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Summary record of the 2288th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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Commission should not discuss or act upon the articles at the present stage. Before taking a decision, it should wait until it had before it all of the chapter of part 2 to be devoted to the legal consequences of an international delict, together with the commentaries. Members were free, however, to speak on the general direction of the work.

48. Mr. EIRIKSSON said he hoped the Chairman of the Drafting Committee would make it clear that the draft articles were not being presented to the Commission for adoption, and that they did not form part of the Commission's report.

49. Mr. SHI said it was deplorable that the Commission was unable to adopt at its current session any of the draft articles completed by the Drafting Committee.

50. Mr. PELLET said that he endorsed that view. The Commission should review its methods of work, in order to move ahead with the draft articles. Another difficulty was that much of the draft report was not yet available.

51. Mr. KOROMA said he, too, was of the view that the Commission ought to be able to submit to the General Assembly the draft articles adopted by the Drafting Committee.

52. After an exchange of views in which Mr. ROSENSTOCK, Mr. CALERO RODRIGUES, Mr. VERESHCHETIN and Mr. PAMBOU-TCHIVOUNDA took part, the CHAIRMAN suggested that after the Chairman of the Drafting Committee had introduced the Committee's report, the Commission should consider the report by the Planning Group (A/CN.4/L.473).

It was so agreed.

The meeting rose at 12.20 p.m.

2288th MEETING

Monday, 20 July 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/440 and Add.1,[1] A/CN.4/444 and Add.1-3,[2] A/CN.4/L.469, sect. F, A/CN.4/L.472, A/CN.4/L.478 and Corr.1 and Add. 1-3, ILC(XLIV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN recalled that, at the previous meeting, the Commission had decided that the articles adopted by the Drafting Committee at the current session on the subject of State responsibility would be introduced by the Chairman of that Committee but would not be discussed or acted upon in plenary at the present stage. Before taking a decision, the Commission would wait until it had before it the whole of the chapter of part 2 on the legal consequences of an international delict as well as the corresponding commentaries. Naturally, members wishing to speak on the general direction of the work could take the floor. He invited the Chairman of the Drafting Committee to report on the Committee's work.

2. Mr. YANKOV (Chairman of the Drafting Committee) said that the Drafting Committee had held 27 meetings, from 5 May to 15 July 1992. It had had before it draft articles referred to it by the Commission on: (*a*) State responsibility (draft articles 6 to 10 *bis*) and (*b*) international liability for injurious consequences arising out of acts not prohibited by international law (draft articles 1 to 10).

3. Following the recommendation of the Commission, the Drafting Committee had given priority to the consideration and adoption of draft articles on State responsibility, bearing in mind the limited time available and the fact that the Committee had not had an opportunity to deal with draft articles on that topic since the Commission's thirty-seventh session, in 1986. Furthermore, it had felt that following the report of the Working Group on international liability, the Commission could put forward recommendations which might affect the scope and conceptual approach to the topic, leading to certain changes regarding the priorities to be accorded to the draft articles already referred to the Drafting Committee. Therefore, the Committee had held only two meetings on international liability and its work had been devoted almost entirely to the articles on State responsibility, which took up 25 meetings altogether.

4. In accordance with the decision taken by the Commission at its previous meeting, he would introduce the report of the Drafting Committee as a whole, covering all the draft articles which it had adopted and which appeared in document A/CN.4/L.472, on the understanding that the articles worked on during the present session would not be discussed or acted upon for the time being. Furthermore, he proposed that those draft articles should be reproduced as an annex to the Commission's report in

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* Resumed from the 2283rd meeting.

[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1992*, vol. II (Part One).

order to enable the Sixth Committee to take cognizance of them.

5. The general structure of the draft articles which had been adopted by the Commission in 1975 was in three parts: part 1, on the origin of international responsibility; part 2, on the content, forms and degrees of international responsibility; and a possible part 3, which the Commission might decide to include and which concerned the question of settlement of disputes and the implementation (*mise en œuvre*) of international responsibility.[3] At its thirty-second session, in 1980, the Commission had provisionally adopted on first reading part 1 of the draft, consisting of 35 articles.[4] At the conclusion of its thirty-seventh session, in 1985, it had provisionally adopted articles 1 to 5 of part 2.[5] At the present session, the Drafting Committee had dealt with the subsequent articles of part 2 and had adopted articles 6 to 10 *bis* as well as a new paragraph 2 for article 1, the titles and texts of which read:

Article 1

1. ...

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 6. Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 6 bis. *Reparation*

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, as provided in articles 7, 8, 10 and 10 *bis*, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(*a*) the injured State; or

(*b*) a national of that State on whose behalf the claim is brought which contributed to the damage.

3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 7. Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(*a*) is not materially impossible;

(*b*) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(*c*) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(*d*) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 8. Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 10. Satisfaction*

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(*a*) an apology;

(*b*) nominal damages;

(*c*) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(*d*) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 10 bis.* *Assurances and guarantees of non-repetition*

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

* The substance of article 9 (Interest) as proposed by the Special Rapporteur was incorporated in paragraph 2 of article 8. Hence the gap in the sequence of articles.

He wished to thank the Special Rapporteur, Mr. Arangio-Ruiz, for his scholarly cooperation with the Drafting Committee, as well as all the members of the Committee for their contribution to the intense and sometimes heated debate on very complex issues conducted in a spirit of understanding and mutual respect. He was also grateful to Miss Dauchy, Ms. Arsanjani and other members of the secretariat for their valuable assistance to the Committee.

6. The Drafting Committee had a number of remarks to make, article by article, on the texts it had provisionally adopted.

[3] *Yearbook... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

[4] For texts, see *Yearbook... 1980*, vol. II (Part Two), pp. 26 *et seq.*

[5] For text, see *Yearbook... 1989*, vol. II (Part Two), pp. 81-82.

7. The text of article 6 (Cessation of wrongful conduct) was based on the article proposed by the Special Rapporteur in his preliminary report[6] and referred to the Drafting Committee in 1989, at the Commission's forty-first session. The need for an article on cessation of a wrongful act of a continuing character had been explained in the Special Rapporteur's preliminary report and the debate in the Commission had indicated that the majority of members felt that a provision of that nature was necessary.

8. Article 6 dealt with the special situation in which a State was committing a wrongful act of a continuing character. In that connection, he drew attention to article 25 of part 1 (Moment and duration of the breach of an international obligation by an act of a State extending in time).[7] In that article, three types of wrongful acts extending in time had been identified. The first type—described in paragraph 1 of article 25—consisted of the breach of an international obligation by an act of the State having a continuing character. Article 6 was intended to deal only with that type of wrongful act. Logically, in such circumstances, the first claim of the injured State was that the wrongful act should be discontinued. That was also the first obligation the wrongdoing State had to comply with before consideration could be given to legal consequences such as reparation. The Drafting Committee, responding to the views expressed in plenary, had deemed it desirable to have an article specifically dealing with cessation of that type of wrongful act, while indicating that cessation was an obligation imposed on the wrongdoing State by international law independently of any request to that effect by the injured State. The injured State might not be in a position to request cessation or might be under pressure not to make such a request. It was for that reason that the article provided for an obligation of the wrongdoing State rather than a right of the injured State to request cessation. The article had also been drafted in the light of the distinction the Commission had drawn in the framework of the topic between primary and secondary rules. Article 6 in fact sought to revive the primary rule which had been violated or the operation of which had been suspended by the wrongful act. The "without-prejudice" clause at the end of the article was intended to make it clear that compliance with the obligation of cessation in no way exonerated the wrongdoing State from any responsibility it might have already incurred as a result of its wrongful act. Consequently, a right of the injured State under the preceding articles on the consequences of a wrongful act remained intact.

9. The present text of article 6 did not differ much from that originally proposed by the Special Rapporteur. Some drafting changes had been made for the sake of clarity: for example, the words "action or omission" in the original text had been replaced by the word "conduct", which was the term used in article 3 of part 1 to cover action or omission. The Committee had decided to retain the expression "wrongful act having a continuing character" because it was to be found in part 1, for example in article 25. The word "remains" in the original text had been replaced by "is", which was more appropriate in a legal text. The "without-prejudice" clause now appeared at the end of the article.

10. The title of the article "Cessation of wrongful conduct" was shorter than the one proposed by the Special Rapporteur and used the same terminology as the article itself.

11. Regarding the place of article 6, as the Special Rapporteur had indicated in his preliminary report, cessation of wrongful conduct was not in fact a legal consequence. Factually and logically, it was the first step taken in respect of a wrongful act of a continuing character prior to the imposition of any legal consequence. That was why, in the view of the Drafting Committee, article 6 could be placed in the opening section of part 2 rather than in the section on the substantive consequences of internationally wrongful acts.

12. During the discussion of article 6 in the Drafting Committee, it had become clear that, from the standpoint of international law and the interest of the injured State, three issues arose when a wrongful act was committed: first, the cessation of the wrongful act; second, the resumption of the primary obligation by the State that had committed the wrongful act; and third, the legal consequences arising from the wrongful act, such as reparation.

13. The issue of cessation could only arise, as already explained, in the context of wrongful conduct of a continuing character and that issue was covered by article 6. The second and third issues, however, namely the resumption of the original obligation and the legal consequences, arose in respect of all wrongful acts, whether or not they were of a continuing character. The Drafting Committee had therefore found it desirable to have a general saving clause concerning the second and third issues and to place it at the beginning of part 2, on legal consequences. It had therefore added a paragraph 2 to article 1 of part 2 that applied to all wrongful acts. Its provisions were without prejudice to the various possibilities which could be characterized as exceptions to the general rule, such as the choice open to the injured State of waiving its right to continued performance of the primary obligation.

14. With regard to article 6 *bis* (Reparation), in examining the substantive legal consequences of an internationally wrongful act, namely the articles on restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, the Drafting Committee had come to the conclusion that it would be more appropriate to have a general *chapeau* article on the concept of reparation, which would list the various forms of reparation and regroup the substantive legal consequences of a wrongful act and clarify their relationship with one another.

15. Article 6 *bis* consisted of three paragraphs. Paragraph 1 contained three basic ideas: (*a*) the injured State was entitled to full reparation; (*b*) the forms of reparation were restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, as provided in the subsequent articles; and (*c*) full reparation could be achieved by one, or a combination of several forms of

[6] See 2276th meeting, footnote 9.

[7] For text, see *Yearbook ... 1980*, vol. II (Part Two), pp. 32-33.

reparation. It was perhaps useful to explain those three ideas one by one.

16. The first was the entitlement of the injured State to full reparation. In the Committee's view, the function of reparation was, as stated by PCIJ in its decision in the *Factory at Chórzow* case,[8] to "wipe out" as far as possible all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the wrongful act had not been committed. The reference to "full reparation" should therefore be understood in that sense.

17. The second idea in paragraph 1 was to indicate the types of remedies that were available to the injured State in accordance with the provisions setting forth those remedies. That meant that the entitlement of the injured State to receive restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition was governed by the articles in question.

18. The third idea expressed in paragraph 1 was that full reparation could be achieved by one form of reparation only or by a combination of several such forms. The words "either singly or in combination" were intended to convey that idea and to make it clear that sometimes full reparation had to be achieved through a combination of various forms of reparation.

19. Paragraph 2 of article 6 *bis* corresponded to paragraph 5 of article 8 as originally proposed by the Special Rapporteur, which had dealt with the possibility that the damage might be due to causes other than the internationally wrongful act, and had done so in the sole context of compensation, since it provided that in the event of a plurality of causes the compensation must be reduced accordingly.

20. The Drafting Committee had felt that the approach reflected in the original paragraph had the major drawback of lumping together a series of hypotheses which called for separate treatment. The Committee had identified four such hypotheses: first, contributory negligence, namely the possibility that the damage might be partly due to the negligence or to a deliberate act or omission of the injured State or of one of its nationals; that was the hypothesis covered in paragraph 2 of article 6 *bis* as now drafted; the second hypothesis concerned the possibility that an independent cause unknown to the wrongdoing State might have aggravated the harm that would have otherwise resulted from the wrongful act. The Drafting Committee had been of the view that, in that case, the wrongdoing State should be liable for all the harm caused, irrespective of the role which external causes might have played in aggravating the harm. In its opinion, that type of situation did not call for a specific provision, particularly in the light of the principle of full reparation set forth in paragraph 1, and should simply be covered in the commentary.

21. The third of the hypotheses identified by the Drafting Committee concerned the concurrent wrongdoing of several States. It raised very complex problems and was furthermore under consideration in ICJ. The Committee had therefore decided to leave it in abeyance.

22. The fourth hypothesis was the possibility that the damage might have been aggravated as a result of the negligence or wilful conduct of one or more of the injured State's nationals. If, for example, State A had caused a flood in State B and if, in State B, the water had spread into a store of radioactive substances where the safety standards had not been observed and it had become radioactive as a result, should State A be under an obligation to provide reparation for the radioactivity damage? The Committee had agreed that that problem should be given further thought by the Special Rapporteur and should be considered again at a later stage.

23. As to the hypothesis dealt with in paragraph 2 of article 6 *bis*, namely the case where negligence or a deliberate act or omission had contributed to the damage, the Drafting Committee had dealt with the issue in the context of article 6 *bis* rather than in the context of article 8 as originally proposed by the Special Rapporteur because, in its opinion, contributory negligence could conceivably come into play in the context of forms of reparation other than compensation.

24. The Committee had furthermore considered that, instead of providing, as did the original paragraph, that in the case concerned "the compensation shall be reduced"—an approach which was inconsistent with the principle of full reparation set forth in paragraph 1 of article 6 *bis*—it was better to make contributory negligence one of the elements to be taken into account in determining the injured State's entitlement.

25. The text of the paragraph itself was self-explanatory. The phrase "contributory negligence" which had appeared in the Special Rapporteur's original text had been replaced by "the negligence or the wilful act or omission . . . which contributed to the damage"—a formulation based on language to be found in article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects. The Committee had felt that the term "contributory negligence" had two drawbacks: being borrowed from the common law system, it was not easily understood in other legal systems, and secondly, it lent itself to a restrictive interpretation excluding deliberate acts or omissions.

26. Lastly, the Drafting Committee had deemed it useful to provide in subparagraph (*b*) for cases where negligence or a wilful act or omission of a national of the injured State on whose behalf the claim was brought had contributed to the damage. Such a circumstance should affect the amount of the reparation to which the injured State was entitled, the underlying idea being that the position of a State which espoused a claim must not be more favourable than would be the position of its national if he could bring the claim himself.

27. Paragraph 3 of article 6 *bis* dealt with the impact of internal law on the obligation of the State which had committed an internationally wrongful act to make reparation, an issue dealt with in paragraph 3 of the text originally proposed by the Special Rapporteur in his preliminary report for article 7. Examining the matter, the Drafting Committee had reached the conclusion that the

[8] *P.C.I.J., Series A, No. 17*, judgment of 13 September 1928, p. 47.

question of the relationship between the internal law of the State and its international obligation to provide reparation did not arise only in the context of restitution in kind. In practice it had usually been in connection with restitution in kind that the wrongdoing State had invoked its internal law and that courts had had to deal with the question, but the issue could equally arise in connection with other forms of reparation. The Drafting Committee had therefore deemed it preferable to deal with internal law problems in the *chapeau* article which was of a general nature. As to substance, the paragraph stated the general principle that the State which had committed an internationally wrongful act could not invoke its internal law as justification for failure to provide reparation. The concept of reparation was, of course, to be understood in the light of paragraph 1. The text originally proposed by the Special Rapporteur as paragraph 3 of article 7 had been slightly amended for the sake of clarity and with a view to making the principle applicable to all forms of reparation. The present wording was patterned on that of article 27 of the Vienna Convention on the Law of Treaties.

28. As for the title of the article, the word "Reparation" had appeared to the Drafting Committee to be the most appropriate to cover restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition.

29. Article 7 (Restitution in kind) was the first of the substantive provisions on the legal consequences of a wrongful act. Like article 6, it had been proposed by the Special Rapporteur in his preliminary report and had been referred to the Drafting Committee in 1989, at the Commission's forty-first session. It would be recalled that, in his preliminary report, the Special Rapporteur had explained that, under customary international law, the function of reparation was to wipe out all the consequences of a wrongful act. As explained in connection with article 6 *bis*, there were four ways of achieving that result, namely restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. Those various forms of reparation were the subject of articles 7, 8, 10 and 10 *bis* and represented the substantive legal consequences of a wrongful act.

30. Article 7 dealt with the very basic remedy available to the injured State, namely recovering what had been taken from it or reinstating the right of which it had been deprived. The article as originally proposed by the Special Rapporteur had consisted of four paragraphs, but the Drafting Committee had thought that too many important ideas had been encapsulated in a single article. It was better to focus on the issues exclusively relevant to restitution in kind and to move those which were also relevant to other forms of reparation to the *chapeau* article, or to a separate article. Consequently, only the first two paragraphs of article 7 as proposed by the Special Rapporteur had been kept in the provision now under consideration.

31. Article 7 as recommended by the Drafting Committee consisted of an opening sentence followed by four subparagraphs. The opening sentence contained two elements: (*a*) the right of the injured State to obtain restitution in kind; and (*b*) the definition of restitution in kind. Subparagraphs (*a*), (*b*), (*c*) and (*d*) dealt with the exceptions to the right of the injured State to obtain restitution in kind. The opening sentence merged paragraphs 1 and 2 of the Special Rapporteur's original proposal. The Committee had taken into account the views expressed by the members of the Commission in the plenary and other issues had also come up during the drafting exercise.

32. Three substantive issues should be mentioned in regard to the opening clause: first, restitution in kind was a remedy to which an injured State was entitled. The article was formulated accordingly. Instead of providing, as did the original text, for a right to claim restitution it stated that "the injured State is entitled to obtain" restitution in kind; secondly, as proposed by the Special Rapporteur, the opening paragraph had not contained any definition of restitution in kind. Considering the uncertainties surrounding that concept, the Drafting Committee had found it prudent to define it, so that restitution in kind was the "re-establishment of the situation that existed before the wrongful act was committed"; thirdly, there was the question of the time-frame to which restitution in kind should correspond. The Drafting Committee had had the option of providing either for re-establishment of the situation prior to the occurrence of the wrongful act or for re-establishment of the situation that would have existed if the wrongful act had not been committed. In the first case, the point in time to be taken into consideration was the time when the commission of a wrongful act had started, and in the second it was the time of the settlement of the dispute. The Drafting Committee had preferred the first alternative for two reasons: (*a*) factually it was only the situation that had existed before the wrongful act was committed that could be accurately assessed. What the situation would have been if the wrongful act had not been committed was a matter of speculation; and (*b*) restitution in kind had often to be supplemented by compensation for all the negative consequences of the wrongful act to be wiped out. In practice, full reparation was usually achieved by combining restitution in kind and compensation. For those reasons, the Drafting Committee had chosen to define restitution in kind as the re-establishment of the situation that had existed before the wrongful act was committed. With that definition, there might be an overlap between article 7 and article 6 (Cessation of wrongful conduct), taken together with paragraph 2 of article 1 of part 2 as introduced earlier. That could occur, for example, in the violation of some treaty obligations where the injured State might have suffered only legal injury with no other damage. In such cases, cessation of the wrongful act and reinstatement of the treaty obligation might suffice to re-establish the situation that had existed before the occurrence of the wrongful act. That overlap, however, would not interfere with the proper operation and the application of those articles.

33. The right of the injured State to obtain restitution in kind was not unlimited: it was subject to the exceptions listed in subparagraphs (*a*) to (*d*). In that regard, the last phrase of the *chapeau* said "provided and to the extent that restitution in kind", which made it clear that if restitution in kind was only partly excluded under subparagraphs (*a*), (*b*), (*c*) or (*d*), then that part of it which was not covered by the exceptions was due.

34. The first exception, contained in subparagraph (*a*), was that of material impossibility. The qualifying word "material" should be understood in the sense of physical impossibility. "Material impossibility" was a broad formula, but it did not include legal impossibility. It referred to situations in which, for example, the object that was taken from the injured State had been destroyed or damaged or was no longer in the possession of the wrongdoing State and could not be recovered.

35. Under the second exception, contained in subparagraph (*b*), the injured State was not entitled to restitution in kind if that form of reparation would involve a breach of an obligation arising from a peremptory norm of general international law. The injured State would therefore have to opt for another form of reparation. The wording adopted by the Drafting Committee was identical to that proposed by the Special Rapporteur.

36. The third and fourth exceptions dealt with the concept of "excessive onerousness". It would be recalled that, in the Special Rapporteur's proposal, one subparagraph provided for an exception based on onerousness and another subparagraph defined the concept in question. The Drafting Committee had considered that the concept of excessive onerousness was not felicitous, and was presented in a way which tipped the scales in favour of the wrongdoing State. It had therefore opted for the solution reflected in the present text, that was to say, not mentioning the concept of onerousness at all, and instead, covering the point under the exceptions to restitution.

37. As to the meaning of the expression "excessively onerous", the Drafting Committee agreed with the Special Rapporteur that the concept should be understood as involving a comparison between the situation of the wrongdoing State and that of the injured State. There were two ways of making such a comparison. One way was a comparison between the loss that the State which had committed an internationally wrongful act suffered in making restitution in kind and the benefit that accrued to the injured State in obtaining restitution instead of other forms of reparation. The other way was a comparison between the loss suffered by the wrongdoing State in making restitution and the loss suffered by the injured State in not obtaining restitution. Subparagraphs (*c*) and (*d*) were formulated in the light of those two forms of comparison. Under subparagraph (*c*), restitution had to be granted if it did not involve a burden out of all proportion to the benefit that the injured State would gain from obtaining restitution in kind instead of receiving compensation. The phrase "a burden out of all proportion" indicated that there must be a gross disproportion between the burden which restitution in kind would place on the wrongdoing State and the benefit which the injured State would derive from restitution in lieu of compensation. The proposed formula relieved the wrongdoing State of the burden of restitution in kind only if the injured State could obtain sufficient and effective reparation through payment of compensation. It involved a comparison between the benefit the injured State would derive from restitution in kind and the benefit it would derive from compensation. Some members of the Drafting Committee had been concerned that the subparagraph might involve subjective assessments. Others had felt that the States concerned would normally come to an agreement on the matter and that the issue would be resolved consensually. If not, and if a third-party settlement was ultimately resorted to, the exception contained in subparagraph (*c*) would be applied on the basis of facts.

38. Subparagraph (*d*) provided that a State which had committed an internationally wrongful act was not bound to provide restitution in kind if that would seriously jeopardize its political independence or economic stability, whereas the injured State would not be similarly affected, that was to say that its political independence and economic stability would not be jeopardized to the same degree if it did not obtain restitution in kind. In a situation where restitution in kind would endanger the political independence or economic stability of the wrongdoing State, but the absence thereof would similarly affect the injured State, then, of course, the interest of the latter State would prevail and restitution in kind would be required. It would be noted that the comparison in subparagraph (*d*) was between restitution in kind on the one hand and other forms of reparation on the other. The determination under that subparagraph would have to be made on the basis of the factual situation, as in the case of subparagraph (*c*). The Drafting Committee was aware that subparagraph (*d*) catered for exceptional situations; it was, however, convinced that such a provision met a concern shared by many States and therefore served a useful purpose. The title of the article was the one proposed by the Special Rapporteur.

39. As far as article 8 (Compensation) was concerned, in paragraph 1 the Drafting Committee had taken as a starting point the first of the two alternatives[9] proposed by the Special Rapporteur, which it had viewed as conveying the same idea as the second but in simpler terms.

40. The phrase "is entitled to obtain" was modelled on the opening phrase of article 7. There again, the word "obtain" made it clear that the provision was intended to secure the substantive right of the injured State to obtain compensation, not the procedural right to claim compensation.

41. The Drafting Committee had eliminated the word "pecuniary", which, in its view, unduly restricted the form which compensation could take (for instance, in the form of fungible goods such as oil or livestock).

42. The phrase "caused by that act" indicated that there must be a causal link between the act and the damage. That requirement was expressed in paragraph 4 of the article as originally proposed by the Special Rapporteur. The Drafting Committee had thought that "caused by that act" conveyed the idea much more succinctly and without any loss in precision—since the phrase "an uninterrupted causal link" contained in the original text did not really provide clear guidance as to the nature of the link required. Paragraph 4 had thus been eliminated. The commentary would, however, elaborate on the requirement of a causal link. The last clause, "if and to the extent that the damage which the injured State has suf-

[9] See 2280th meeting, footnote 13.

fered is not made good by restitution in kind", clarified the relationship between restitution in kind and compensation as forms of reparation. The word "if" catered for the possibility that restitution in kind might be entirely ruled out either on the basis of subparagraphs (*a*) and (*d*) of article 7 or because the injured State preferred to have reparation provided entirely in the form of compensation.

43. The words "to the extent that" covered a second set of hypotheses, the first one being that restitution in kind was only partly possible under article 7, and the second, that the injured State had opted for a combination of restitution in kind and compensation. Under all hypotheses, the injured State was entitled to obtain full reparation in accordance with paragraph 1 of article 6 *bis*.

44. Finally, the Committee had eliminated the last clause of the Special Rapporteur's text ". . . in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed". The reason was that, as made clear by article 7, re-establishment of the situation prior to the commission of the wrongful act was actually a function of restitution in kind, not of compensation.

45. The Drafting Committee had devoted some time, in its consideration of article 8, to the question dealt with by the Special Rapporteur in paragraph 4 of his article 7 (Restitution in kind), namely the question of the choice open to the injured State between restitution in kind and compensation or a combination of both. Since both articles 7 and 8 were couched in terms of an entitlement of the injured State, the Drafting Committee had not found it necessary, in the case of a bilateral situation, to have a specific provision on the question, particularly in the light of the inclusion in paragraph 1 of article 6 *bis* of the phrase "either singly or in combination". The Committee was aware, however, that where there was a plurality of injured States problems might arise if the injured States opted for different forms of remedy. It was of the view that that question was part of a cluster of issues which arose when there were two or more injured States which might be equally or differently injured. That question had implications in the context of both substantive and instrumental consequences and the Committee intended to revert to it when it dealt with instrumental consequences.

46. Paragraph 2 of article 8 combined the ideas contained in paragraphs 2 and 3 of article 8 and in article 9 (Interest),[10] originally proposed by the Special Rapporteur. The Drafting Committee had found that those ideas could be expressed very succinctly by indicating what compensation should cover for the purposes of article 8.

47. The Commission would remember that, in the Special Rapporteur's approach as reflected in paragraph 2 of his article 8, compensation was to cover the moral damage sustained by the nationals of the injured State. The Drafting Committee had taken the view that the relationship between the injured State and its nationals was a primary rule which had no place in the section under consideration. It had retained the generally accepted concept of "economically assessable damage". As he had previously explained, the requirement of a causal link between the damage and the internationally wrongful act was provided for in paragraph 1, and had therefore not been repeated in the definition of the term "damage".

48. The last part of the paragraph, reading "and may include interest and where appropriate, loss of profits", corresponded to article 8, paragraph 3, and article 9 as originally proposed by the Special Rapporteur. The Committee was aware of the controversies on such issues as the method of assessment of loss of profits, the question whether interest and compensation for loss of profits were mutually exclusive or could be combined and the dates from and until which interest should accrue. The Committee was, however, of the view that it would be extremely difficult to arrive at specific rules on such issues that would command a large measure of support, particularly as practice was extremely varied in all those matters. It had therefore felt it preferable to state a general principle, couched in quite flexible terms, and leave it to the judge or the third party involved in the settlement of the dispute to determine in each case whether interest and/or compensation for loss of profits should be paid. The decisive element in reaching a decision on those points was, of course, the necessity of ensuring "full reparation" of the damage as provided in article 6 *bis*.

49. In the text before the Commission, interest and compensation for loss of profits were not placed on an equal footing. Although the word "may" indicated that interest would not automatically be paid, the proposed text, by qualifying the reference to loss of profits by the phrase "where appropriate", recognized that interest was more often applicable than loss of profits. The text also left open the question whether both interest and loss of profits could be covered by the compensation in a given case.

50. The title of the article, which, as proposed by the Special Rapporteur, had read "Reparation by equivalent", had been replaced by the more generally understood term "Compensation".

51. Lastly, owing to lack of time the Drafting Committee had been unable to consider in depth whether some of the exceptions listed in article 7, were relevant in the context of article 8. It intended to revert to that question at a later stage.

52. Article 10 (Satisfaction) also formed part of the articles referred to the Drafting Committee at the Commission's forty-second session, in 1990. The text proposed by the Special Rapporteur[11] had dealt with satisfaction and guarantees of non-repetition. In the Drafting Committee's opinion, there was a considerable difference between those two notions. Satisfaction was granted for damage caused as a result of the wrongful act, whereas guarantees of non-repetition usually bore no relation to the damage caused and could be granted in certain cases even when reparation had been made for the whole of the damage. The Committee had therefore decided to

[10] Ibid.

[11] Ibid.

deal with satisfaction and with guarantees of non-repetition in separate provisions, namely articles 10 and 10 *bis*.

53. Article 10 therefore dealt only with satisfaction. There were differences between the draft now proposed by the Committee and the one proposed by the Special Rapporteur, in terms of both structure and content. As to structure, the article proposed by the Special Rapporteur had comprised four paragraphs: paragraph 1, on the types of damage for which satisfaction would be granted and the forms that satisfaction could take; paragraph 2, on the relation between the obligation breached and the forms of satisfaction; paragraph 3, on situations where a declaration on the wrongfulness of the act by a tribunal would be considered an appropriate form of satisfaction, and finally, paragraph 4, indicating that satisfaction could not take a form that was humiliating to the wrongdoing State.

54. Article 10 as proposed by the Drafting Committee consisted of only three paragraphs. Paragraph 1 dealt with the circumstances in which satisfaction could be obtained, paragraph 2 with the various forms of satisfaction, and paragraph 3 with unacceptable demands for satisfaction.

55. As to substance, there were also differences between the present text and the one proposed by the Special Rapporteur. In the Special Rapporteur's version, article 10 had been drafted in terms of an obligation by the State which had committed an internationally wrongful act to provide satisfaction. It furthermore limited the availability of that form of remedy to cases in which the wrongful act caused "a moral or legal injury not susceptible of remedy by restitution in kind". The prevailing view in the Drafting Committee had been that there could be circumstances in which a form of satisfaction was more important to an injured State than restitution or compensation if—and it was an important proviso—and to the extent it was necessary to provide full reparation. That view was not, however, held by all members of the Drafting Committee. A few members had felt that satisfaction should be made available only in the case of moral damage. They did not agree with the article as drafted, but did not object to its adoption.

56. The Drafting Committee had formulated article 10 in terms of a right of the injured State to obtain satisfaction. While recognizing that in practice satisfaction was granted in most cases for moral damage, the Drafting Committee had not wished to preclude its application to other forms of damage. That understanding was reflected in paragraph 1, which provided that the injured State was entitled to obtain satisfaction "for the damage, in particular moral damage" caused by the wrongful act. Also, the Committee had not wished to expand the scope of application of satisfaction. In its view, satisfaction, if granted for material injury, replaced restitution in kind or compensation. Therefore, an injured State could not, for the same damage, obtain restitution in kind, or compensation, and also satisfaction. It could, if it wished, choose between restitution, compensation or satisfaction for the same damage. The idea that it was the same damage was important, because there could be several types of damage resulting from the same wrongful act. But the injured State could not claim satisfaction for damage for which it had already obtained compensation or restitution. The phrase added at the end of the paragraph, "if and to the extent necessary to provide full reparation", was intended to convey that understanding. The word "if" was meant to indicate that there could be circumstances in which satisfaction might not be granted. The phrase "to the extent necessary to provide full reparation" served to avoid the possibility that the injured State might be given remedy twice for the same damage—in fact to prevent "over-compensating" the injured State. In the view of the Drafting Committee, that was a point which the commentary to the article should explain in greater detail.

57. Paragraph 2 provided an exhaustive list of the forms of satisfaction. Subparagraphs (*a*) and (*b*) maintained forms of satisfaction proposed by the Special Rapporteur. Subparagraph (*c*) dealt with what was known in common law as "exemplary damages", in other words, damages on an increased scale awarded to the injured party over and above the actual loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. The purpose of that type of remedy was to set an example. The Drafting Committee had not used the term "exemplary damages" because the term did not seem to have an equivalent in other languages. It had decided instead to spell out the content of the concept. The commentary would explain that subparagraph (*c*) was intended to express the meaning of "exemplary damages". Again, in the Committee's view, it was a form of satisfaction that was available only in special cases. The words "in cases of gross infringement" was intended to convey that idea by setting a high threshold for availability of that type of satisfaction.

58. Subparagraph (*d*) provided for the punishment of responsible individuals as a form of satisfaction. The Committee had made some changes in the formulation proposed by the Special Rapporteur in order to make it applicable to both persons and groups and also to both State officials and private individuals. Under subparagraph (*d*), if a wrongful act was committed as a result of the serious misconduct of State officials or the criminal conduct of individuals, the injured State could request the punishment of those persons as a form of satisfaction. The subparagraph was constructed so as to make it clear that criminal conduct was punishable whether it was to be ascribed to State officials or to private individuals, whereas disciplinary action would of course be limited to officials.

59. The Committee was concerned that the application of subparagraph (*d*) should not be broad in scope. Because of the special nature of that form of satisfaction it should be available only in very special circumstances. If the scope of application of the subparagraph were not limited, the result would be too much interference in the internal affairs of States. For that reason, the word "serious" had been added to qualify the word "misconduct" of officials. In the Committee's opinion, the commentary should explain the special nature of that form of satisfaction and indicate that it was available only in rare circumstances.

60. Paragraph 3 was a revised version of paragraph 4 of article 10 as proposed by the Special Rapporteur. Under paragraph 3, the right of the injured State to obtain satisfaction did not justify demands which would impair the dignity of the wrongdoing State. The paragraph thus prevented the injured State from abusing its right to obtain satisfaction. It would be noted that the word "humiliating" which had appeared in the Special Rapporteur's proposal had been replaced by "impairing the dignity", which the Committee considered more appropriate. The reference to "violation of . . . sovereign equality or domestic jurisdiction" in the paragraph proposed by the Special Rapporteur had also been deleted; the Committee had feared that those safeguards might be unreasonably used by the wrongdoing State to refuse to provide satisfaction. The paragraph as drafted provided sufficient protection for the wrongdoing State.

61. The Drafting Committee had deleted paragraph 2 as contained in the original proposal by the Special Rapporteur. That paragraph had indicated that the choice of the forms of satisfaction should be made taking into account the importance of the obligation breached and the existence of a degree of wilful intent or negligence of the wrongdoing State. In the opinion of the Drafting Committee, the idea contained in the paragraph was already incorporated in the new paragraph 2 of article 10, particularly since the words "full reparation" at the end of paragraph 1 would avoid the possibility of overcompensating the injured State. The commentary to the article was a better place to reflect that idea in greater detail.

62. The Committee had also deleted paragraph 3 of the Special Rapporteur's proposal. That paragraph had indicated that a declaration of wrongfulness of the act by a competent international tribunal could in itself constitute an appropriate form of satisfaction. The Committee had considered that, if the States concerned could not solve their dispute, the matter went to a tribunal and it would be up to that tribunal to declare that the wrongdoing State had committed a wrongful act. Such a declaration could not by itself be regarded as a form of satisfaction. For those reasons, the Committee had deleted the paragraph. Of course, the deletion of that paragraph, did not, he wished to emphasize, prevent a tribunal from making such a declaration, or an injured State demanding such a declaration, as a form of satisfaction. Perhaps that point could be elaborated on in the commentary.

63. The title of the article corresponded to the contents and read "Satisfaction".

64. As to article 10 *bis* (Assurances or guarantees of non-repetition), the Drafting Committee had considered that assurances or guarantees against repetition were not, strictly speaking, a form of reparation and should, accordingly, form the subject of a separate provision. It had also felt that assurances and guarantees of non-repetition were a rather exceptional remedy which should not be made available to every injured State, particularly in the light of the broad meaning of "injured State" under the terms of article 5 of part 2.

65. The words "where appropriate" were intended to give the article the necessary flexibility in that respect and, in effect, left it to the judge (or other third party called upon to apply the rules) to determine whether, in the particular instance, it was justifiable to allow for assurances or guarantees of non-repetition. The conditions for granting such a remedy should, for instance, be that a real risk of repetition existed and that the claimant State had already suffered a substantial injury. The Drafting Committee had considered that perhaps that point should also be elaborated on in the commentary to be submitted by the Special Rapporteur. The text was otherwise self-explanatory and did not call for further clarification.

66. He wished to express his general agreement with the guidelines concerning the composition and working methods of the Drafting Committee proposed by the Planning Group (A/CN.4/L.473/Rev.1) and also add a few general observations, based on the Drafting Committee's experience, including at the present session.

67. First, the Commission should consistently apply the rule, so often mentioned on various occasions, of referring to the Drafting Committee only articles which had been adequately considered and were ripe for drafting, with an indication of the main trends emerging from the discussions on specific draft articles.

68. Secondly, the Drafting Committee should be given sufficient time to perform its tasks, so that it could complete its work during the first half of the session and present its report as early as possible. Efforts should be made to avoid a situation of scattered meetings of the Drafting Committee right up until the last weeks of the session. The Special Rapporteur, or a working group within the Drafting Committee would thus be able to submit for consideration the commentaries to the draft articles adopted by the Drafting Committee. At the same time, the members of the Commission would also have the opportunity to consider the draft articles and the commentaries properly.

69. Thirdly, the Commission should make the necessary arrangements to avoid any accumulation of draft articles being passed on from one session to the next thus increasing the Drafting Committee's workload during the last two sessions of the term of office of the Commission.

70. Lastly, he recalled his proposal to the effect that the draft articles adopted by the Drafting Committee should be attached as an annex to the Commission's report.

71. The CHAIRMAN thanked the Chairman of the Drafting Committee for an excellent statement which gave a detailed account of the Committee's work. He would remind the Commission that it was not called on to revert in plenary to the substance of the report or to the draft articles since the articles would not be approved at the present session or be referred to the General Assembly. The debate would take place at the next session in the light of the commentaries that would be formulated by the Special Rapporteur before then. Nevertheless, he invited members who had any suggestions about action on the report of the Drafting Committee to take the floor.

72. Mr. YANKOV (Chairman of the Drafting Committee), reverting to his earlier proposal that the draft ar-

ticles on State responsibility should be annexed to the Commission's report, said that he was prepared to withdraw the proposal in view of the explanations just given by the Chairman, if that would facilitate the Commission's task.

73. Mr. ARANGIO-RUIZ (Special Rapporteur) expressed his sincere gratitude to the Chairman of the Drafting Committee for his remarkable statement. He accepted, in the main, the proposals of the Chairman of the Drafting Committee, but none the less considered that, in view of the complexity and difficulty of the subject, he had to reserve his position on the draft articles submitted by the Drafting Committee until he had had time for reflection and had done further personal work on the various points.

74. Mr. KOROMA expressed his congratulations to the Chairman of the Drafting Committee on a very instructive statement and said it was regrettable that the Commission did not have time to discuss his report in detail. He also wished to thank the members of the Drafting Committee, as well as the Special Rapporteur on the topic of State responsibility.

75. By and large, the draft articles formulated by the Drafting Committee were very useful and calculated to advance the Commission's work on the topic, although personally he had reservations both on the interpretation and on the wording of certain articles. He none the less hoped that the reservations could be lifted when the draft articles submitted by the Drafting Committee were considered at the next session.

76. Mr. PELLET said that he congratulated the Drafting Committee and its Chairman on the excellent work done. He said it was regrettable that the Commission did not have the time to consider in plenary the articles submitted by the Drafting Committee. That type of drawback could be avoided with a split session. He would have liked to have said a few words on the link between articles 6 to 10 *bis*, but was prepared to wait until the next session to make his comments if that was the wish of the Commission.

77. Mr. VILLAGRAN KRAMER said it was inadmissible that, after the amount of work done by the Drafting Committee and the excellent report presented by its Chairman, the Commission should have nothing on the topic of State responsibility to propose to the General Assembly in 1992.

78. Many newly-elected members had participated for the first time in the discussion on that topic, which was particularly important for the countries of the third world, and it would be regrettable if the Sixth Committee gained the impression that nothing had been done in 12 full weeks of meetings. Even though certain disagreements on the subject of articles 6 to 10 *bis* remained, a debate had been held on the essential aspects of those articles and he wondered whether, in the circumstances, he should not take up the proposal put forward, and later withdrawn, by the Chairman of the Drafting Committee to the effect that the draft articles on State responsibility should be annexed to the report of the Commission.

79. The CHAIRMAN observed that it was not the Commission's custom to refer to the General Assembly draft articles that were not accompanied by commentaries and had not been adopted by the Commission in plenary. It was preferable to take note of the Drafting Committee's report and simply give the Assembly general indications on the work done, giving it, for example, the titles of the draft articles, but not the text.

80. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, according to the Chairman of the Drafting Committee, the Commission had long since accepted the idea that the draft articles on State responsibility should consist of three parts, namely a part 1, containing a definition of an internationally wrongful act, a part 2, on the consequences, and a "possible" part 3, on implementation. Personally, he thought that the word "possible" was unnecessary. Without prejudging the Commission's ultimate decision on that last point, he felt certain that, for the time being, the third part was an integral element of the draft.

81. Mr. BENNOUNA, speaking on the line of action proposed by the Chairman, said that, if it was actually decided not to transmit the draft articles on State responsibility to the General Assembly, he would add his own protests to those voiced by Mr. Villagran Kramer. It seemed inadmissible that the Commission should have worked a whole session on the topic without submitting to the General Assembly specific proposals which made it possible to maintain a dialogue from one session to the next. In his view, the report of the Chairman of the Drafting Committee should be transmitted to the General Assembly, along with the articles provisionally adopted by the Committee, in order to obtain at least the Assembly's reaction.

82. Mr. SZEKELY said he too believed that, after all the work done by the Chairman and members of the Drafting Committee, it would be frustrating to have nothing to transmit to the General Assembly. On the other hand, if the Commission transmitted something half-finished it would also be open to criticism. That showed that the Commission's methods of work would have to be reviewed and that the Commission must without fail find ways and means of transmitting articles to the General Assembly on a regular basis.

83. Mr. KOROMA said that Mr. Villagran Kramer's remarks were justified. If it did not transmit the report of the Drafting Committee and the draft articles to the General Assembly, the Commission ran the risk of being criticized for not having done enough. On the other hand, it was inconceivable that the Commission should transmit the draft articles to the Assembly before it had itself discussed them. If draft articles were included in the report, it would be an invitation for the members of the Sixth Committee to make comments, a thing that was not perhaps desirable at the present stage. Some middle way would have to be found. He therefore suggested that only the titles of the articles should be mentioned in the Commission's report, articles to which the Chairman of the Commission could also refer in introducing the Commission's report to the General Assembly so as to give an idea of the work done on the topic of State responsibility. For the rest, the Commission had had a very

thorough debate on the question of the so-called instrumental consequences of an internationally wrongful act as well as on the question of the establishment of an international criminal jurisdiction and it had sufficient material to transmit to the General Assembly.

84. Mr. CALERO RODRIGUES said he shared the concern expressed by some members, but since it had not been possible to submit any commentaries to the Commission in plenary, he thought it wiser not to transmit the draft articles to the General Assembly. If the Commission were to invite the General Assembly to comment on articles before the Commission itself had had an opportunity to consider them, the normal procedure would be reversed. Moreover, in paragraph 29 (6) of its report (A/CN.4/L.473/Rev.1), the Planning Group had recommended that, in drafting its report, the Commission should adopt the principle whereby:

> When only fragmentary results have been achieved in the consideration of a topic or an issue, and such results can only be properly assessed by the Sixth Committee after further elements have been added, the information contained in the report should be very summary, with the indication that the matter will be more fully presented in a future report.

There was nothing to prevent the General Assembly from commenting on those draft articles after they had been considered by the Commission.

85. For the time being, the indications given on the matter in the draft report of the Commission on the work of its forty-fourth session appeared sufficient, even if the formulation was not entirely satisfactory.

86. Mr. BOWETT said he shared the views of Mr. Villagran Kramer and Mr. Bennouna. He too found it difficult to see the Commission send to the General Assembly a report which failed to do justice to the amount of work done on the topic of State responsibility. Admittedly, the draft articles could not be transmitted to the General Assembly for consideration without having been first discussed and acted on by the Commission itself. Nevertheless, he saw no reason why it should not be possible to annex to the Commission's report the text of the draft articles as well as a summary of the report of the Chairman of the Drafting Committee, for information purposes and to show the importance of the work that had been done.

87. Mr. ROSENSTOCK said that, in fact, two separate questions had arisen: one of them concerned the Commission's methods of work, which had proved unproductive and ought to be reconsidered; the other question was to determine what should be done with the draft articles and the Drafting Committee's report. It would serve no purpose to put the report and the draft articles in an addendum or an annex, because the mere fact of submitting a text was an invitation to discuss it, something that did not seem desirable at the present stage. It would be enough for the Commission's report to contain a sufficiently detailed account of the work done. On that point, he shared the opinion expressed more particularly by Mr. Koroma.

88. Mr. PELLET said it was necessary to avoid giving the impression that the Commission had nothing of substance to submit to the General Assembly, when the Drafting Committee had in fact held 27 meetings. The solution might be to expand the paragraphs of the Commission's report that gave an account of the work on the articles in question, by including a very full summary of what the Chairman of the Drafting Committee had stated in presenting the draft articles adopted by the Committee. The text of the draft articles would be given in a footnote, something which was indispensable for an understanding of the statement by the Chairman of the Drafting Committee.

89. Mr. MIKULKA protested at the suggestion that the Commission might convey the impression of not having done enough work. That would mean ignoring the progress made on the question of an international criminal court.

90. Very appropriately, Mr. Calero Rodrigues had recalled the guiding principle recommended by the Planning Group for the Commission in drafting its report. It was essential to abide by that principle, but instead of presenting a "very summary" account of the work on State responsibility, the relevant passage of the report could be expanded. In any case, the Commission should refrain from transmitting to the General Assembly drafts which it had not itself discussed. It might be possible to annex to the Chairman's introduction to the Sixth Committee a text reproducing the statement by the Chairman of the Drafting Committee and the text of the articles in question. That would clearly show that the articles were still a mere draft and make it possible to halt any discussion on the articles, since they would not have been submitted formally.

91. Mr. JACOVIDES suggested that it might be enough to indicate the subject-matter of the articles adopted by the Drafting Committee and to include large extracts from the statement by the Chairman of the Drafting Committee in the Commission's report.

92. Mr. VILLAGRAN KRAMER said he was concerned that the Commission was facing difficulties connected with its methods of work. It had already had to improvise a solution for the purpose of presenting the results of its work on the establishment of an international criminal court. In the present instance, the idea of including the draft articles in a footnote was not a bad one, for the Commission should always indicate clearly what it had done and what it was doing. Since the membership had changed recently, it would be too easy to criticize it for inadequate results. He could willingly accept being attacked for his ideas, but he did mind being accused of idleness.

93. Mr. CALERO RODRIGUES, speaking on a point of order, pointed out that a discussion was being held on the report of the Commission and not on the report of the Drafting Committee. He suggested that a working group should be set up to draft a new version of the paragraphs of the report in which the Commission gave an account of its work on the draft articles on State responsibility.

94. Mr. SZEKELY said he shared the opinion of Mr. Villagran Kramer: it was important to inform the General Assembly of the fruit of the Commission's work. A footnote seemed the best solution. If a working group was set up, it should be assigned the task of studying all possible options, and not one single solution.

95. Mr. SHI said it would be very dangerous to submit to the General Assembly the text of the draft articles in any form. If the representatives in the Sixth Committee began to comment on them, it would tie the hands of the Commission. Members should at all times retain their freedom of thought.

96. Mr. KOROMA and Mr. MAHIOU said they supported the suggestion for the setting up of a small working group.

97. Mr. CRAWFORD said that he fully shared Mr. Mikulka's view. If Mr. Mikulka's proposal was not accepted, he could agree to a small working group being set up.

98. Mr. EIRIKSSON said he had been convinced by Mr. Shi's argument. In a spirit of compromise, however, he would agree to Mr. Mikulka's solution.

99. Mr. PAMBOU-TCHIVOUNDA said that there was no reason to fear the General Assembly's judgement unduly. The Commission's reports varied from one year to the next and were not always very long. That was no reflection on the seriousness of its work. While it was necessary to avoid inserting the actual text of the draft articles in the Commission's report, a summary of the statement by the Chairman of the Drafting Committee could none the less be included.

100. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to set up a small working group, consisting of interested members, to examine the question of the place to be given in the Commission's report to draft articles 6 to 10 *bis* on State responsibility and to the statement by the Chairman of the Drafting Committee.

It was so agreed.

The meeting rose at 1.15 p.m.

2289th MEETING

Monday, 20 July 1992, at 4.10 p.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer.

State responsibility (*concluded*) (A/CN.4/440 and Add.1[1], A/CN.4/444 and Add.1-3,[2] A/CN.4/L.469, sect. F, A/CN.4/L.472, A/CN.4/L.478 and Corr.1 and Add.1-3, ILC(XLIV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIRMAN said that the informal working group set up at the previous meeting had arrived at a compromise formula that in place of paragraphs 15 and 16 of chapter III of the Commission's draft report, concerning State responsibility (A/CN.4/L.478), a new subsection would be inserted before subsection 2 to be entitled "The draft articles contained in the preliminary and second reports of the Special Rapporteur", followed by paragraphs 15 and 16, revised to read:

> "15. At its 2288th meeting, the Commission heard the presentation by the Chairman of the Drafting Committee of a report of the Committee (A/CN.4/L.472) concerning its work on the draft articles on State responsibility which were contained in the preliminary and second reports of the Special Rapporteur and which had been referred to it at the forty-first and forty-second sessions of the Commission. The Drafting Committee devoted 25 meetings to the consideration of those draft articles and succeeded in completing its work on them. It adopted on first reading a new paragraph 2 to be included in article 1, as well as articles 6 (Cessation), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 *bis* (Assurances and guarantees of non-repetition).
>
> "16. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time it will have before it the material required to enable it to take a decision on the proposed draft articles."

2. It was understood that the part of the summary record of the 2288th meeting containing both the draft articles adopted by the Drafting Committee and the introductory statement by the Chairman of the Drafting Committee would be attached to the statement which he, as Chairman of the Commission, would deliver to the Sixth Committee in presenting the Commission's report.

3. Mr. de SARAM asked whether the draft articles on State responsibility were being described as provisionally adopted.

4. The CHAIRMAN replied that, since the Commission had not adopted the articles, they would certainly not be described as provisionally adopted.

5. Mr. VERESHCHETIN said that he accepted the proposals of the informal working group, with one ex-

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[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1992*, vol. II (Part One).