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Summary record of the 2175th meeting

Topic:
State responsibility

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tion for State responsibility, the fact and extent of fault might affect the quantification of damages and also satisfaction. As the Special Rapporteur had pointed out, fault had a role to play in the case of countermeasures, reprisals and sanctions adopted *vis-à-vis* the author State. He looked forward to the development of those particular issues in the Special Rapporteur's next report.

The meeting rose at 1.10 p.m.

2175th MEETING

Friday, 15 June 1990, at 11.10 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. 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. Sreenivasa RAO said that he had the impression from the second report (A/CN.4/425 and Add.1) that it placed more emphasis than necessary on the materials and awards in cases involving private individuals or agents of the State acting in their private capacity in order to bear out the Special Rapporteur's thesis concerning remedies for breaches of international obligations. In the present state of international relations, it was open to question whether the age-old theory of a State suffering injury through its nationals or agents while they were in a foreign State was still as relevant as it had been in the nineteenth century. Even in that century, claims of that kind by some States had been regarded as unfriendly or unacceptable. Several recent developments contradicted that theory.

2. First of all, cases of nationalization by States of foreign corporations or other agencies had given rise to many controversies, since large sectors of the population of the States concerned aspired to economic independence following their liberation from the yoke of colonialism. There was no need to go into such matters in detail to show that past cases of diplomatic espousal of claims concerning nationalization and the resulting awards could no longer serve as valid precedents.

3. Secondly, there was the attitude of States—certainly of Western States—that they had nothing to do with their multinational corporations, for whose activities they would assume no responsibility, since such corporations were said to have independent legal personality. That was the doctrine that governed the questions of the immunity, civil liability and control of the assets and operations of corporations, especially where transnational activities were involved.

4. The movement of peoples across international boundaries had also assumed phenomenal proportions. States were no longer in a position to control and regulate such movements. Moreover, migrants had become more aware of their rights and duties and the remedies available to them when they were abroad. They did, of course, seek help when necessary from the embassy of their country of origin, but such help was usually confined to giving them advice or suggesting local lawyers who could assist them in obtaining redress where appropriate. At present, States had neither the time nor the resources to espouse private claims by their nationals.

5. As Mr. Graefrath (2168th meeting) had pointed out, a clear statement was therefore needed that the injured State was entitled to claim compensation not covered by restitution only for damage it had suffered itself, either directly or through its nationals. That being the case, he was not sure whether it was necessary to go into so much detail in the articles dealing with compensation, interest rates and the rules on satisfaction. In that regard, he supported the suggestion that rates of interest should be treated as part of compensation and that the question of compound interest

[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.

should be left aside. He also shared the concern of the members of the Commission who had said that flexible rates of interest should be adopted so as to take account of the needs of developing countries.

6. As a matter of principle, he would prefer that all questions of reparation, including restitution, pecuniary compensation and satisfaction, be subject to amicable settlement through bilateral negotiations among the States concerned. The draft articles should be used only to guide such negotiations and to solve the attendant problems. They should thus be as flexible as possible, as in the case of the draft articles on the law of the non-navigational uses of international watercourses. After all, there were no uniform standards for fixing the quantum of damages, to say nothing of the difficulty of interpreting the expression "economically assessable damage" (art. 8, para. 2). Too rigid a formulation would endanger the entire draft by making it less acceptable to States.

7. As Mr. Pellet (2173rd meeting) and other members had noted, the Commission should, with the help of the Special Rapporteur, take as its main theme the question of the breach of an obligation giving rise to responsibility and deal with the various forms of reparation only as a component of that theme, not as the primary objective of its work. Furthermore, the concept of State responsibility should, as Mr. Graefrath and Mr. McCaffrey (2174th meeting) had pointed out, be extended to other areas, such as the environment, marine pollution, the Antarctic and the ozone layer, in which there could be more than one injured State and more than one author State. If those new areas were opened up, it would become pertinent to question the validity of the well-known principle laid down in the *Chorzów Factory* case (Merits)[5] that reparation must "wipe out" the legal and material consequences of the wrongful act.

8. The Special Rapporteur's approach should also be less oriented towards punishment. Concepts such as punitive damages and fault were outside the scope of the doctrine of State responsibility. Moreover, the introduction of such ideas might make the draft less acceptable to States.

9. Turning to the draft articles submitted by the Special Rapporteur, he said that he would not comment on the drafting points raised by other members in connection with articles 8 and 9. In draft article 10, the important question of satisfaction was reduced to a few unacceptable details. The matter of apologies and expressions of regret should be left to the discretion of the States concerned and should not be dealt with in the draft articles as a rigid rule.

10. The Special Rapporteur had tried to extend the scope of damages which could be claimed on account of personal or psychological injury by using the uninterrupted causal chain as the test. Several members had objected, and he agreed with their arguments. Mr. McCaffrey, for example, had rightly proposed that, as a matter of policy, there should be a limit to the amount of reparation which could be claimed.

11. Mr. ARANGIO-RUIZ (Special Rapporteur), summing up the discussion, said that he had learned a great deal from the comments of members of the Commission on his second report (A/CN.4/425 and Add.1). He would do his best to provide the explanations they had requested.

12. To begin with, many members had regretted the fact that some quotations appeared in the English mimeographed version of the report in Italian, French or German. In future, he would see to it that passages quoted in languages other than that of his reports were always translated.[6]

13. As to terminology, he had noted the comments made by Mr. Calero Rodrigues (2169th meeting) concerning the methodological distinction made in the report between the "substantive" consequences of an internationally wrongful act—including cessation, restitution and the various forms of reparation—and its "instrumental" consequences, namely the measures, countermeasures, reprisals and sanctions which States might use in order to obtain cessation, restitution, etc. He agreed with Mr. Calero Rodrigues that such consequences were always legal, since they derived from the application of a rule of law, but he could not understand the distinction Mr. Calero Rodrigues had drawn between substantive, i.e. material, consequences and legal consequences. In his own view, the distinction related not so much to the legal consequences of the internationally wrongful act as to the effects of the wrongful act, which were either material—or, to use Mr. Calero Rodrigues's term, substantive—or moral/legal. He could therefore not agree with Mr. Calero Rodrigues that cessation was a legal consequence of a wrongful act. The obligation of cessation was a legal consequence, while cessation itself was a type of conduct: an act or an omission. That was also true of restitution. There could be cases of legal restitution, for example where restitution involved the amendment of a constitutional or legislative provision or the annulment of a judgment, but usually it involved restoring something to its original condition. Although governed by a legal rule, that was also a material act. He hoped to discuss that question of terminology with Mr. Calero Rodrigues; it was an important issue because it could mask conceptual differences. Lastly, although he endorsed the suggestion by Mr. Calero Rodrigues that the word "damage" should be used only for material damage, he was not so sure that the word "injury" should be used only for legal damage; in the definition of the "injured State",[7] for example, the word "injured" also referred to material injury.

14. Ultimately, of course, it was for the Commission to decide such matters of terminology and he would naturally comply with any decision it might take.

15. During the discussion, there had been many comments on points to be dealt with later, such as crimes and countermeasures, for which texts had already been drafted. For example, Mr. Ogiso (2171st meeting) had

[5] See 2168th meeting, footnote 6.

[6] The passages in question are translated in the final printed version of the report appearing in *Yearbook . . . 1989*, vol. II (Part One).

[7] See article 5 of part 2 of the draft as provisionally adopted by the Commission (see footnote 3 above).

recalled the ideas he had put forward in 1985 with regard to the various methods of dispute settlement between the "presumed" author State and the "presumed" injured State—rightly regarding the adjective "presumed" as being necessary as long as the case had not been settled either by agreement or through a third-party settlement procedure—and was apparently afraid that the texts proposed would not cover *ex gratia* or agreed settlements between the parties, noting that reference should be made to them in one of the draft articles. He wished to make it clear that, in all the draft articles he had submitted, it was assumed that requests for reparation, or for negotiations or third-party settlement where an agreement to that effect existed, and requests for other forms of negotiated settlement had to precede countermeasures in all but exceptional cases, for instance in emergencies. In that connection, Mr. Ogiso had proposed that paragraph 2 of draft article 8 should provide that, if no agreement was reached between the parties on the assessment of the damage, the question should immediately be referred to a third party for settlement. That question related to the settlement of disputes, which would be dealt with in his next report.

16. He had not tackled the question of crimes because he had kept to the tentative outline submitted in his preliminary report in 1988 (A/CN.4/416 and Add.1, para. 20), not because he believed there was no clear dividing line between the most serious delicts and the least serious crimes. Chapter III of his second report (A/CN.4/425 and Add.1), on satisfaction, was closer in some respects to the consequences of crimes than to the question of pecuniary compensation.

17. Mr. Pellet (2173rd meeting) had made some comments on the relationship between reparation and satisfaction, the idea of reparation in general and the different forms and purposes of reparation, depending on the nature of the injury. Reparation and satisfaction would both be compensatory and would come into play whenever *restitutio in integrum* was not enough to wipe out all the consequences of the wrongful act. Apart from the fact that the distinction which Mr. Pellet was driving out the door was coming back in through the window—represented in that case by the purpose, which, in his own view, differed depending on whether the injury was a material one or a "moral" or "political" one—the proposed simplification was unacceptable for a number of reasons. First, it had no apparent usefulness either *de lege lata* or *de lege ferenda* and it was not in keeping with actual practice, which drew a distinction between satisfaction and guarantees of non-repetition, and pecuniary compensation. Secondly, it did not square with the different kinds of injury to which the two remedies applied. Thirdly, it was incompatible with the nature—if not punitive or afflictive, since many members of the Commission did not want those two words to be used, then at least of a sanction—that characterized satisfaction much more than pecuniary compensation. There was a very clear-cut difference between satisfaction, on the one hand, and restitution and compensation, on the other. Fourthly, it was contradicted by much of the doctrine. Fifthly, it was ruled out by the obvious fact that wrongful acts could not be placed in two separate, hermetically sealed compartments. In that connection, he pointed out that he was bound by article 19 (International crimes and international delicts) of part 1 of the draft, which had been wanted by the General Assembly, largely owing to the combined efforts of the developing countries and the countries of what had then been the socialist bloc, and had also been wanted by Mr. Ago, the Special Rapporteur at the time, and hence by the Commission itself. Article 19 existed and had to be taken into account. The proposed simplification also ignored the fact that the most serious delicts calling for such forms of satisfaction included delicts in which there was a significant element of wilful intent or negligence, and both were even more typical of crimes.

18. Mr. Pellet also seemed to believe that the position taken in the second report differed both from that adopted in the preliminary report, as far as the difference between delicts and crimes was concerned, and from the position taken by Mr. Ago. On the first point, he admitted that he had made such a distinction, but it was purely methodological and certainly did not mean that the consequences of delicts and of crimes had nothing in common. On the second point, although he did not regard himself as being necessarily bound by Mr. Ago's views in the matter, Mr. Ago's position was actually similar to his own. In the course on "Le délit international" he had given at The Hague Academy of International Law in 1939,[8] Mr. Ago had expressed the opinion that the various forms of reparation presented both elements of "compensation" and elements of "sanction".

19. In another area, he had noted Mr. Bennouna's criticism (2172nd meeting) of a passage in his second report on the specific nature of the topic from the point of view of the progressive development and codification of international law. In his view, considerable differences existed between the secondary rules which the Commission was working on and primary rules. In the case of primary rules, for example the law of the sea, outer-space law, trade law and the law of international economic relations, conflicts of interest between groups of States were clear, obvious and well-defined. That was not the case in the area of secondary rules: any country might one day be an author State or an injured State. Clearly, it was important to bear in mind the particularities of certain States, especially the developing countries, for example in cases where they were confronted by excessive reparation claims. That must, however, be taken into account primarily, though not exclusively, in respect of primary rules; that was in the interests of the developing countries themselves. He had consistently spoken out in the competent bodies in favour of a shift from soft law to hard law in the area of international economic relations in order to promote the establishment of a new international economic order. The developed countries had so far done very little for the developing world. Yet, however desirable it might be for the Commission to incorporate in its draft

[8] R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Recueil Sirey), vol. 68, p. 419.

articles elements designed to allow for differences in the level of development of countries, it must also take care not to go too far because that might hinder the development of primary rules or make the developed countries more reluctant to accept a transition from soft law to hard law in the area of development.

20. To conclude his introductory comments, he referred to a number of questions that had been omitted in the second report, in addition to those that he intended to consider at a later stage of his work. In particular, he had been criticized for not having dealt with the law of the environment, for having concentrated too heavily on damage caused to the nationals of States and not enough on direct damage caused to States themselves, and for not having addressed the question of treaties. He pointed out, first of all, that he had referred in the report to the *Cosmos 954* case (A/CN.4/425 and Add.1, para. 40). Secondly, the question of direct damage to States had been considered primarily in chapter III, on satisfaction, which contained many examples of violations of diplomatic premises or immunity, which were, in a sense, direct attacks against States. Lastly, in what had been called the second "*Rainbow Warrior*" case,[9] decided on 30 April 1990, the two parties concerned and the arbitral tribunal had presumably taken his reports into account. In that case, the question had been not only whether material damage had been caused to persons or property, but also whether the terms of an agreement reached earlier had been respected. He had not neglected treaties, but, in his view, there was no difference in international law between contractual and non-contractual responsibility.

21. Turning to the draft articles themselves, he noted, first, with regard to the title of draft article 8 (Reparation by equivalent), that Mr. Koroma (2174th meeting) and Mr. Al-Khasawneh (2173rd meeting) had questioned whether reparation by equivalent could not be considered as being more or less synonymous with pecuniary compensation. Referring to the *British Claims in the Spanish Zone of Morocco* case (see (A/CN.4/425 and Add.1, footnote 234), Mr. Al-Khasawneh had pointed out that the Spanish Government had offered the British Government other premises as reparation for the damage caused to the latter's consular premises. That could be considered as a sort of restitution in kind that served as compensation. It was also his impression that, under Islamic law, there were three forms of *restitutio in integrum*: first, restitution in kind; secondly, pecuniary compensation; and, thirdly, the provision of an equivalent object that might satisfy the injured State. Thus one might just as easily accept a rather broad concept of restitution *in integrum* as the idea that pecuniary compensation meant more or less reparation by equivalent. In any event, the expression "reparation by equivalent" was perhaps ambiguous and should be eliminated from article 8.

22. He had considered whether there were, in fact, any rules of international law in the area that might be codified and to what extent it would be desirable to go into that subject in detail. Mr. Graefrath (2168th meeting) had said that he (the Special Rapporteur) had been too optimistic in thinking that such rules existed. In addition to the views expressed by Mr. Al-Khasawneh, he would refer members to the relevant part of the second report (A/CN.4/425 and Add.1, paras. 26-33), which should dispel their doubts on that question. As to the suggestion by some members, including Mr. Graefrath and Mr. Thiam (2173rd meeting), that the Commission should restrict itself to "maxims" in the area, he regarded that as an indirect reference to draft article 6 as submitted by his predecessor, Mr. Riphagen, in 1984 and 1985,[10] in which Mr. Riphagen had attempted to condense into 8 or 10 lines the entire contents of the new draft articles 6 to 10 which he (the Special Rapporteur) had himself submitted to the Commission in his preliminary and second reports. Those draft articles were not without shortcomings, but one thing was certain: the Commission had adopted 35 articles for part 1 of the draft in order to define a wrongful act and to deal with its characteristics and the circumstances precluding wrongfulness. It would therefore not be reasonable to condense into a single article the entire question of the substantive consequences of wrongful acts. Moreover, owing to its excessively compact form, article 6 as proposed by Mr. Riphagen had posed a number of problems for the Drafting Committee.

23. With regard to the expression "injured State" in paragraph 1 of draft article 8, a number of members had said that, whereas the definition of that expression in article 5 of part 2 as provisionally adopted on first reading[11] extended the characterization of "injured State" well beyond the State directly affected (an extreme example being the injury *erga omnes* sustained by States bound by multilateral rules relating to the protection of human rights), the wording proposed in paragraph 1 of draft article 8 would not solve the problem and no State could be identified as having a right to compensation. He had the impression that a misunderstanding concerning the term "damage" had arisen because he had not included comments for each draft article. Admittedly, in the event of a violation of a multilateral rule protecting human rights, no State sustained damage in the sense in which that term was used in paragraph 1 of article 8. Thus no State had a right to pecuniary compensation. It would, in fact, be odd for State A to claim such compensation from State B because of human rights violations committed against nationals of State B by the latter. In his view, however, that question was dealt with in draft article 10. The provisions of that article, particularly paragraph 1, provided a remedy for any State directly concerned by a legal situation arising, for example, out of the violation of a multilateral rule relating to human rights. The damage sustained in such a case by the State was, in fact, the type of moral or legal injury referred to in paragraph 1 of article 10. He had provided for various forms and different degrees of satisfaction in article 10 in order to take account of a situation of that kind.

[9] See 2168th meeting, footnote 4.

[10] See *Yearbook ... 1985*, vol. II (Part Two), p. 20, footnote 66.

[11] See footnote 3 above.

24. Mr. Ogiso seemed to think that a problem of a similar nature arose with regard to the declaratory judgment of an international tribunal under paragraph 3 of draft article 10, and had referred in that context to the judgments of the ICJ in the *South West Africa*[12] and *Barcelona Traction*[13] cases. He failed to see how paragraph 3 of article 10, or, for that matter, article 10 as a whole, could cause problems in connection with article 5. Any injured State as defined in article 5 had a right to satisfaction in one of the forms provided for.

25. The suggestion that article 10 should state more clearly that the forms of satisfaction it referred to did not constitute an exhaustive list was, however, well taken.

26. As to the question of the link between paragraph 1 of draft article 8 and paragraph 4 of draft article 7 (Restitution in kind) as submitted in the preliminary report (A/CN.4/416 and Add.1), to which a number of members had referred, he acknowledged that, in the preliminary report, he had been uncertain whether to take *restitutio in integrum* in the broad sense or in the narrower sense of the expression and had wondered whether, when taken to mean restitution in kind, it would really make it possible to re-establish the situation that would exist if the wrongful act had not been committed. It was very difficult to achieve such a result through restitution alone and it was almost always necessary to add pecuniary compensation. For example, in the case of the theft of an object, *restitutio in integrum* was not possible for deprivation of enjoyment or loss of profits suffered between the time the object had been stolen and the time it was returned.

27. Members of the Commission seemed to have been generally in agreement on the principle that reparation should be integral, even though some reservations had been expressed on that point. He had proposed two alternatives for paragraph 1 of article 8 because he had been unable to decide in favour of one or the other and had preferred to leave it to the Drafting Committee to choose one of the two texts, which he regarded as equivalent.

28. Mr. Ogiso had voiced reservations with regard to the expression "the situation that would exist" in paragraph 1 of article 8 and had questioned whether the expression "the situation which would... have existed" used in the *Chorzów Factory* case (Merits) (see A/CN.4/425 and Add.1, para. 21) might not be preferable. Mr. Ogiso had given the following example: State A mistakenly bombed a dam located in State B and an agreement was reached between the two States. Before completion of the reconstruction work, torrential rains caused flooding that ravaged the shore of State B. The question was whether State A must repair the damage caused by that flooding. In his own view, everything depended on the agreement reached. State B had to draw on the best possible legal and technical advice in order to determine with care the specifics of the agreement.

29. Since the criterion of "economically assessable damage" in paragraph 2 of article 8 had given rise to many reservations, he pointed out that that paragraph should not be interpreted as meaning that all economically assessable damage was automatically subject to compensation simply by virtue of the fact that it existed. For the purpose of compensation, it must above all be established that the damage resulted from the internationally wrongful act—i.e. that there was an uninterrupted causal link (para. 4)—and that it was not due, wholly or in part, to the negligence of the injured State or to other circumstances unrelated to the said act. Needless to say, such a criterion in no way affected the assessment made by the parties or the arbitrator. It had its place, perhaps in another formulation, in an article or a commentary, for the very purpose of avoiding any arbitrary assessment.

30. The expression "moral damage" in paragraph 2 meant the moral damage sustained by the injured State's nationals privately and not as representatives or agents of that State. The quantification of such damage was admittedly difficult, but not impossible, assuming the help of experts, such as psychologists, despite the doubts expressed by Mr. Graefrath. In any event, the principle of compensation for moral damage should be expressly stated in international law in one form or another precisely because it did not exist or was vague in a number of legal systems.

31. The concept of "equity" had been mentioned, but it might be dangerous to refer expressly to it, since it was part and parcel of law and of any legal decision.

32. With regard to paragraph 3 of article 8 and the concept of *lucrum cessans*, which encompassed the problem of nationalization, he pointed out, to dispel any misunderstanding, that the topic under consideration related only to the consequences of an internationally wrongful act and that the case of legal nationalization was therefore excluded. Admittedly, *lucrum cessans* raised a difficult problem. Replying to Mr. Bennouna and Mr. Mahiou (2171st meeting), he said that the arbitrator was expected to take account in such cases of the different levels of economic development and economic means of States and to proceed on the basis of equity.

33. As for the criterion of an "uninterrupted causal link" in paragraph 4, and to return to the example Mr. Ogiso had given (see para. 28 above), he said that no such link existed between the events that had occurred before the flooding or the beginning of repair work—or, at any rate, before the conclusion of the agreement—and the subsequent events. Everything depended on the terms of the agreement. In reply to Mr. Koroma, he said that he did not take an uninterrupted causal link to mean an *ad infinitum* link, but one which existed and continued to exist independently of the fact that other events had been introduced into the chain. In any event, he noted that some members had expressed their agreement with that criterion.

34. Concerning the criteria of normality and predictability, he said that, if the Commission so decided, the Drafting Committee might retain them.

35. Replying to Mr. Al-Khasawneh, he said that the criterion of the excessive nature of the burden imposed

[12] See 2171st meeting, footnote 6.

[13] *Ibid.*, footnote 7.

on the author State was likely to temper quantitatively and qualitatively the obligation of *restitutio in integrum*, but it could not be easily applied to compensation. Retaining the criterion in the latter case would certainly be tantamount to giving a State, even a prosperous one, complete latitude in claiming that the compensation to which it was bound was excessively heavy. There again, equity must enter into play.

36. With regard to draft article 9, on interest, he noted that most members of the Commission who had spoken on the subject regarded it as essential. He did not himself have strong feelings on the question but, if article 9 were deleted, it would be necessary to incorporate a provision on interest in article 8 to avoid creating the impression that the award of interest was excluded.

37. Concerning satisfaction, which was dealt with in draft article 10, he was quite prepared to delete the reference to "punitive" damages (para. 1). Clearly, he had not intended to provide for States the type of physical punishment that might be imposed on individuals, but it did sometimes happen that arbitral tribunals awarded punitive damages as satisfaction.

38. The fact of the matter was that satisfaction existed and had a role to play. That role had been contested by Mr. Graefrath (2168th meeting), who had argued that satisfaction was primarily a diplomatic practice and rhetorical and that it was therefore open to question whether it reflected a rule of law or simply diplomatic practice. He himself could not, for a number of reasons, accept the idea that diplomatic practice was not an element from which the existence of rules of international law could be deduced. Where else did general international law come from if not from diplomatic practice? The number of disputes settled by judicial or arbitral means was negligible compared to the number of conflicts settled by diplomatic means. After all, United Nations practice was itself diplomatic, the Organization being a system of multilateral diplomacy. Diplomatic practice was, in fact, much more abundant than that referred to in the second report.

39. In paragraph 1 of article 10, he suggested that the words "moral or legal injury" be retained for the time being for lack of a better solution. He was convinced that the very purpose of satisfaction was to repair that type of injury. All internationally wrongful acts entailed legal injury. Paragraph 1 aimed to take account of the fact that cases occurred in which compensation covered satisfaction. That had been so in the first "*Rainbow Warrior*" case (see A/CN.4/425 and Add.1, para. 134), in which the Secretary-General of the United Nations had set an amount for compensation which, in the opinion of most commentators, far exceeded the damage sustained.

40. Lastly, the fault, wilful intent or negligence of the State committing the wrongful act was an essential point, as a number of members had stressed. The Commission must examine the question of fault independently of part 1 of the draft articles. The term lent itself to a number of interpretations in the case of "international delicts" and even more so in that of "international crimes".

41. He thanked members of the Commission for their observations and apologized for perhaps not having replied to all the questions raised.

42. The CHAIRMAN thanked the Special Rapporteur for his clear and detailed summing-up. He asked the Commission whether it wished to refer draft articles 8 to 10 to the Drafting Committee, it being understood that the Committee would take fully into account the comments made and opinions expressed during the discussion.

43. Mr. McCAFFREY said that, while he would not oppose referral of the draft articles to the Drafting Committee, like some other members of the Commission he had certain reservations about the approach taken in the articles. He regretted that the Commission did not have time to discuss that approach in the light of the Special Rapporteur's summing-up.

44. Mr. DÍAZ GONZÁLEZ said that he agreed with Mr. McCaffrey. There were substantial differences of opinion among the members of the Commission. In his view, it would be premature to refer the articles to the Drafting Committee, but he would not oppose such referral if that were the decision of the majority of the Commission, in accordance with its usual practice.

45. Following a procedural discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), Mr. MAHIOU (Chairman of the Drafting Committee), Mr. KOROMA and Mr. BEESLEY took part, Mr. CALERO RODRIGUES, speaking on a point of order, requested that the discussion be postponed.

46. The CHAIRMAN, noting that the Commission had not completed its discussion of agenda item 3, suggested that it resume its consideration of the topic when the Special Rapporteur's presence made it possible to do so.

It was so agreed.

The meeting rose at 1.25 p.m.

2176th MEETING

Tuesday, 19 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. 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. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.
