a distinction between direct damage caused to the subjects of international law and indirect damage stemming from undesirable consequences not directly related to the internationally wrongful act but affecting the interests of subjects of international law and their citizens. It seemed that one could speak of a rule, upheld in many arbitral awards, in State practice and in doctrine, whereby only direct damage should be taken into account and serve as a basis for determining the extent of responsibility. The only criterion that could serve to distinguish direct damage from indirect damage, which was not normally indemnifiable, was the nature of the causal link between the adverse consequences giving rise to damage and the internationally wrongful act that caused them. Identifying direct damage through the establishment of an appropriate causal link between the adverse consequences and the internationally wrongful act would set limits within which the specific extent of damage should be determined. The formula "positive damage" was commonly used to calculate material damage reflected in real losses which could not be compensated for in kind and consequently called for pecuniary assessment. Soviet literature on the subject stressed the importance of interpreting accurately the various elements of positive damage, namely losses, injury and expense, if that formula was to be applied properly.

28. For the reason given in the report (*ibid.*, para. 62), the Special Rapporteur had paid special attention to issues relating to the loss of profits that could have accrued had the internationally wrongful act not been committed, i.e. *lucrum cessans*. It could be said that international practice and doctrine lacked a consistent approach to the concept of *lucrum cessans* as a means of determining the extent of damage caused by breaches of international law. Although some decisions by international courts took account of loss of profits in determining the scope of indemnifiable damage, others ruled out the very possibility of applying the *lucrum cessans* formula. Similar divergences could be observed in the positions of legal scholars. Those divergences could probably be explained by the broad interpretation of loss of profits as relating to any loss sustained by a State because of the inability to secure benefits that might have accrued to it had the wrongful act not been committed. On the basis of that interpretation, loss of profits was bound to include both direct and indirect damage. It must be borne in mind that, while the desire to take account of all the elements of direct damage led to the use and recognition of the "loss of profits" formula, the fear of introducing elements of indirect damage into direct damage created a situation in which the formula was often either rejected or considered negatively. It might therefore be more appropriate to use the formula "real loss of profits", as opposed to loss of profits in the very broad sense of potential loss. That approach would be in keeping with the tribunal's decision in *AMCO Asia Corporation* v. *Indonesia* (*ibid.*, para. 75) to the effect that *lucrum cessans* should not exceed the "direct and foreseeable prejudice".

29. One of the parameters essential in establishing the scope of material damage was the determination of the time at which it should be assessed. The significance of the time factor stemmed from the fact that the adverse material consequences of an internationally wrongful act, which served as the basis for the assessment of material damage, could be perceived differently at different times. The extent of the damage could indeed vary in time, yet under international law there were no specific rules stipulating the time at which the assessment of such damage should start, the duration of the period for which material damage should be assessed and, consequently, the time for the submission of a claim against the wrongdoer.

30. In Soviet literature the opinion had been expressed that general rules could usefully be worked out to establish a reasonable procedural time-limit within which a State could submit a claim for compensation and all the adverse consequences of the violation would presumably be known, and within which the injured State could freely choose a time for assessment of the material damage it had suffered. The suggestion that the rule on a procedural time-limit for submitting a claim should be of a dispositive nature was based on the fact that the adverse consequences of some kinds of breaches—for instance, radioactive contamination—became apparent only after a lengthy period, whereas others might be more immediately noticeable.

31. However, account would have to be taken of the procedural time-limits for the submission of claims laid down in general and specific international instruments, such as the 1972 Convention on International Liability for Damage Caused by Space Objects, which set the limit at one year after the full extent of the damage was known. Account should also be taken of the situation of States, which might be unable to reveal the damage and submit a claim in time on account of their status or level of development.

32. At the same time, Soviet doctrine, in accordance with rules of international law, stemmed from the fact that cases of determination of damage arising from international crimes were unconditionally excluded from the scope of rules establishing time-limits for the submission of restitution claims and thus limiting the time-frame for calculating the amount of damages. In view of the particularly grievous and, in many cases, prolonged nature of international crimes and their harmful consequences, it was necessary to elaborate a general peremptory rule to the effect that the submission of claims for damage arising from such crimes should not be subject to any procedural limitation as to time.

33. In the report (*ibid.*, paras. 82 *et seq.*), the time factor was considered from a different angle, namely as the date from which interest should be calculated. Three possibilities were offered, that of calculating interest from the day on which the damage had occurred, that of calculating it from the day on which the *quantum* decision had been rendered, and that of computing interest from the date on which the claim for damages had been filed at national or international level. In his view, *dies a quo* could also be any date determined by the arbitral tribunal. While recognizing the cogency of the arguments advanced by the Special Rapporteur in favour of adopting the date on which the damage had occurred as *dies a quo*, which was the solution chosen in the majority of court decisions, he agreed with Mr. Mahiou (2171st meeting) about the need for sufficient flexibility to enable the specific circumstances of each case, including the financial situation of the respondent State, to be taken into consideration.

34. Although satisfaction, the subject of chapter III of the report and of draft article 10, was often viewed as a means of legal remedy for moral, political and/or legal wrong, its purpose in the strict and most widely accepted sense was to remedy damage of a generally non-material kind and, in particular, injury to a State's honour, prestige or dignity. Since all internationally wrongful acts involved some measure of such injury, ordinary satisfaction was an essential practical reflection of the offending State's responsibility. In cases where an internationally wrongful act did not give rise to material damage, the offending State's responsibility manifested itself exclusively through satisfaction.

35. The Special Rapporteur pointed out in the report (A/CN.4/425 and Add.1, para. 107) that satisfaction was not defined only on the basis of the type of injury with regard to which it operated as a specific remedy but was also identified by the typical forms it assumed, which differed from *restitutio in integrum* or compensation. He agreed with the Special Rapporteur that the question whether satisfaction was punitive or afflictive, or compensatory in nature, was crucial (*ibid.*, para. 108). Opinions on that score differed, but the idea of satisfaction being proportional to the seriousness of the offence or to the degree of fault of the responsible State (*ibid.*, para. 109) was, in his view, extremely important.

36. Guarantees of non-repetition of the wrongful act, discussed in chapter IV of the report, were, as the Special Rapporteur pointed out (*ibid.*, para. 148), a remedy generally dealt with only marginally and within the framework of satisfaction. The Special Rapporteur concluded (*ibid.*, para. 163) that guarantees against repetition constituted a form of satisfaction performing a relatively distinct and autonomous remedial function. Without wishing to minimize the importance of appropriate guarantees of non-repetition as a remedy in the case of delicts, for his own part he wished to stress the incomparably greater significance they assumed in the context of international crimes such as annexation, genocide, and so forth. The point at issue was not only the emergence of new forms of guarantees, but also the purpose of guarantees. The question of the political and legal evaluation given to measures described as guarantees of non-repetition had given rise to lively discussion within the Commission. Obviously, political and legal assertion of guarantees of non-repetition would depend on the view taken of the act whose repetition was to be prevented. The measures adopted could be extremely reactionary if they were directed, for example, against a national liberation movement; the case of the Boxer Rebellion, mentioned in the report (*ibid.*, para. 159), was one example. The report abounded in similar examples drawn from the colonial practice of the era of imperialism.

37. In considering guarantees of non-repetition of crimes, it would be necessary to address the practice of settlement after the First World War and the Second World War which involved, in relation to States having committed genocide, such guarantees as taking away their sovereignty over the people against whom that crime had been committed or, in the case of a State having committed aggression, setting its borders in such a way as to prevent it from using territory as a springboard for the repetition of aggression. True, those examples related to crimes rather than to delicts, but then so did some of the examples cited in the report. He hoped that the Special Rapporteur would give some consideration to the comment in further work on that theme.

38. Lastly, on the question of fault, including wilful intent and negligence, dealt with in chapter V of the report, he agreed with the Special Rapporteur (*ibid.*, para. 164) that the issue was of fundamental importance and that the Commission would have to face it in the course of the elaboration of part 2 of the draft articles. The mystical view of the State and efforts to elude the question of fault resulting from that approach would, sooner or later, have to yield to the need to consider the place of fault in State responsibility. The problem would take on particular importance when the Commission went on to consider responsibility for crimes such as genocide or aggression committed by a State, but it was already essential at the present stage in connection with delicts or internationally wrongful acts. In the past, the Commission had tended to circumvent the issue, although, according to the Special Rapporteur's understanding (*ibid.*, para. 165), it had appeared to believe that fault was a *sine qua non* of wrongfulness and responsibility. Now, however, the Commission's work had reached a stage where consideration of the

fault issue had become indispensable for the specific determination of the consequences of an internationally wrongful act.

39. If breach of an obligation was considered as the basis for State responsibility, some questions arose that should be answered in the interests of strengthening legality and the rule of law. In any case, the issues raised in the report were of such serious nature and had such far-reaching implications that one could not close one's eyes to them. He therefore wished to stress the need for an in-depth discussion of the problem of fault at a future session.

40. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to clarify two points. First, with regard to satisfaction, his second report (A/CN.4/425 and Add.1) distinguished between three periods, the one preceding the First World War, the inter-war period and the period since the Second World War. It condemned most cases of satisfaction relating to the first period as instances of arrogant treatment of smaller or weaker countries by more powerful countries. The situation in the two later periods, where satisfaction had been employed as a remedy between equals, was, of course, altogether different.

41. His second point related to the issues of equity and fault. He had omitted express references to equity from the report because, as experience showed, such references were apt to be unhelpful. Needless to say, however, equity was implied in all legal rules and formed an essential and integral part of law. As for the concept of fault, he failed to see how it would be possible to invoke equity and, at the same time, not mention the role of fault, wilful intent or negligence in the commission of internationally wrongful acts.

42. Mr. FRANCIS said that critical comments in no way detracted from the excellent quality of the Special Rapporteur's second report (A/CN.4/425 and Add.1) or from the signal contribution it made towards advancing the Commission's work. He would none the less associate himself with Mr. Njenga's remarks (2171st meeting) concerning the large number of quotations in French in the English mimeographed version, more particularly in the footnotes. Not all members of the Commission were accomplished linguists, and all wished to read and understand every word of the documents placed before them.

43. With regard to draft article 8, he supported alternative A of paragraph 1: it was the more economically worded and, at the same time, conveyed the basic concept underlying the provision. The words "in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed" were particularly important in conjunction with paragraph 2, where the reference to moral damage was, in his view, superfluous, being subsumed under that stipulation in paragraph 1 (alternative A). The reference to moral damage in paragraph 2 should be deleted and the reason duly explained in the commentary. He fully agreed with members who had raised doubts about the phrase "economically assessable damage" in paragraph 2.

44. As to paragraph 3, Mr. Calero Rodrigues (2169th meeting) had commented that the definition of compensation referred only to profits but not to losses deriving from the internationally wrongful act. In that connection, paragraph 4 did specifically refer to "any loss connected with such act", and he would suggest that the two paragraphs might be merged into one, covering both profits and losses.

45. The expression "contributory negligence" in paragraph 5 was rather too technical and should be replaced by a form of words making it quite clear that if the injured State had in any way contributed to the occurrence of the internationally wrongful act, the compensation it could claim would be reduced accordingly.

46. With regard to draft article 9, he agreed with Mr. Barsegov's view that the question of the date from which interest should be calculated could be left to the arbitral tribunal or, as the case might be, to the parties to a bilateral settlement. The question of dates was out of place in the context of the article. On the subject of the interest rate, Mr. Razafindralambo (*ibid.*) and other members were right to point to the importance of adopting a flexible approach and of not imposing interest rates which might in some cases prove too burdensome. Except in very special circumstances, compound interest should not be awarded.

47. Draft article 10 stood in need of more precision. In particular, the damage should be expressed in terms of its effect on the honour and dignity of the State concerned. Paragraph 1 rightly described satisfaction and guarantees of non-repetition as a form of compensation for injury "not susceptible of remedy by restitution in kind or pecuniary compensation", but in the qualification of the injury as "moral or legal" the reference to "moral" should be removed. He was in favour of article 10 as a "shock absorber", to cover injury that could not be covered by means of monetary compensation under article 8. There was no place for the concept of "wilful intent or negligence", in paragraph 2, for those issues were matters for adjudication by the arbitrator or legal adviser concerned, with due regard for the circumstances.

48. Paragraph 3 met with his approval, as did paragraph 4, on the question of humiliating demands, since it took into account the fact that some States were strong and others weak. It was therefore appropriate to lay down the standards set forth in paragraph 4.

49. The articles under discussion dealt with reparation in the context of the application of articles 8 to 15 of part 1 of the draft. He referred in particular to article 8, on the attribution to the State of the conduct of persons acting in fact on behalf of the State, article 9, on the attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization, and article 10, on the attribution to the State of the conduct of organs acting outside their competence or contrary to instructions concerning their activity.

50. With regard to the attribution to the State of the acts of its officials, and with special reference to crimes, it was appropriate to recall the ruling by the Nürnberg

International Military Tribunal to the effect that crimes against international law were committed by men and not by abstract entities; that only by punishing individuals who committed such crimes could the provisions of international law be enforced. The present draft was actually intended to cover both torts and war crimes. It would be noted that the second report stated:

> If in the case of juridical persons of national law a legal attribution or imputation of will or acts is a practical terminological expedient, in the case of States as international persons a legal attribution seems actually to be an error and a redundancy.... (A/CN.4/425 and Add.1, para. 175.)

The Special Rapporteur then went on to say that that attribution would be effected by the "foreign ministry legal adviser or the arbitrator called to make the finding" in the light of the appropriate criteria, standards and principles (*ibid.*, para. 176). For his own part, he was firmly convinced that, if attribution were to be left to be effected in that manner, the result would be an array of conflicting and disparate decisions.

51. In that connection, he wished to draw attention to the following statement by Mr. Ago, a former Special Rapporteur:

> ... The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function) is unanimously upheld by the writers on international law who have dealt with this question.[9]

Mr. Ago had cited a number of learned authors in support of that view. In his opinion, the Special Rapporteur should revise the views he had expressed in paragraphs 175 and 176 of his second report in the light of those remarks.

52. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Francis had referred to the question of attribution of responsibility, which was of course a legal question. The passages cited by Mr. Francis from the second report (A/CN.4/425 and Add.1, paras. 175-176), however, referred to the attribution of acts by an arbitrator or by a foreign ministry legal adviser. On that last point, there might be some difference of opinion between himself and Mr. Ago; but there was none on the issue of attribution of responsibility, which was a question of law and not of fact.

53. Mr. HAYES said that, in regard to reparation by equivalent, one should start from the principle, identified in the *Chorzów Factory* case (Merits),[10] that all legal and material consequences of the unlawful act should be wiped out so as to establish or re-establish the situation that would exist if the wrongful act had not been committed. In his second report, the Special Rapporteur cited a number of concrete cases which provided material for developing rules going beyond the *Chorzów* principle (A/CN.4/425 and Add.1, para. 28), though not rules on detailed questions. For his part, he generally favoured progressive development and, in the present instance, was reinforced in that tendency by paragraph 32 of the report and the Special Rapporteur's oral introduction (2168th meeting).

54. The Special Rapporteur cited persuasive authority indicating that, in the sphere of pecuniary compensation, international law had been influenced by municipal law to the extent that international legal principles modelled on municipal-law principles or rules had been applied (A/CN.4/425 and Add.1, para. 27). As pointed out in the oral introduction, however, the question of the actual payment of pecuniary compensation depended on the assessment of facts, regardless of whether the issue was settled by arbitration or through diplomatic effort. In that connection, the question arose as to what matters were appropriate for development. A line had to be drawn between material prompting general rules and material that was the result of assessment, in the circumstances of particular cases, by negotiators or arbitrators. Such a division was not very accurately observed in the draft articles. Thus, while there was a strong case for providing that *lucrum cessans* was a factor calling for compensation, it was inadvisable to seek to regulate such details as rates of interest and the methods for calculating interest, or the period in respect of which interest should be paid.

55. He found no difference in substance between alternatives A and B of paragraph 1 of draft article 8. Alternative A was preferable as it was more direct and concise and identified reparation by equivalent as secondary and supplementary to restitution in kind. It would be better, however, if the wording indicated more clearly that the situation to be established was that which would exist if the wrongful act had not been committed, rather than the *status quo ante*. Actually, that appeared to be the Special Rapporteur's intention, judging from the trend of both of his reports and the use of some language from the *Chorzów Factory* case in the draft.

56. He had hesitations about the expression "economically assessable" in paragraph 2. It was not clear how that criterion of identification would be applied, or indeed what it meant, particularly if there was an implication that moral damage to a national was "economically assessable" whereas moral damage to a State was not. The content of paragraph 2 of draft article 10, as well as the relevant passages of the second report (*ibid.*, paras. 13-17), showed that paragraph 2 of article 8 was partly intended to exclude moral damage to the State from reparation by means of pecuniary compensation. Paragraph 2 of article 8 should therefore be drafted to say that directly. Again, if redrafting along those lines was undertaken, he questioned the need to maintain the reference to moral damage to nationals, it being axiomatic that unlawful infliction of harm on nationals comprised damage to their State, without distinction as to the nature of the harm.

57. He had no difficulty with the substance of paragraph 3 and found the Special Rapporteur's treatment of *lucrum cessans* extremely lucid. The question was shown to be one of causation. Of course, it was, from a different angle, a factor in the function of reparation to establish the situation that would exist if the wrongful act had not been committed, rather than

[9] *Yearbook ... 1971*, vol. II (Part One), p. 266, document A/CN.4/246 and Add.1-3, para. 194 *in fine*.

[10] See 2168th meeting, footnote 6.

the *status quo ante*, as the Special Rapporteur recalled by mentioning the *Chorzów Factory* case (Merits) (*ibid.*, para. 66 *in fine*).

58. On the subject of "direct" and "indirect" damage, the quotation in the report from the *South Porto Rico Sugar Company* case (*ibid.*, para. 36), to the effect that the distinction between "direct" and "indirect" damage was "frequently illusory and fanciful and should have no place in international law", was convincing. He accordingly endorsed the Special Rapporteur's approach to the problem on the basis of causation, the test being the existence of a clear and unbroken causal link between the wrongful act and the damage. Fortunately, the Special Rapporteur had avoided incorporating the elements of "normality" and "predictability" as factors in the determination of causality. They should be left to the negotiators or the arbitrators, since they related to the assessment of what constituted an "uninterrupted causal link".

59. He accepted the Special Rapporteur's summary (*ibid.*, para. 42) to the effect that damages must be fully paid in respect of harm caused exclusively by the wrongful act, whether immediately or not, and thus supported paragraph 4 of article 8 in substance, but urged that it be more tightly worded.

60. In his oral introduction, the Special Rapporteur had said that, if the wrongful act was only one of many causes of the damage, the amount payable in compensation had to be reduced accordingly, and in the report had proved the case for a rule along those lines, adding (*ibid.*, para. 46) that no attempt should be made to provide for criteria for apportioning liability between multiple causes and assessing the partial damages. Likewise, the conclusion was reached that contributory negligence on the part of the injured State, as a justification for reducing the compensation for damage, fell within the situation of multiplicity of causes (*ibid.*, para. 51). Hence he supported paragraph 5 of article 8.

61. Lastly, it was to be hoped that the Special Rapporteur would consider introducing in article 8 an express provision to the effect that full payment was required in respect of damage caused exclusively by the wrongful act.

62. Draft article 9 should be deleted. There was a certain link between that article and paragraph 3 of article 8, on loss of profits, since interest was the most frequently used method for compensating for such loss. As he saw it, the question whether interest should be included in compensation and, if so, between which dates, at what rate and whether it should be calculated as simple or compound interest were all matters for appraisal by arbitrators or negotiators seeking to establish terms of compensation in the light of all relevant circumstances. Consequently, it was not advisable to attempt to devise rules in that regard. Actually, the rule laid down in paragraph 1 of article 9 was much too rigid and other provisions of the article were so general as not to be of any significance. Paragraph 2 merely stated that compensation must be adequate, an element already comprised in article 8. It would of course be clearer in article 8 if, as he had suggested, a provision on full compensation were added.

63. With regard to draft article 10, the existence of satisfaction as a mode of reparation in international law was supported by the Special Rapporteur's exhaustive examination of writings, decisions and State practice in chapter III of the report. Satisfaction constituted a non-compensatory form of reparation for a moral, political or juridical wrong to a State. The Special Rapporteur listed a number of forms of satisfaction (*ibid.*, para. 139) and, with one exception, they were clearly directed towards reparation of injury to the State's dignity, honour or prestige. The exception was payment of money in excess of what was required to compensate for material damage. That should be omitted as not being appropriate to the injury and also as tending towards punitive damages.

64. He approved of the descriptive clause "not susceptible of remedy by restitution in kind or pecuniary compensation" in paragraph 1 of article 10, but "adequate" should be replaced by "appropriate" as the word to qualify "satisfaction". The word "punitive" should also be removed. Indeed, it might be preferable to delete the entire reference to "nominal or punitive damages". It should also be made clear that the list of forms of satisfaction was not exhaustive. At the same time, he believed that flag-saluting ceremonies or expiatory missions, for example, did not constitute viable forms of satisfaction in the present day and age.

65. He was hesitant about including the element of wilful intent or negligence in paragraph 2, notwithstanding the Special Rapporteur's conclusion that fault and wilful intent or negligence influenced the forms and degrees of reparation (*ibid.*, para. 180) and that fault had influenced the forms and degrees of satisfaction (*ibid.*, para. 187). The Commission should perhaps revert to the question after it had considered the provisions on the consequences of crimes.

66. Paragraph 4 should be deleted. Apart from the fact that it proposed to limit the content of claims rather than of conclusions, it related to humiliating demands, which were a late and unlamented feature of State practice. They should be mentioned in the commentary and not be dignified by a reference in the text of the article, even for the purpose of rejecting them.

The meeting rose at 1.05 p.m.

2173rd MEETING

Wednesday, 13 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo,