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Summary record of the 2173rd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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,

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*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

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

1. Mr. AL-KHASAWNEH said that the Special Rapporteur's second report (A/CN.4/425 and Add.1) was not only theoretically brilliant, but also contained a good deal of realism and common sense. The Special Rapporteur deserved congratulations.

2. Before turning to the substance of the report, he drew attention to two relatively minor defects which could easily be rectified to make the report more readable. First, the corrigenda which had been issued had not eliminated the many typing mistakes that disfigured the English mimeographed version. Secondly, the Special Rapporteur had quoted relatively long passages from works in the original Italian, thereby preventing those who were not familiar with that language from understanding important points in the report.

3. Another general comment was that, during the debate on the topic, the Special Rapporteur had been criticized for quoting cases from the nineteenth and early twentieth centuries, especially relating to satisfaction. He nevertheless considered that the Special Rapporteur was fully justified in that approach. To refer to a case in which abusive measures had been imposed against a small or weak State in order to obtain satisfaction did not imply approval of that practice. On the contrary, no proper appraisal of satisfaction or of the ways in which it could be abused was possible without a close and dispassionate examination of the past. Power disparities among States remained a constant factor in international relations and, at the previous meeting, Mr. Bennouna had rightly stated that, even in respect of the elaboration of secondary rules, which, according to the Special Rapporteur, were more amenable to progressive development than primary rules, the existence of disparities between creditors and debtors, large and small, weak and strong, would continue to make itself felt in legal relations between States. It was therefore necessary now, as it had been in the nineteenth century, to be aware of the impact of power relations; but, as long as they did not have a more direct effect, they did not invalidate legal relations.

4. In his preliminary report (A/CN.4/416 and Add.1, para. 66), the Special Rapporteur cited the well-known dictum of the PCIJ in the *Chorzów Factory* case (Merits) to the effect 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". The words "in all probability" were not without significance, for they left no room for doubt that what was meant was some theoretical situation which had never existed, but which would have existed had it not been for the intervention of the wrongful act. That definition, which had been endorsed by the Special Rapporteur, contrasted with the definition stated in the *Bryan-Chamorro Treaty* case (*ibid.*), in which reparation had been regarded as the restoration of the *status quo ante*. In the preliminary report (*ibid.*, para. 67), the Special Rapporteur recognized that those two definitions had different impacts on the scope of pecuniary compensation, which was the subject of draft article 8 submitted in the second report. In view of that impact and of the absence of a definition of *restitutio in integrum* in draft article 7 as submitted in the preliminary report, he shared the misgivings expressed by Mr. Graefrath (2168th meeting) about the two alternatives proposed by the Special Rapporteur for paragraph 1 of article 8. At any rate, he would welcome explanations on the subject from the Special Rapporteur.

5. A somewhat different point related to the equation of reparation by equivalent with pecuniary compensation. In the *British Claims in the Spanish Zone of Morocco* case (see (A/CN.4/425 and Add.1, footnote 234), the arbitrator had decided that the Spanish Government should provide premises for the British Consul at Tetuan to replace those for whose unlawful destruction it had been responsible. Christine Gray had listed that case as one of material restitution, but he himself thought that it was rather a case of reparation by equivalent, albeit not of a pecuniary nature. If that proposition were accepted, it would follow that giving reparation by equivalent an exclusively pecuniary nature might be too restrictive.

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[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.

6. A third point related to the possible impact on reparation by equivalent of the concept of the excessively onerous burden on the "author" State. If read together, draft articles 7 and 8 gave the impression that the exception of the excessive onerousness of the burden imposed on the author State applied only to restitution in kind, or at least that its relationship to reparation by equivalent was tenuous. It was obvious, however, that the reasons that had led the Special Rapporteur to introduce the concept of excessive onerousness as an exception to the duty to make restitution in kind applied with equal force to reparation by equivalent. The complete ruin of a State could be brought about by onerous demands of a pecuniary nature, especially if it was considered that the draft did not limit indemnifiable damage by means of the proximate-cause test and provided for the possibility of awarding compound interest to ensure full compensation. It therefore seemed to him that, if it was the Special Rapporteur's intention that the operation of the exception of excessive onerousness should apply to reparation by equivalent, that point should be made clear.

7. In draft article 8, paragraphs 2 to 5, and in draft article 9, the Special Rapporteur enunciated, on the basis of the progressive development of the law, a number of detailed rules relating to the scope and determination of reparation by equivalent. Ironically, progressive development was warranted in the present case not because of a lack of jurisprudence, but because, despite its abundance, it was difficult to draw any uniform standards of indemnification from it. The Special Rapporteur's treatment of the possibility and wisdom of drawing up rules that went beyond the so-called *Chorzów* principle was well-balanced and he himself fully endorsed that part of the second report (*ibid.*, paras. 26-33). He recalled that, during the debate, Mr. Graefrath had advised against going into detail in that regard. He was, however, even more convinced by what Mr. Graefrath had said in a 1984 lecture at The Hague Academy of International Law, namely that the definition of reparation in the *Chorzów Factory* case was "such a general, abstract and far-reaching one that it might be quoted by everybody",[5] as well as by Mr. Graefrath's further comment:

> ... it is necessary that the obligation is sufficiently specific and precise. Wide social spheres, under present conditions of quick extension, development and changes in international relations, cannot be regulated simply through general legal principles, as important as they are. Precise rules are necessary ...[6]

On the other hand, the question of how precise the rules to be developed should be was ultimately more a question of art than of science. He believed that the legislator should leave the judge some latitude and therefore considered that the expression "economically assessable damage", in paragraph 2 of article 8, was reasonably precise.

8. In paragraph 3 of article 8, the Special Rapporteur dealt with the question of *lucrum cessans*. Although there was strong support in legal literature and in practice for compensation of *lucrum cessans*, there was no uniformity in that regard. In two cases cited by the Special Rapporteur, the "*Canada*" case and the *Lacaze* case (*ibid.*, para. 64), the courts had refused to compensate for lost profits because, in the first case, such profits had been considered uncertain and, in the second, the damage had been considered indirect. In the *Shufeldt* case (*ibid.*, para. 66), the arbitrator had stated that, to be recoverable, *lucrum cessans* had to be the direct fruit of the contract and not be too remote or speculative. He himself believed that that was the most equitable solution to the problem of providing compensation for lost profits. The wording used in paragraph 3 was therefore much too broad in so far as it referred to compensation for "any profits".

9. In paragraph 4, the Special Rapporteur introduced the idea of an "uninterrupted causal link" and it was apparently Bollecker-Stern's algebraic formula (*ibid.*, para. 43) that had made him adopt that metaphor rather than the proximate-cause approach. He did not intend to embark on an analysis of the idea of causation in law. Suffice it to stress that what was needed was a provision of principle which kept indemnifiable damage within reasonable bounds rather than a philosophical concept which was at best unsatisfactory. While the Special Rapporteur was absolutely right in saying (*ibid.*, para. 41) that the use of the adjective "proximate" was not without a certain degree of ambiguity, the term should nevertheless provide enough specificity in a rule which surely would be interpreted by the courts and adapted by them to each individual case.

10. With regard to paragraph 5, he saw no need for including, as Mr. Hayes had suggested at the previous meeting, a provision to the effect that, in the absence of concomitant causes, including possibly contributory negligence by the injured State, compensation should be paid in full. In his own view, such a rule could be derived from either alternative A or alternative B of paragraph 1, or, *a contrario*, from paragraph 5. The rule on partial reduction of compensation due to contributory causes appeared to be well established: it had been applied in the *S.S. "Wimbledon"* case decided by the PCIJ (*ibid.*, para. 50), as well as in the "*Costa Rica Packet*" and *Delagoa Bay Railway* cases (*ibid.*, para. 48) and the *John Cowper* case (*ibid.*, para. 49), and it was significant that, although publicists did not all agree on its origin, they did agree on the existence of the rule.

11. In draft article 9, paragraph 2 seemed to run counter to the trend surveyed by the Special Rapporteur. Its exceptional imposition and the iniquitous results to which it could lead were such that it should be deleted. In fact, he was in favour of the deletion of article 9 as a whole because the calculation of interest was so much a matter of circumstances that it should be decided on a case-by-case basis.

12. With regard to satisfaction, the general proposition that justice had a punitive aspect could not be completely overlooked. It had often been said that punitive damages were incompatible with the concept of the sovereign equality of States and could easily be

[5] B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses of The Hague Academy of International Law, 1984-II* (The Hague, Nijhoff, 1985), vol. 185, p. 69.

[6] *Ibid.*, p. 37.

abused as a result of the actual inequality of States in size and power, but he thought that such fears, though not unfounded, were exaggerated. Proper safeguards in the draft should eliminate, or at least reduce, abuses and, as far as sovereign equality was concerned, it should not be forgotten that the codification and progressive development of international law should aim at the establishment of the rule of law in international relations. He was not much persuaded by the argument that posited sovereignty against justice and he believed that there was much that deserved support in the comment by Lauterpacht cited in the report (*ibid.*, footnote 264). Eagleton, also cited in the report (*ibid.*, footnote 263), had summed up the matter very eloquently in stating:

> ... international law is badly in need of such sanctions. It can no longer be argued that the sovereign State is above the law; and there seems to be no reason why it should not be penalized for its misconduct, under proper rules and restrictions.

13. Much had been made of the statement by the umpire, Edwin B. Parker, in the "*Lusitania*" case that "as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal" (*ibid.*, para. 114). He himself agreed with the way the Special Rapporteur interpreted that case: what the arbitrator had meant was that the matter was one for States to settle at the ordinary diplomatic level, not that the whole concept of satisfaction was beyond legal regulation. That interpretation seemed to be supported by other cases cited in the report. Thus, in the *Miliani* case, the umpire had stated that "unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so" (*ibid.*, footnote 278).

14. For all those reasons, he believed that satisfaction should have a place in the draft. He had no difficulty in principle either with draft article 10 or with the introduction of the concept of negligence or wilful intent into the text. On the whole, however, he thought that it would be advisable to give those issues further thought and to wait until the question of particularly serious delicts and crimes had been discussed.

15. Mr. BARBOZA sincerely congratulated the Special Rapporteur on his excellent second report (A/CN.4/425 and Add.1), which dealt exhaustively with a complex and fascinating topic.

16. With regard to paragraph 1 of draft article 8, he said that, like most members of the Commission, he preferred alternative A. The Special Rapporteur had apparently accepted the principle regarding reparation laid down in the *Chorzów Factory* case (Merits),[7] something he had not done explicitly in his preliminary report (A/CN.4/416 and Add.1). Perhaps he had wanted to avoid stating his position before the Commission had discussed the matter. In any event, he personally was glad that article 8 stated the *Chorzów* principle, which he preferred to the *status quo ante* rule adopted by the previous Special Rapporteur.

17. He also thought that alternative A partially duplicated paragraph 4 of draft article 7 as submitted in the preliminary report, which read: "The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind ...". The two provisions could either be merged or paragraph 4 of article 7 could be incorporated into article 8 to produce the following text:

> "The injured State may, in a timely manner, claim from the State which has committed an internationally wrongful act pecuniary compensation to substitute for restitution in kind, in the measure necessary to establish the situation that would exist if the wrongful act had not been committed, provided that such a choice would not result in an unjust advantage to the State which committed the internationally wrongful act or involve a breach of an obligation arising from a peremptory norm of general international law."

He pointed out that he had eliminated the words "totally or in part" in paragraph 4 of article 7 because, if the *Chorzów* principle was accepted, restitution in kind was equivalent to full restitution, which, by definition, could not be partial. Moreover, since the point was not, as Mr. Graefrath (2168th meeting) had noted, to re-establish an earlier situation, but rather to establish a situation which had never existed, the word "re-establish" had been replaced by "establish".

18. He had no difficulty with paragraph 2 of article 8: the expression "economically assessable" reflected international case-law and practice. Although economic assessments differed from one case to another, in each of the cases cited an effort had been made to assess the damage in economic terms and it had been found that the damage was "economically assessable".

19. As to paragraph 3, which dealt with *lucrum cessans*, he thought that the expression "any profits the loss of which" was too vague, even though its scope was restricted to some extent by paragraph 4, which provided that the damage must be connected with the internationally wrongful act by an uninterrupted causal link.

20. In paragraph 4, which made the uninterrupted causal link the criterion for limiting the scope of the assessment of damage and *lucrum cessans*, the Special Rapporteur seemed to have followed the rule applied in administrative decision No. II of the United States-German Mixed Claims Commission of 1 November 1923 (A/CN.4/425 and Add.1, para. 39), and thus, rather strangely, had not taken account of the favourable opinion he had expressed (*ibid.*) on the criterion of predictability. The idea of predictability was very important and it should be included in the text.

21. He welcomed the fact that the Special Rapporteur had not retained the *in abstracto* or *in concreto* alternative methods for determining *lucrum cessans* or the "going concern" reasoning. The *Chorzów* principle was an adequate guideline.

22. He fully agreed with paragraph 5 of article 8.

23. Draft article 9, on interest, which the Special Rapporteur described as being a part of *lucrum cessans* (*ibid.*, para. 78), could be deleted and it could simply be indicated, perhaps at the end of paragraph 3 of article 8, that interest must be paid whenever compensa-

[7] See 2168th meeting, footnote 6.

tion was due for the loss of a sum of money. Courts must be free to interpret the full-compensation rule in each particular case and to determine how interest was to be calculated.

24. Draft article 10, on satisfaction, was very important. He particularly supported the wording of the beginning of paragraph 1, believing as he did that moral injury to a State was different from material or moral damage to the nationals of that State. Otherwise, there would be no need for an article dealing with satisfaction. When the dignity of a State was injured, reference was made to "moral" or "political" damage to the State. That was a key concept and, as both case-law and diplomatic practice showed, moral damage to a State was not economically assessable.

25. Commenting generally on satisfaction, he questioned whether it was punitive or compensatory in nature. In fact, the two aspects were closely linked in international law. Satisfaction always involved a punitive aspect, because it was by no means easy for a State which had committed a wrongful act to fulfil certain obligations which it had not at first recognized as being binding on it. But it also had a compensatory aspect, since what was afflictive for the author State was compensatory for the injured State. For pragmatic reasons, however, he would prefer not to place too much emphasis on the punitive aspect.

26. With regard to the second part of paragraph 1, listing various forms of satisfaction, he noted that, although apologies existed in diplomatic practice, there had not been many examples of them in international case-law. Generally speaking, States did not claim "satisfaction". There had been some interesting recent decisions in that regard. For instance, the United States of America had not called for apologies in the case of the American hostages in Iran. Even going further back, the ICJ, in the *Corfu Channel* case, had found that the Court's declaration that the United Kingdom had violated the sovereignty of the People's Republic of Albania constituted in itself appropriate satisfaction for the injured State.[8] It was therefore perhaps not very advisable to include the concept of apologies in a draft intended as a contribution to the progressive development of international law. One possible solution might be to soften the term and refer instead to "an expression of regrets". In general, however, it did not seem necessary to provide for different degrees of satisfaction. He was also opposed to the idea of punitive damages.

27. Paragraph 2 of article 10 was the most original and boldest of all the proposed provisions. However, the Special Rapporteur's decision to include the concept of "wilful intent" in that paragraph carried weighty implications. It was clear from the second report (*ibid.*, footnote 399) that part 1 of the draft articles would have to be amended. It had, however, already been difficult to arrive at a consensus on part 1 and, if the idea of fault was to be introduced, it would be necessary to begin again on a different basis.

28. Paragraph 3 appeared to lay down a rule intended for an international court, and he thought that the provision should be included at the end of paragraph 1.

29. Finally, with regard to paragraph 4, he agreed with other members that the concept of "humiliating demands" was too subjective and should be eliminated.

30. Mr. PELLET, speaking for the first time in the Commission, thanked the members for their warm welcome and paid tribute to the memory of Paul Reuter, whom he had the great honour of succeeding.

31. Leaving aside for the moment the question of interest, dealt with in draft article 9, he said that he wished to comment on draft articles 8 and 10 and would make some general observations on the concept of reparation itself.

32. Without going into detail in the far-reaching theoretical debate on the nature of international responsibility, he could not help pointing out that the approach adopted by the Special Rapporteur, both in his preliminary report (A/CN.4/416 and Add.1) and in his second report (A/CN.4/425 and Add.1), seemed rather ambiguous. The entire logic of part 1 of the draft articles that had served as the foundation for the approach which the former Special Rapporteur, Mr. Ago, had taken and which he fully endorsed had been based on the idea that reparation was one of the consequences of responsibility, which was incurred by the sole fact that an internationally wrongful act existed. In other words, responsibility existed from the time a breach of international law could be attributed to a State and no circumstance precluding wrongfulness could be found. That was the first stage and it was also the subject-matter of part 1 of the draft.

33. In the second stage—the subject-matter of part 2 of the draft articles—it had to be asked what the consequences of such responsibility were. One was reparation, which, as the Special Rapporteur had lucidly explained in his preliminary report, must be distinguished from another consequence of responsibility, namely the cessation of the wrongful act, which, in his own view, must also be distinguished from guarantees of non-repetition. Guarantees of non-repetition should be the subject of a separate article, perhaps even a separate subdivision, as the Special Rapporteur had himself suggested in the tentative outline submitted in his preliminary report in 1988 (A/CN.4/416 and Add.1, para. 20). The purpose of such guarantees was not to make reparation, but to prevent other internationally wrongful acts from occurring or to prevent them from continuing. It would therefore be useful to deal with the question of guarantees of non-repetition separately and to determine whether they were in fact always a consequence of responsibility for an internationally wrongful act. The various types of guarantee should perhaps also be given more detailed treatment.

34. Once reparation had been rid of the "impurities" of cessation, guarantees of non-repetition and sanctions —to which he would come back later—it turned out to be nothing more than the "wiping out" of the harmful consequences of the internationally wrongful act, and that was obviously the purpose of all the forms of reparation listed, namely restitution in kind, compensa-

[8] *Corfu Channel, Merits*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at p. 36.

tion and satisfaction. However, the ambiguity to which he had referred was that, in some cases, the Special Rapporteur seemed to be treating reparation less as a consequence of responsibility than as its key element. It was obvious that, in the Special Rapporteur's view, reparation not only was designed to "wipe out" the consequences of the internationally wrongful act, but was also something of a sanction, in the "punitive" sense of the term. The Special Rapporteur also made a distinction between the different types of reparation, not only according to the form of reparation, but also according to its purpose, in other words according to the nature of the injury suffered. In his own opinion, compensation and satisfaction were actually two forms of reparation by equivalent, both being intended to wipe out the harmful consequences of the internationally wrongful act when restitution in kind was impossible or inadequate. Compensation corresponded to the pecuniary form of reparation by equivalent and satisfaction to the other forms of non-pecuniary reparation. If his analysis was correct, there would be several practical consequences.

35. First, the title of article 8 should not be "Reparation by equivalent", since article 10 also dealt with a form of reparation by equivalent, but, rather, "Compensation": that would be fully in keeping with the content of article 8, since it was the term used in the two alternatives of paragraph 1 and in paragraphs 2 and 3. Secondly, damages should be associated in every instance with compensation, in other words with article 8, and not with article 10 on satisfaction, since the main consideration would be the form of reparation.

36. He admitted that that approach, despite its undoubted simplicity, had one disadvantage. Although compensation might sometimes be determined "objectively", when it corresponded, for example, to the value of an item of property, it could also depend on much more "subjective" considerations when compensation was due for an injury to the honour of a State or to the feelings of an individual. If compensation was paid, however, that must mean that in both cases it was considered that the damage was "economically assessable": for Grotius, money was the measure of all things. In that connection, he did not think that the wording proposed in article 8, paragraph 2, should relate only to compensation for material damage and he could not quite see why moral damage suffered by nationals should be more—or indeed less—economically assessable than that suffered by the State itself.

37. In any event, even in the light of the Special Rapporteur's reasoning, it seemed clear from his second report that compensation was the form of reparation for material damage and satisfaction the form of reparation for moral injury. Article 8 and particularly article 10 might therefore be amended to include wording more along those lines.

38. Those articles also called for two other important comments. First, he did not believe it was possible to speak of "legal" injury. Any injury arising from an internationally wrongful act must, assuming that there was responsibility, have a "legal" element. However, as soon as reparation had been made, in whatever form, the injury had *ipso facto* been made good. Hence the "legal" injury which was ultimately a part of every international injury could not in any sense be separated from it and, in any case, there was no need to refer to it specifically in draft article 10, rather than in draft article 8 or draft article 7 (Restitution in kind).

39. Secondly, he agreed with what was apparently a majority of the members of the Commission that the idea of "punitive" damages was not very appropriate. Admittedly, any form of satisfaction and even, indeed, any form of reparation was "afflictive" in nature, but that was no reason to use wording with criminal-law connotations. Although Anglo-Saxon doctrine and a few arbitral awards referred to "punitive damages", French doctrine was much more circumspect in that regard for a variety of reasons, including the old saying that "the king [the State] can do no wrong". A State probably could be required to make good the harmful consequences of an internationally wrongful act, but that was an objective act which met a social need and was not based on any value judgment. For psychological, political and diplomatic reasons, moreover, he did not think that it was reasonable to slip such a radical change into traditional international-law concepts. He nevertheless explained that, unlike some other members of the Commission, he did not in principle object to the idea that, in some cases, a State might be subject to criminal sanctions. That had nothing to do with reparation, however. The idea of sanctions should probably be dealt with elsewhere in the draft articles, perhaps in the part relating to crimes, because such a consequence of the international responsibility of the State would obviously be of an exceptional nature and would occur only in certain cases that would have to be carefully defined.

40. That did not mean that he was indifferent to the reasoning of the Special Rapporteur, who had demonstrated, by giving many examples, that the damages paid as reparation for moral injury varied widely, ranging from one symbolic franc to very large sums. However, he did not think that it was necessary to resort to the concepts of fault or criminal sanctions to explain those variations, which rather depended, in his view, on the seriousness of the injury suffered: a mild infringement of a mild rule would obviously not cause such serious damage as a serious breach of a rule of essential importance. In such a case, there was certainly a difference of degree, but it was not due to the extent of the fault; it was due to the extent of the damage suffered by the injured State. Furthermore, if one accepted the otherwise attractive idea that there was a continuum, as it were, in the seriousness of the offence, ranging from a very minor breach to a crime, one of the key ideas in the Special Rapporteur's preliminary report which had apparently been endorsed by all members of the Commission would necessarily have to be abandoned, for there would no longer be any reason for separating the consideration of the consequences of an international delict from that of the consequences of an international crime.

41. Turning next to the measure of reparation by pecuniary compensation, he said that, of the two alternatives proposed for paragraph 1 of article 8, and contrary to the majority of members, he was firmly in

favour of alternative B, since the idea expressed in alternative A that such compensation could be calculated on the basis of what was necessary "to re-establish the situation that would exist if the wrongful act had not been committed" seemed to him to be incompatible with the distinction made between "restitution", which had the effect of re-establishing the pre-existing situation, and "pecuniary compensation", which became due precisely when the re-establishment of the pre-existing situation was impossible. That was a contradiction in terms.

42. On the other hand, he did not disagree with the idea reflected in paragraph 4, according to which the only thing that mattered was an uninterrupted causal link between the wrongful act and the loss. Any damage which had a direct or, better still, a "transitional" link with the internationally wrongful act should in principle be compensated for. As the Special Rapporteur demonstrated, that was in keeping with international practice, even though he (Mr. Pellet) agreed with other speakers that it would probably be advisable to introduce the concept of predictability at that point in addition to the concept of causality.

43. Moreover, certain examples more recent than those cited by the Special Rapporteur and of a somewhat different kind confirmed that *lucrum cessans* could also be compensated for if there was a causal link, as referred to in paragraphs 3 and 4 of article 8, with the wrongful act. In that connection, he regretted that the second report dealt mainly with the traditional problems involving offences against the property of private individuals. Care should be taken to avoid an unduly restrictive view of the concept of *lucrum cessans*. To take the case of the raids which South Africa had perpetrated against its neighbours in the past and which had been condemned by the Security Council and the General Assembly of the United Nations, South Africa had been legally bound to make reparation for the harmful consequences of those incursions and to pay compensation to the neighbouring countries, not only for loss of human life, but also for lost harvests and damage—even long-term damage—to their economies. That indeed was also a case of *lucrum cessans*. *Lucrum cessans* also seemed to be covered by the terms of paragraph 292 (13) and (14) of the judgment delivered by the ICJ on 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.[9]

44. In general, however, he agreed with the Special Rapporteur's analyses concerning the problem of causality and *lucrum cessans* and, subject to minor drafting changes, would support paragraphs 3 and 4 of article 8. The reference to equity which Mr. Bennouna (2172nd meeting) had proposed introducing was perhaps not altogether appropriate, as it was a concept that had proved somewhat ineffective in the case of the law of the sea.

45. He was nevertheless still puzzled about one point, which concerned damage to individuals. While he would not dwell on questions of terminology—although, instead of referring to "indirect" damage, it would perhaps have been better to speak of "mediate" damage as contrasted with immediate damage to the State itself—he regretted that no mention of the mechanism of diplomatic protection was made either in article 8—which was normal—or in the report—which was less so. Even if the question was apparently a procedural one and should be dealt with in the context of part 3 of the draft, that mechanism none the less had a direct effect on the problems under consideration. As everyone knew, to cite the famous dictum of the PCIJ in the case concerning the *Mavrommatis Palestine Concessions*:

> ... By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.[10]

That dictum was based on a legal fiction which already was questionable in itself, but was also unacceptable so far as one aspect at least of the questions under discussion was concerned. In practice, the amount of compensation due to the State for damage caused to individuals was always calculated on the basis of the injury suffered by such individuals. Paragraph 2 of article 8 as proposed by the Special Rapporteur made a very indirect reference to damage suffered by individuals. He wondered, however, whether it would not be essential to tackle the question head on and to take a clear position on the question of the compensation due in the event of "mediate" injury to individuals. Should such compensation be calculated on the basis of the damage suffered by the individual or on the basis of the damage suffered by the injured State itself? The two things were not always the same and a choice would have to be made. That could not be done if one ignored the question of diplomatic protection, which was, moreover, to a large extent symmetrical with the question of attribution dealt with in part 1 of the draft.

46. Furthermore, he had difficulty in understanding why, in the two alternatives for paragraph 1 of article 8, the Special Rapporteur had chosen what might be termed an "active" form of words: "The injured State is entitled to claim ..." and "has the right to claim ...". That appeared to encroach on the procedural issues which should be the subject of part 3. It would be preferable, in his view, to adopt a passive form of words along the following lines: "The State which has committed an internationally wrongful act shall be required to pay compensation ...". That turn of phrase had been used in draft article 10 and was in keeping with the position which the Special Rapporteur had himself taken at the previous session during the consideration of draft article 6 (Cessation of an internationally wrongful act of a continuing character) as submitted in his preliminary report.

47. Finally, he fully agreed with the idea expressed in paragraph 4 of draft article 10, which seemed to be a necessary guarantee—though perhaps an inadequate one—for weak States against the excessive demands of

[9] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits*, *I.C.J. Reports 1986*, p. 14, at p. 149.

[10] *Mavrommatis Palestine Concessions*, Judgment No. 2 of 30 August 1924, *P.C.I.J.*, *Series A*, *No. 2*, p. 12.

strong States. Perhaps the paragraph should be strengthened and separated from the rest of the article.

48. Mr. THIAM thanked the Special Rapporteur for his second report (A/CN.4/425 and Add.1), which dealt in masterly fashion with the facts, events, judicial decisions and disputes in legal literature regarding State responsibility.

49. Expressing his agreement with the broad lines of the report, he noted that the solutions which it proposed and which were distilled in draft articles 8, 9 and 10 were the expression of general principles of international law, as repeatedly formulated by international tribunals. The first of those principles was that any internationally wrongful act entailed an obligation to make reparation; the second, that the reparation must be designed to redress all the consequences of the wrongful act so as to re-establish the situation that would have existed if the wrongful act had not been committed; and the third, that, if it was not possible to re-establish that situation, recourse should be had to compensation or, more specifically, indemnification. He would not dwell on the subsidiary method of reparation known as indemnification, though it was the most common and was based on the principle of full or partial reparation of the injury according to whether the wrongful act was or was not the exclusive cause of the damage.

50. The Special Rapporteur had analysed the requirements for reparation, including the fact that there must be a causal link between the wrongful act and the damage, and had drawn attention in particular to the case in which the causal link formed part of a chain of events among which the wrongful act might or might not appear to be the sole cause of the harmful result. He had then considered the concept of reparation itself—in other words, the elements of which it was composed—and had pointed out that, as reparation was supposed to cover the full extent of the injury suffered, account must be taken not only of *damnum emergens*, but also of *lucrum cessans*. He had gone on to discuss the question of interest, including compound interest. In that connection, he (Mr. Thiam) had to confess to doubts about the need to award compound interest in all cases. The award of compound interest was based on the optimistic presumption that the beneficiary of the reparation would have administered the capital sum paid to him with due diligence. That did not go without saying. The society of States, like the society of men, had its prodigals. Such considerations would not detain him.

51. He wished, however, to dwell on the question of moral injury suffered directly by the State, to the exclusion of injury suffered by individuals, and on the specific method of reparation known as satisfaction. Satisfaction was undoubtedly one of the most original institutions in the law of international responsibility and, above all, one of the best suited to the nature of the subjects of law concerned, namely States. Throughout the ages, reparation for moral injury had given rise to much controversy, which had focused on criticism of those who had sought to alleviate their moral suffering in the quest for a sum of money. Eventually, there had been a move away from symbolic damages to the award of ever larger sums of money as compensation for moral suffering.

52. Reparation for moral injury suffered by the State posed even more complex problems than reparation for moral injury suffered by individuals. A feeling of affection was, of course, unknown to States; they were cold entities which were moved solely by the wish for power and whose action was motivated by the *raison d'Etat* alone. But there was one kind of feeling peculiar to the nature of the State to which the Special Rapporteur referred on several occasions, namely the feeling of the honour, dignity and prestige of the State.

53. Those three concepts were not, however, situated at the same level in the scale of values. Prestige was linked to the idea of greatness, which was less important than the concept of honour and, above all, the concept of dignity. Prestige was linked to the power of the State and, in bygone times, had been measured in terms of conquest. Of course, in the modern day and age, that was no longer so. A State's sphere of influence was no longer based on power, but on its attachment to such values as justice, peace and the principles of the Charter of the United Nations. The more a State upheld those values, the more influence it had throughout the world. Yet that did not mean that the concept of prestige in its old meaning had been completely eclipsed. It still retained its original meaning.

54. The position was different in the case of dignity and honour, however. Every State, small or large, rich or poor, needed dignity and honour. Those values were sacrosanct and formed part of the nature of the State, whatever trials and tribulations it might have to endure along the path of history. Consequently, the problem of reparation for moral injury suffered by the State as a result of an offence against its dignity or honour was extremely delicate. There had been a time, happily now gone by, when reparation for an offence against those values had been sought in war: that had been the time when the State had merged into the person of the sovereign and when the concepts in question had involved values of chivalry. In a sense, they still did, since every State regarded any infringement of those values as an offence. And that was where reparation for such an offence came into play. Despite an evolution in customs and a certain tendency to bargain which was a feature of the modern day and age, reparation for moral injury suffered by the State could not undergo the same evolution as reparation for moral injury suffered by individuals, which tended increasingly to be compensated for by the payment of ever more substantial damages. It was more complex. In that connection, he did not really think that the adage of Grotius cited by Mr. Pellet was valid in that area as well. There was no certainty that reparation for an injury to the honour or dignity of a State could be reduced to the mere payment of a sum of money. That was where satisfaction came in.

55. Internal law was well equipped when it came to compensating for moral injury, and particularly for moral injury resulting from an offence against the

honour of, and respect due to, individuals. Two actions were available in law for dealing with libel and slander: a civil action for reparation and a criminal action. The two could in fact go hand in hand at the procedural level, so that the perpetrator could have an obligation to make reparation and at the same time a criminal sanction imposed upon him. That was what normally occurred in the case of offences by the press. International law was far less well equipped to deal with such offences. It was impossible to transpose to States a criminal sanction applied to individuals. That was why the Special Rapporteur, who was well aware of the point, used the expression "punitive damages", which had been criticized by some in connection with satisfaction. Satisfaction was, however, the most suitable solution in that particular case. In view of its hybrid nature, it had the characteristics both of reparation and of punishment: it had the characteristics of reparation when it consisted in the award of a symbolic sum of money or of a limited amount; and it had the characteristics of a criminal or afflictive sanction, as it were, when it served, as an additional element, to compensate for material damage. However, when it involved substantial damages exceeding the capacities and means of States, it no longer served the purpose for which it was intended.

56. On the other hand, he did not think that satisfaction, as a criminal sanction, could go beyond, for instance, apologies or regrets. Apologies were not outmoded: even if they were not common in judicial or arbitral practice with regard to the peaceful settlement of disputes, they were in diplomatic practice. In recent times, Israel had presented its apologies—specifying that a form of reparation was involved—when it had seized Eichmann; and France had also presented its apologies in the "*Rainbow Warrior*" case (see (A/CN.4/425 and Add.1, para. 134). He agreed with the Special Rapporteur that, in so far as satisfaction served to remedy the deficiencies of reparation, it was a form of sanction which, though not a traditional criminal sanction, was none the less a form of penitence which the State imposed on itself or which was imposed on it by the courts. Satisfaction could not, however, be assimilated to "punitive damages".

57. Furthermore, satisfaction seemed to be the method of reparation that was indicated in the case of an international delict, but certainly not in the case of an international crime, which was of particular seriousness and called for a special sanction. Notwithstanding article 19 of part 1 of the draft articles, which dealt with international crimes committed by States, he did not think that an attempt should be made to attribute criminal responsibility to the State. In the case of international crimes of the kind listed in that article, it was no longer possible to speak of satisfaction. It was necessary to look beyond the responsibility of the State to the criminal responsibility of the individual. It was clear that criminal responsibility could attach only to an individual, and not to a State, and that, if an individual used the means given to him by the State because he was acting on its behalf as a representative or agent, it was the criminal responsibility of that individual that had to be established, not that of the State.

58. The concept of fault could not be dissociated from that of the crime of a State and of State responsibility. In referring to the matter, the Special Rapporteur took the view that it was covered only implicitly in part 1 of the draft. For his own part, he did not think that was correct. Fault was an element of an internationally wrongful act: it was impossible to distinguish the internationally wrongful act, on the one hand, and fault, on the other. Any fault necessarily involved a breach of an international obligation. It could be more or less serious but, in any event, had an influence on the mode of reparation.

59. With regard to the proposed draft articles, he said that he agreed with many of the objections formulated by some members of the Commission. He had been struck by a certain imbalance between the tenor of the report itself and that of the draft articles. That did not mean that he wished to introduce a great many concepts into the wording of the articles. When it came to codification, particularly in the case of State responsibility, the Commission should confine itself to laying down general principles in the form of maxims—of brief, synthetic formulas. The rest should be left to doctrine and jurisprudence. He therefore did not think that it was absolutely necessary to specify in draft article 8 that, for responsibility to be incurred, there had to be a causal link between the wrongful act and the damage: that was all too obvious. The same applied to the concept of predictability. It also applied to the concept of *lucrum cessans*, for it would suffice to lay down the principle of full reparation, which covered both *damnum emergens* and *lucrum cessans*. If necessary, each concept could be analysed in detail in the commentary, since that was what the commentary was for. He therefore preferred alternative A to alternative B for paragraph 1 of article 8 and agreed with Mr. Pellet that it would be preferable to invert the proposal by using a passive form of wording.

60. As for draft article 9, on interest, he was in favour of its deletion.

61. A provision on satisfaction was absolutely essential. He therefore approved of draft article 10, although he considered that any reference to the concept of "punitive damages" should be avoided. He agreed, however, that it should be made clear that satisfaction should not involve humiliating demands. Satisfaction would no longer act as a pacifying element in international conflicts if it was combined with excessive financial or moral conditions.

62. Mr. BEESLEY said that the Special Rapporteur had very aptly chosen the precedents cited in his extensive second report (A/CN.4/425 and Add.1) and had made a clear distinction between State practice prior to the First World War, between the two World Wars and since the Second World War. Although he had also referred to the very old case of the Boxer Rebellion, he had not done so as an example of what to follow; he had clearly dissociated himself from the circumstances giving rise to that case.

63. That clearly reflected the basic problem the Commission faced: it was difficult to conduct a survey of current State practice, especially if it was not systematically recorded in arbitral awards and since many cases were settled amicably. The Commission risked getting bogged down in past case-law, whereas its mandate was to codify rules for the future, not necessarily in an idealistic sense, but in keeping with actual developments in the modern-day world.

64. With regard to draft articles 8 to 10 submitted by the Special Rapporteur, he said that he agreed with their general thrust. In article 8, however, alternative A proposed for paragraph 1 was not very satisfactory, at least in English. There was an internal contradiction, since it stated that there might be "damage not covered by restitution in kind" and, then, that compensation could "re-establish the situation that would exist if the wrongful act had not been committed". Alternative B was much better, despite the phrase "the situation ... is not re-established by restitution in kind", which gave rise to misgivings for the same reasons. It was closer to common sense and reflected a practical approach that the other alternative lacked. Whether it was worded in a passive or active form would ultimately not make much difference. The Commission should be careful not to use pecuniary compensation as tantamount to a substitute for something that did not, perhaps, lend itself to purely pecuniary reparation.

65. Many comments had been made on the expression "any economically assessable damage" in paragraph 2 of article 8. However, as much as it could be criticized, there appeared to be no alternative for the time being. Furthermore, the expression "moral damage" was also rather vague and the way in which it was used in that provision could refer to just about anything. Yet, in that particular context, moral damage was no doubt to be understood as any damage that could not be covered by pecuniary compensation.

66. Paragraph 3 dealt with the loss of profits as a result of an internationally wrongful act. There seemed to be no point in including a separate provision for that specific case and it would be preferable to provide for that contingency in paragraph 4 in a passage reading: "... damage, including loss of profits and other benefits, deriving from an internationally wrongful act ...". The reference to "benefits" would further broaden the concept of loss of profits, for the profits derived from a given activity were not necessarily pecuniary.

67. Paragraph 4 raised the issue of causality. The Commission would no doubt have to give the matter further consideration, even if it meant redrafting the provision entirely. The meaning of the term "uninterrupted" must be spelled out, possibly in the commentary. There might, for example, be cases involving a temporary interruption in which the causal link would unquestionably remain unimpaired. At any rate, the approach based on the "causal link" was most certainly preferable to that based on the distinction between direct damage and indirect damage.

68. Paragraph 5 raised the issue of "negligence" and thus, indirectly, that of fault and responsibility. Those issues appeared to fall within the scope of tort, which was more closely related to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In any event, the need for precision was all the greater since the situations to be covered could vary enormously. For example, could a charge of negligence be brought against a State that had been raided, on the ground that its border guards had not prevented the raiders from crossing the border?

69. Draft article 9, on interest, did not give rise to any particular problem. The question of compound interest might, however, best be dealt with in the commentary. Yet the Special Rapporteur had been wise to draw the Commission's attention to those technical points, thereby forcing it to consider them.

70. Some members of the Commission had spoken against the concept of "punitive damages" referred to in paragraph 1 of draft article 10, on satisfaction and guarantees of non-repetition. Provision should none the less be made for that form of damages, even if they verged on the field of criminal law, for article 10 was intended to cover cases that could be extremely serious and morally indefensible. In a very recent case involving loss of life, the "*Rainbow Warrior*" (*ibid.*, para. 134), that type of reparation had been imposed and had seemed entirely appropriate.

71. Forms of satisfaction should perhaps not depend on the importance of the damage, as provided for in paragraph 2. However, the Special Rapporteur would no doubt have observations to make on that point, which had given rise to many comments. Furthermore, the "degree of wilful intent", mentioned in the same paragraph, referred once again to the concept of fault and State responsibility. Extreme caution must therefore be exercised.

72. As stated in paragraph 3, a declaration of the wrongfulness of the act by a competent international tribunal might constitute a form of satisfaction. Although there were admittedly few relevant cases, that point remained valid. Was it really necessary to make it a separate provision? Such specific cases could also very well be covered in the commentary.

73. No one was in favour of "humiliating demands on the State which has committed the wrongful act", as stated in paragraph 4. The latter referred to the concept of apologies already mentioned in paragraph 1. He illustrated that point by giving a number of examples showing that that form of satisfaction was not entirely outdated in the modern world and that it should not be ruled out completely. He referred to several recent cases, in Asia and in eastern Europe, in which apologies had been deemed entirely appropriate. He also referred to a number of cases in the Middle East, in which apologies had been demanded but not given, and which clearly showed that apologies retained their full significance in relations between States. For example, it could be said that, through its present attitude, South Africa was expressing qualified apologies, as if it were acknowledging its wrongs. Reference could also be made to the official apologies presented by a State for the destruction of an airliner over the Persian Gulf.

Lastly, he referred to a case which, although minor, provided a good example: during a visit by the head of Government of the USSR to Canada, a mentally disturbed bystander had rushed at the official guest and, in the shuffle, had torn his raincoat. The Canadian Government had deemed it appropriate to present apologies, which had been accepted. In addition to that form of satisfaction, it had, of course, provided restitution in kind, namely a new raincoat.

74. In conclusion, he advised the Commission against rashness in rejecting examples from the past on the pretext that it had to make provision for the future. Unlike other members, he did not think that there was any imbalance between the extensiveness and erudition of the Special Rapporteur's analyses and the draft articles he had submitted. On the contrary, the Special Rapporteur had managed to focus sharply on the issues raised by State responsibility and had drawn the Commission's attention to the crux of the matter.

75. Mr. ROUCOUNAS said that, in his view, reparation was the focus of the application of international responsibility in practical terms. It showed, much more so than the attribution of responsibility, how effective the system was and how States intended to wipe out the consequences of an internationally wrongful act. A major political factor had long confused the issue and, to some extent, kept reparation, together with international responsibility itself, within the scope of a conception of international law which was now outdated. The draft the Commission was working on concerned the present and the future and that was precisely how the Special Rapporteur and the Commission regarded it.

76. Despite the considerations put forward by the Special Rapporteur in paragraph 140 of his second report (A/CN.4/425 and Add.1), a distinction still had to be made between reparation and satisfaction, on the one hand, and measures of a punitive and pseudo-punitive nature, on the other. The latter had no place in the international legal mechanisms with which the Commission was dealing. For example, the *Tellini* case (*ibid.*, para. 124) could be understood only as an example of the arrogance that certain powerful countries had demonstrated at the expense of smaller ones.

77. The documentation assembled by the Special Rapporteur called for a comment. According to the arbitral practice surveyed, the range of applications of the law of reparation obviously tended, depending on the period, towards a particular aspect of international responsibility such as physical damage to the nationals of a State, investments, etc. In generalizing, as it must, with the aim of acquiring an overview of international practice, the Commission had to rely on the material submitted to it by the Special Rapporteur, who must therefore be careful not to give too much weight to the solutions adopted in a particular area, for others which might not have led to the development of an actual body of case-law also had to be taken into account by the Commission.

78. The draft articles submitted by the Special Rapporteur settled the question of damage in the sphere of State responsibility. The link between parts 1 and 2 of the draft, the first being concerned with the "origin of international responsibility" and the second with the "content, forms and degrees of international responsibility", was probably as strong as it looked, but the fact that a breach of an international rule automatically entailed State responsibility, coupled with the fact that several States could come forward and claim injury, meant that the Commission had to consider the respective positions of those States in relation to the mechanism of reparation. As Mr. Graefrath (2168th meeting) had shown, quite apart from a request for cessation and even in the event of restitution, proof of damage had to be provided in respect of each and every one of the injured States. A provision dealing specifically with that issue might help to avoid inconsistencies.

79. With regard to draft article 8, he preferred alternative A of paragraph 1. It would provide a sound basis for the work of the Drafting Committee. In paragraph 2, there seemed to be no need for the expression "any economically assessable damage", especially since that paragraph appropriately provided for moral damage.

80. Paragraph 3 was worded very rigidly and should be made more flexible, along the lines suggested by Mr. Mahiou (2171st meeting). The same applied to paragraph 4, which might contain wording striking a balance between the requirements of "normality" and "predictability", which the Special Rapporteur analysed in the report (A/CN.4/425 and Add.1, paras. 37 *et seq.*).

81. From a more general point of view, consideration had been given, in the course of the discussion on reparation, to the significance of equity. On that point, the Commission should go along with the Special Rapporteur, who considered that any rule of law expressed and embodied equity. However, it must also be noted that, outside the rules of law, equity was entirely a matter of chance. In a draft such as the one the Commission was working on, it would not be enough simply to refer the judge to the principle of equity. Those who would have to apply the future provisions should be given guidance and told how to bring the mechanisms of reparation into play. If the Commission merely referred to the principle of equity, it might as well dispense with the entire section of the draft concerned with reparation.

82. With regard to draft article 9, the date from which interest was to run should be set as the day the corresponding claim was filed with the competent body. Paragraph 2, on compound interest, went into details which were not appropriate to all possible situations.

83. Draft article 10 dealt with satisfaction and guarantees of non-repetition. As far as the latter were concerned, a more elaborate text would have to be considered. With reference to satisfaction in general, was it really appropriate to state in paragraph 1 that satisfaction was due "in the measure in which an internationally wrongful act has caused . . . injury not susceptible of . . . compensation"? It would appear that satisfaction could be demanded even if reparation by equivalent had been provided, in other words in addition to reparation. Of course, satisfaction presupposed

consent on the part of the injured State, at least when it took the form of apologies or punishment of the responsible individuals. Yet the draft must not suggest that such punishment was merely a matter of satisfaction and not a separate obligation incumbent on the State of which the perpetrator of the internationally wrongful act was a national.

84. Lastly, paragraph 4 of article 10, which was intended to prohibit claims including humiliating demands, was not absolutely necessary because it might cast doubt on the relevance of the principle of satisfaction, even at the present time.

The meeting rose at 1 p.m.

2174th MEETING

Thursday, 14 June 1990, at 10.05 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. Njenga, 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*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

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

1. Mr. PAWLAK said that the material presented in the Special Rapporteur's second report (A/CN.4/425 and Add.1) brought the Commission closer to completing the important task of preparing a draft legal instrument, probably a future convention, on what was one of the most difficult and important topics in international law.

2. As he had said in the course of the debate on draft articles 6 and 7 at the previous session, every State had a duty to respect the rights of other States and a corresponding right to demand that other States should respect its own rights. In that connection, the 1949 advisory opinion of the ICJ to the effect that the breach of an engagement involved an obligation to make reparation in an adequate form[5] was particularly noteworthy. That opinion derived from the 1927 judgment of the PCIJ in the *Chorzów Factory* case (Jurisdiction),[6] but the principle it enunciated went back a good deal further. A fifteenth-century Polish lawyer and author, Stanislaw of Skarbimierz, had already written that a sovereign who waged an unjust war was responsible not only for damage inflicted upon the adversary by his subjects, but also for injury suffered by his own people from the adversary; whoever had created the opportunity to inflict damage should be deemed to have caused the damage, and hence all wrongful situations should be corrected and the damage unjustly committed should be repaired. For many centuries, the fundamental purpose of the reparation process had thus been to achieve full compensation for the unlawful act, the best way of doing so being through *restitutio in integrum*. However, since that was impossible in many instances, pecuniary compensation, as the Special Rapporteur rightly pointed out (*ibid.*, para. 20), was called upon to fill the gap.

3. He agreed with Mr. Hayes (2172nd meeting) that the idea of achieving full compensation for internationally wrongful acts should be explicitly reflected in the body of draft article 8, which had real meaning only if it was realized that pecuniary compensation was a supplementary form of reparation. On that understanding, he could support alternative A of paragraph 1, which indicated that pecuniary compensation was to be paid for "any damage not covered by restitution in kind". That type of compensation could be used where it was impossible to re-establish the situation which had existed before the commission of the internationally wrongful act, for example when the objects of restitution had been destroyed or when people had been killed or injured. It was also important to add that pecuniary compensation, wholly in keeping with the principle laid down in the *Chorzów Factory* case (Merits),[7] allowed

[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.

[5] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, p. 174, at p. 184.

[6] See 2168th meeting, footnote 5.

[7] *Ibid.*, footnote 6.