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**A/CN.4/SR.2635**

**Summary record of the 2635th meeting**

Topic:  
**<multiple topics>**

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had solved the problem by saying that the article (former article 8) covered moral damage to individuals and article 45 (former article 10) covered moral damage to States. That solution had been controversial because the term “moral damage” could apply to things so disparate as the suffering of an individual subjected to torture and an affront to a State as a result of a breach of a treaty. It would probably be necessary to come back to that question following the consideration of article 45.

57. Mr. Gaja’s comment was very pertinent: a return to the status quo ante was obviously not the only kind of restitution, although it was in a way the prototype. Everything was basically a matter of degree. In fact, the main problem with article 43 was once again the relationship between primary rules and secondary rules. In the theory of State responsibility, restitution was a well-established form of reparation, but, in practice, it was not, as shown by the examples given in paragraph 143. The problem was thus to reconcile theory and practice.

58. He thanked Mr. Economides for having drawn his attention to the lack of precision of some elements, which he would try to remedy.

59. He recognized that the problem of a plurality of injured States to which Mr. Pambou-Tchivounda had referred was a real one. Two “injured States” could not, for example, simultaneously obtain the extradition of one and the same person. That problem would be greatly reduced, however, if a distinction was made between the underlying obligation of reparation and its invocation by injured or other States. That was what he had tried to show in the first part of the text.

60. On the basis of the members’ first reactions, it seemed to him that, leaving aside the problem of loss of profits for the time being, the majority of the members of the Commission were in favour of a concise article 44 accompanied by detailed explanations in the commentary.

61. Mr. GOCO said that he too was in favour of that solution. In his opinion, the discussion should continue on the basis of the new version of article 44 contained in paragraph 165 of the report, the text of which could be elaborated on by the Drafting Committee. The comments made by Governments on that question could, of course, not be overlooked. In paragraph 152, it was stated, for example, that, on the basis of the decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission, the United States had held that the current drafting of paragraph 2 (of the old version of article 44) went counter not only to the overwhelming majority of case law on the subject but also undermined the “full reparation” principle.<sup>7</sup>

62. Must it be considered that, in the new version, the words “any economically assessable damage”, which were also used in the old version, implicitly covered loss of profits and interest? That question must be taken into account by the Drafting Committee.

63. Mr. ROSENSTOCK said that he fully endorsed the solution which the Special Rapporteur had just suggested,

namely, that article 44 should be drafted concisely, while nevertheless including a reference to loss of profits and giving detailed explanations in the commentary.

64. Mr. HE said that, in his view, the main problem which arose in article 44 was the definition of the scope of compensation. That article should therefore be further developed in order to cover all cases in which a State which had committed an internationally wrongful act owed compensation.

65. In the article itself, it would be necessary to define what was meant by “economically assessable damage” by specifying that such damage was linked to the internationally wrongful act. That causal link should be clearly spelled out. The reference to loss of profits should also be introduced in the text.

*The meeting rose at 1 p.m.*

## 2635th MEETING

*Friday, 9 June 2000, at 10.05 a.m.*

*Chairman:* Mr. Chusei YAMADA

*Present:* Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma.

### State responsibility<sup>1</sup> (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,<sup>2</sup> A/CN.4/L.600)

[Agenda item 3]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of chapter I, section B, of his third report (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that, in introducing the remainder of chapter I, section B, he was not trying to pre-empt further debate on articles 43 and 44. He suggested that the beginning of the first plenary meet-

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

<sup>7</sup> See 2613th meeting, footnote 3.

ing of the second part of the session should be set aside for any member wishing to comment on those two articles before they were referred to the Drafting Committee and that discussions should then continue on the other three articles proposed in his third report, articles 45 (Satisfaction), 45 bis (Interest) and 46 bis (Mitigation of responsibility), which he would introduce at the current time.

3. Starting with article 45, he said that the crucial phrase in paragraph 1 of the draft article adopted on first reading and set out in paragraph 167 was “satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation”. Hence, the words “moral damage” were used in association with satisfaction. There was then a list in paragraph 2 of the forms that satisfaction might take.

4. Despite an underlying core of agreement, article 45 gave rise to a number of difficulties. The reference in paragraph 1 to satisfaction for moral damage was problematic. First, the term “moral damage” had a reasonably well-established meaning in the context of individuals. As the former Special Rapporteur on the topic, Mr. Arangio-Ruiz, had repeatedly stressed, claims for compensation on behalf of individuals, for example, for pain and suffering or egregious violations of their rights, would come under the heading of compensation rather than of satisfaction. There was thus some difficulty in talking about moral damage in connection with both article 44 and article 45. Secondly, it was awkward to speak of moral damage in relation to States because to do so was to attribute all sorts of feelings, sentiments, affronts and dignity to them. That language reflected a real concern and there had certainly been cases in which States or Governments of States had, for example, felt humiliated by a wrong. It would nevertheless be wise to keep the use of emotive language for States within reasonable limits and to avoid confusion with moral damage to individuals. He agreed with Dominicé that the term “non-material injury” (*préjudice immatériel*) should be used as the subject matter of satisfaction instead of the term “moral damage”.<sup>3</sup>

5. The purpose of the words “to the extent necessary to provide full reparation” was to indicate that there might be circumstances in which no question of satisfaction arose. The question was simply one of distributing losses in the event that harm was being caused, in which case articles 43 and 44 would be sufficient.

6. It was unclear from the *travaux préparatoires* whether paragraph 2 was intended as an exhaustive list of forms of satisfaction. One paragraph of the commentary said that it was exhaustive and another said that it was not.<sup>4</sup> In introducing the provision, the Chairman of the Drafting Committee had said that it was exhaustive, but the *chapeau* of paragraph 2 implied that it was not. In any case, it ought not to be exhaustive.

7. The main form of satisfaction in judicial practice was the declaration, which was well established as a result of the *Corfu Channel*, the “*Rainbow Warrior*” and many other cases. In the *Corfu Channel* case, ICJ had made it very clear that the declaration of the illegality of the mine-sweeping operation had been sufficient satisfaction. That language had been repeated in many cases since. Thus, if paragraph 2 was meant to be exhaustive, it left out what in judicial practice was the most common remedy and that point had been made by Mr. Arangio-Ruiz himself, who had proposed that a declaration was a form of satisfaction<sup>5</sup> as had a number of Governments, including that of France.<sup>6</sup> The problem with the declaration, however, was that, by definition, it was granted by a third party; it could not be granted in respect of oneself. Yet the articles were being drafted on the assumption that they applied directly to State-to-State relations and that judicial processes were subsequent to those relations. In other words, the articles proceeded in the declaratory tradition—and he used the word “declaratory” in a different sense—namely, on the basis that the function of a court was to declare an existing legal relation between the States parties to the dispute. Of course, those decisions might well have binding effect under the *res judicata* principle, but that was a separate issue. So there was some difficulty, from the point of view of drafting technique, in fitting the declaration into paragraph 2. It seemed unarguable that it ought to be there, but the problem was that paragraph 2 was concerned with what one State should do in response to a well-founded claim of a breach of international law by another State.

8. He therefore proposed the notion of an acknowledgement by a State, of which there were examples in State practice: in the *LaGrand* case and in the *Paraguay v. United States* case, the United States had acknowledged that there had been a breach of article 36, paragraph 1, of the Vienna Convention on Consular Relations. Obviously, it had not declared that there had been such a breach because it had been talking about its own conduct, but it had acknowledged that there had been such a breach. If it was assumed, hypothetically, that there had been a failure to acknowledge that a dispute had arisen over whether there had been a breach, but that no material damage had occurred and that the individual concerned had subsequently been released: it was clear that a tribunal in those circumstances would do nothing more than grant a declaration. In such a case, the breach would have been relatively minor and it would have been sufficient to say that one had occurred. Thus, acknowledgement by the responsible State seemed to be the equivalent, in terms of State-to-State conduct, of the declaration granted by a tribunal. It was the lowest form of satisfaction, but it was a useful and frequently granted remedy. Consequently, he proposed an acknowledgement of the breach as the first form of satisfaction. The commentary would then explain that, where a State declined to acknowledge that it had committed a breach, the corresponding remedy obtained in any subsequent third-party proceedings would be a declaration.

<sup>3</sup> C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, *L'ordre juridique international entre tradition et innovation : recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

<sup>4</sup> See paragraphs (9) and (16) of the commentary to article 10 (*Yearbook ... 1993*, vol. II (Part Two), pp. 78 and 80, respectively).

<sup>5</sup> See article 10, paragraph 3 (*Yearbook ... 1989*, vol. II (Part One), p. 56, document A/CN.4/425 and Add.1, para. 191).

<sup>6</sup> See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1-3.

9. Paragraph 2 also contained a reference to an apology, which was frequently given by States to other States. Just as a State could not make a declaration in respect of itself, so a tribunal could not make an apology on behalf of a State; only the State could apologize for its own conduct. There had, however, been examples in which tribunals or other third parties had even required, and certainly proposed, that an apology was in order. The Secretary-General, in his award in the "*Rainbow Warrior*" case, had indicated that France should apologize for the breach. Of course, that had in effect been an award on agreed terms, but it was nonetheless a third-party award indicating that an apology was appropriate. An apology, or an expression of regret, to use the wording suggested by France, was slightly more elevated than an acknowledgement, which was more neutral. It seemed, however, that an apology should also be included.

10. He proposed that acknowledgement or apology should be treated separately from the other forms of satisfaction in a new paragraph 2, since it was the basis on which any other form of satisfaction would be granted. It was also the minimum form of satisfaction. It was useful to emphasize the value of declaratory remedies and the sources cited in the report did so. Singling that out had the value of distinguishing between the minimum form of satisfaction and those other forms which might be exceptional, but might be appropriate in certain cases and would be contained in a new paragraph 3.

11. Referring to the other forms of satisfaction, he said that the first listed in paragraph 2 was nominal damages. Although there was some practice in international law of the award of nominal damages, it was not clear that it was useful. He preferred the view taken by the Permanent Court of Arbitration in the "*Carthage*" and the "*Manouba*" cases that, when a tribunal awarded a declaration that there had been a breach, there was no point in awarding one franc by way of damages. Nominal damages, at least in the common law system, had three functions. One was to acknowledge that there had been a breach; that had been before the courts in the Commonwealth countries had developed the remedy of the declaration. Hence, it had been an earlier equivalent of declaratory relief. The second function was to serve as a peg on which to hang costs, because, if a farthing of nominal damages was awarded, costs would be awarded as well and they might be very substantial indeed. A third function of nominal damages was to insult the plaintiff. The classic example was a libel action in which someone claimed to have been defamed. In awarding one shilling, the jury showed just how much it thought the plaintiff's reputation was worth. Hence, nominal damages were also used to demonstrate that, although technically the plaintiff might have a cause of action, his case had no substantial merit.

12. Those three reasons for nominal damages in the common law system were inapplicable in international litigation. The declaratory remedy was sufficient, as the Permanent Court of Arbitration had noted, in lieu of nominal damages. There was no practice by which costs were generally awarded; costs did not follow the event in international litigation, and, if they did, they certainly did not do

so to that extent; and the third reason was another reason not to mention nominal damages.

13. He was not suggesting that small damages might not be appropriate and there had been recent examples of such awards, such as 100 Dutch florins. There had also been cases in which small amounts of money had been awarded by way of what might be described as general damages, without distinguishing between compensation and satisfaction. But they were not nominal damages in the sense in which that term was used in national legal systems. In his view, paragraph 3 should be non-exhaustive because examples could be cited of things done by way of satisfaction which certainly did not fall within existing categories, such as some of the more imaginative remedies proposed in the "*Rainbow Warrior*" case. If the provision was non-exhaustive, there was no need to list nominal damages. There were relatively few modern cases in which they had been granted and they were referred to in a footnote to paragraph 188. The last State-to-State case in which nominal damages had been awarded had been in the "*Lighthouses*" case. More recently, there had been a case in which a tribunal had awarded three French francs for loss of profit, and that suggested that profits had not been very high in the first place. He proposed that the words "nominal damages" should be deleted from article 45 and he had placed them in square brackets for the time being, not because there might not be occasions where they might be appropriate, but because they did not deserve to be highlighted.

14. The third category referred to in paragraph 2 and the first category for potential inclusion in his paragraph 3 was "damages reflecting the gravity of the infringement". However, in the draft article adopted on first reading, that was limited to cases of gross infringement of the rights of the injured State. The problem was not just the difficulty in defining what "gross" meant, but that, in State practice, damages had been awarded by way of satisfaction in cases which, in his view, had not amounted to gross infringement and the damages awarded had not been spectacularly high. The award by way of satisfaction in the first phase of the "*Rainbow Warrior*" case might be regarded as being in response to a gross infringement and it had certainly been a spectacular award at the time—US\$ 7 million in 1986. In the "*I'm Alone*" case, US\$ 25,000 had been awarded to Canada by way of satisfaction. No compensation had been awarded because the boat in question had in fact been owned by United States nationals trying to beat prohibition by running alcohol, but damages had been awarded as an affront to Canada for the sinking of a Canadian registered vessel. In the context, it would be an exaggeration to describe that as a gross infringement. It had clearly been a breach, but not a gross one, and the damages had not been spectacularly high. There were other examples in international practice where moderate awards had been granted by way of satisfaction in respect of moderate breaches. Thus, the words "in cases of gross infringement" unduly limited the normal function of satisfaction in respect of normal breaches.

15. That raised the question of the function of paragraph 3 (c). Was it concerned with establishing the rule of punitive damages in international law or with something else? In the first version of article 10 proposed by the

former Special Rapporteur in his second report, he had specifically included the words “punitive damages” in paragraph 1.<sup>7</sup> The Drafting Committee had rejected that view at the forty-fourth session of the Commission, adopting instead the notion of “exemplary damages”,<sup>8</sup> a term which also came from a particular tradition in relation to damages. Exemplary damages were not punitive damages. They were not intended as a penalty, but as an example. It was true that the distinctions could be rather refined, but, when there had been an egregious breach and a real affront to the respondent, exemplary damages could be awarded. For example, if there was a gross violation of privacy or the home in the context of a search and seizure or a gross affront to someone in the context of defamation, exemplary damages might be awarded, even though they were not punitive. The classic mark of punitive damages was that they were awarded by reference to some multiplier, such as the treble damages awards in United States anti-trust law. The Commission and the Drafting Committee had intended to reject the notion of punitive damages and the wording of paragraph 3 (c) had been meant to reflect the notion of exemplary damages. That raised two problems. The first was what to do about punitive damages and the second was what to do about paragraph 3 (c). As to punitive damages, there was much authority, going back to the “*Lusitania*” case, for the proposition that punitive damages were unknown in international law; if they were known, they were limited to the case of egregious breach. “Gross infringement” might be the term, but he thought that the Commission needed something more carefully defined and stronger if it wanted to have it as a separate category. It seemed uncontroversial that, beyond that category, if it was retained, there was no place for punitive damages.

16. He therefore agreed with the Commission’s decision on first reading that paragraph 3 (c) should not provide for punitive damages. The question arose, however, whether it should provide for exemplary damages. In his view, it would be more consistent with decisions in general international law to delete the words “in cases of gross infringement of the rights of the injured State” and simply to provide for the award of damages in general, where appropriate, by way of satisfaction, in accordance with decisions such as that in the “*I’m Alone*” case. That would leave open the possibility of providing for what might be described as expressive or exemplary damages, where appropriate, and excluding punitive damages, a subject that would be taken up later in the context of a possible special category of “egregious breach”, to which special conditions needed to be attached. If the Commission decided to retain anything approximating to the language used in article 19, it would be contradictory not to allow punitive damages in that context. However, if a reference to “crimes” was included, punitive damages could not be excluded. He was suspicious of commentators and others who were in favour of the category of crimes, but rejected that of punitive damages. If penal language was to be avoided, it should be consistently avoided.

17. The fourth form of satisfaction was disciplinary action or punishment of the persons responsible, who might be officials or private individuals. France had rightly objected that the word “punishment” implied individual guilt.<sup>9</sup> As in extradition treaties, provision should be made for the proper referral of the matter to the prosecuting authorities, who would deal with it as a criminal case. The Commission had intended that the form of action referred to in article 45, paragraph 2 (d), as adopted on first reading should be available only in exceptional cases, but there were cases in which such action was appropriate quite apart from any primary obligation to which a State might be subject, for example, under an international criminal law treaty. He therefore proposed that it should be retained, with some rewording based largely on the French proposals.

18. There were clearly other procedures that could appropriately be described as forms of satisfaction, such as a joint inquiry into an incident that had caused damage. However, if paragraph 2, as adopted on first reading, was understood to be non-exhaustive, it did not need to cover all the possible permutations which satisfaction might take. It would be sufficient to give examples in the commentary.

19. The issue of limitations on satisfaction was dealt with in the paragraph 3 as adopted on first reading. A number of States had complained that they did not understand what was meant by the word “dignity”. They viewed the paragraph either as a possible avenue for evasion of satisfaction or as totally meaningless and proposed that it should be deleted. There were, however, concerns about excessive demands for various kinds of symbolic acts. The two cases cited by Mr. Arangio-Ruiz had both involved collective demands of a humiliating character.<sup>10</sup> He therefore proposed that paragraph 3 should be retained, with slightly different wording.

20. Paragraph 1 of the proposed new article 45 contained the introductory provision that a State “was obliged to offer satisfaction for any non-material injury” occasioned by an internationally wrongful act. The notion of causality in respect of satisfaction was, of course, different from that used in respect of compensation. New paragraph 2 stated that “In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.” New paragraph 3 listed other forms of satisfaction that might ensure full reparation in particular cases, though, in his view, only two specific cases should be mentioned. New paragraph 4 provided a guarantee against satisfaction that was disproportionate to the injury and took a form humiliating to the responsible State.

21. Turning to the question of interest, he noted that the Commission had rejected Mr. Arangio-Ruiz’s proposal for reasons which, in his view, had not gone to the core of the issue. That proposal had focused on two questions: compound interest and the starting and finishing dates for

<sup>7</sup> See footnote 5 above.

<sup>8</sup> See *Yearbook* . . . 1992, vol. I, 2288th meeting, p. 221, para. 57.

<sup>9</sup> See footnote 6 above.

<sup>10</sup> See *Yearbook* . . . 1989, vol. II (Part One), p. 37, document A/CN.4/425 and Add.1, para. 124.

the calculation of interest. The former, in particular, was a highly controversial issue and very limited practice existed in respect of the award of compound interest in international tribunals. ICJ and PCIJ had awarded or considered the possibility of simple interest on every occasion on which the question of quantification had arisen, e.g. in the *S. S. "Wimbledon"* case, the *Corfu Channel* case (Assessment of Amount of Compensation) and the *Chorzów Factory* case (Merits). Considerable authority could therefore be invoked against the award of compound interest. When Mr. Arangio-Ruiz had proposed, *de lege ferenda*, an article dealing with the subject, he had omitted the basic proposition that, where a sum owed by way of compensation had not been paid, interest fell due on that sum until such time as it was, a proposition that no one had denied in the debate at the forty-third session of the Commission. As a result, the draft article had been rejected. In response to the many comments made by Governments, he proposed that the draft should include an article which would not focus on compound interest, but deal simply with the general question of entitlement to interest.

22. He had also tried, in somewhat more flexible terms, to deal with the second of the issues contained in the article proposed by the former Special Rapporteur, namely, the question of the time period affected by the award of interest. A decision had to be made as to when the amount of compensation on which interest was due should have been paid. There was a major discrepancy in the jurisprudence and the literature on the subject. In some legal traditions, the sum was payable on the day on which the cause of action arose. In others, it was not payable until a demand for payment had been filed by the injured State. Both of those rules were defensible in particular contexts. In other situations, the interest might date from the point at which payment would have fallen due in the normal course of relations between the parties. In order to accommodate the need for flexibility between the different possible starting dates for payment of interest, he proposed a more general formula in article 45 bis, paragraph 2, than that proposed by the former Special Rapporteur, who had favoured the date on which the cause of action had arisen. The question when compensation should be paid would be a matter for the tribunal to determine: immediately upon the cause of action arising, within a reasonable time after a demand had been made or at some other point. He submitted that the new formula solved some of the problems created by the unduly rigid wording of Mr. Arangio-Ruiz's previous proposal. There was broader agreement on the final date on which interest was payable, namely, that on which the obligation to pay had been satisfied, whether by waiver or otherwise. He saw no reason to differ with Mr. Arangio-Ruiz's conclusion on that score.

23. Some Governments thought that the article should cover compound interest and Mann had written vehemently in its favour.<sup>11</sup> Courts, however, had remained very cautious in that regard. For instance, the Iran-United States Claims Tribunal had argued that there was no need for any provision expressly conferring on it the power to award compound interest, since it held such power as part of its

general jurisdiction. However, it would not do so save in extraordinary cases. His own view was that, if a claim was based on an underlying contract providing for compound interest, there should be no objection to the award of such interest. But, even in that context, international tribunals had been extremely cautious. He therefore proposed, in the light of international jurisprudence, that the possibility of compound interest in particular cases should not be ruled out, but that it did not need to be specifically mentioned.

24. He drew attention to a decision by an ICSID tribunal, in which some allowance for compound interest had been made in respect of unpaid compensation for expropriation over a period of some 20 years.<sup>12</sup> As some measure of discretion generally existed as to the interest rate imposed and the mode of its calculation, that principle should be extended to the special cases in which some form of compound interest was allowed. That point could be made clear in the commentary. If the Commission tried to deal in too great detail with the issue of compound interest in the light of the available authorities on compound interest, there was a risk of losing the entire article.

25. Reading out his proposed article 45 bis, he said that the second sentence of paragraph 1, based on that of the former Special Rapporteur, was somewhat loose, but, in the light of the writings of the authorities, it was difficult to be more precise. In paragraph 2 concerning dates, he had used the wording "Unless otherwise agreed or decided" because States could agree that there should be no award of interest and also because tribunals had in some cases exercised levels of flexibility about interest that were inconsistent with the idea that there was a simple right to interest covering any fixed period. For instance, they had allowed interest in respect of shorter periods of time than were strictly applicable or at a lower level than the market rate. That wording was used in some of the draft articles in respect of State succession and although it was somewhat vague, he thought that it was an area in which some degree of flexibility was necessary.

26. One of the issues dealt with in the final provision of chapter II of Part Two, article 46 bis proposed in his third report, on the mitigation of responsibility, had not been covered in the previous draft articles and the other had been dealt with in article 42, paragraph 2, as adopted on first reading, relating to contributory fault. The paragraph in question dealt with a case in which an injured State, or a person on behalf of whom a State was claiming, contributed to the loss by negligence or wilful act or omission, for which various terms such as "contributory negligence" and "comparative negligence" were used by different legal systems. There was well-established jurisprudence that the fault of the victim, where the victim was an individual, could be taken into account in the context of reparation. No State comment had taken issue with that principle. In extending it to injured States, however, the Commission had taken a step by way of progressive development. One or two Governments had queried that step on the ground that the principle of contributory fault

<sup>11</sup> F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), pp. 377 et seq., in particular, p. 383.

<sup>12</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (Case No. ARB/96/1), award of 17 February 2000, paras. 103–105 (*ICSID Review, Foreign Investment Law Journal*, vol. 15, No. 1 (Spring 2000), pp. 167 et seq., at p. 202).

should not apply in State-to-State cases. He saw no reason why it should not. Otherwise, a situation could arise in which a responsible State was made to pay for damage or loss suffered by reason of the conduct of the injured State.

27. He therefore proposed that paragraph 2 should be retained, with minor changes in the wording. His motive for doing so had nothing to do with causation. The former Special Rapporteur had originally proposed that reparation should be reduced where there were multiple causes for the loss.<sup>13</sup> The Drafting Committee had rejected that theory<sup>14</sup> and he had followed suit in his report. He was retaining paragraph 2 rather for considerations of equity, which seemed to apply equally to cases in which the comparative fault was that of the State or a national of the State. He noted, moreover, that, in most cases where a State brought a claim on behalf of a national, it was doing so in its own right.

28. One of the concerns referred to in chapter I, section B, was that injured States should not be over-compensated for losses which might have been caused for complex reasons. He did not think that the principle of the division of causation used by the previous Special Rapporteur as his main vehicle for addressing that problem was the right one. An effort should be made to strike a balance in terms of compensation between the responsible State and the injured State. He was therefore proposing a new provision dealing with mitigation of damage based essentially on the formulation of that principle by ICJ in the *Gab Ž kovo-Nagymaros Project* case.

29. He also intended, in the context of Part Two bis, to propose a principle against double recovery that was not a principle of quantification of reparation. For example, where there were multiple tortfeasors in the case of a plurality of States, a claimant might be awarded the same amount of damages against two States, since they were both equally responsible for the wrong. In all legal systems, however, a plaintiff was not entitled to recover more than the amount of the damage suffered. In the context of the invocation of responsibility, that principle should be reaffirmed. In his view, it related not to quantification, but to invocation. Mitigation of damage, on the other hand, related to the attenuation of the primary amount. A State that unreasonably refused to mitigate damage might find that it was unable to recover all of its losses. The simple principle involved was recognized by legal systems generally and by ICJ. It was therefore appropriate for it to be stated in the draft articles and he proposed a new article 46 bis to that effect.

30. The CHAIRMAN said that the debate on the draft articles on State responsibility would be resumed at the beginning of the second part of the session. A decision would also be taken then on the referral of articles 43 and 44 to the Drafting Committee.

### Diplomatic protection (*concluded*)\* (A/CN.4/506 and Add.1<sup>15</sup>)

[Agenda item 6]

31. Mr. DUGARD (Special Rapporteur), introducing the report of the informal consultations concerning the draft articles on diplomatic protection (ILC(LII)/IC/DP/WP.1), said that, while there had been considerable support during the debate in the Commission for the referral of draft articles 5, 7 and 8 to the Drafting Committee, it had been decided that a decision on the matter should be deferred until informal consultations had been held on draft articles 1, 3 and 6.

32. Three such consultations had taken place. They had focused on article 1, which sought to define the scope of diplomatic protection. It had been suggested, especially by Mr. Sepúlveda (2626th meeting), that the study should include the topic of denial of justice and that article 1 should indicate that it was the intention of the Commission to consider the matter. The Special Rapporteur and others had opposed that view chiefly on the ground that it was a primary rule and that the whole purpose of the topic was to focus on secondary rules.

33. It had, however, been generally agreed that the issue of denial of justice could not be completely avoided and would have to be referred to in the commentary. Elements of the concept would be an essential feature of the provision dealing with exhaustion of local remedies. It had also been agreed that no attempt should be made to deal with denial of justice substantively in the report or in the draft articles and that, accordingly, article 1 should not include any reference to that issue.

34. In the course of the debate, suggestions had been made that certain topics should not be included in the study. Those suggestions had been considered by the informal consultations and it had been agreed that the draft articles should not attempt to deal with the issues listed in paragraph 2, subparagraphs (a) to (d), of the report of the informal consultations. No exclusionary clause would be attached to article 1, but the commentary would make it clear that the draft articles would not cover the issues in question.

35. There had been some debate on whether the scope of the articles should be limited to injury to natural persons. The majority view had been that, at the current stage at least, such a limitation would be unwise and that the articles should deal with both natural and legal persons. Accordingly, the term “national”, as used in article 1, encompassed both categories of persons. There had also been some debate on the question of the inclusion of a reference to “peaceful” procedures. That suggestion would be taken up by the Drafting Committee when considering the three options referred to in the report of the informal consultations.

36. Article 3 had given rise to very little debate, the only question raised being whether the State of nationality had the right to exercise the right provided for in the article, or

<sup>13</sup> See article 8, paragraph 5 (*Yearbook . . . 1989*, vol. II (Part One), p. 56, document A/CN.4/425 and Add.1, para. 191).

<sup>14</sup> See *Yearbook . . . 1992*, vol. I, 2288th meeting, p. 217, paras. 20–26.

\* Resumed from the 2627th meeting.

<sup>15</sup> See footnote 2 above.

was merely entitled to do so. That was a matter for the Drafting Committee to decide.

37. It would be recalled that article 6 had proved rather controversial in the Commission. While recognizing that opinions were divided on the substance of the article, the informal consultations had nevertheless agreed that it should be referred to the Drafting Committee, on the understanding that it would consider including safeguards against abuses of the principle embodied in the article. Three possible ways of providing such safeguards were described in section C of the report of the informal consultations.

38. No objection having been raised to the referral of draft articles 5, 7 and 8, he therefore recommended, in the light of the informal consultations, that draft articles 1, 3, 5, 6, 7 and 8 should be referred to the Drafting Committee.

39. Mr. ECONOMIDES said that none of the three options proposed for article 1 was sufficient in itself; a satisfactory result could be achieved only by combining all three options. He would agree to the referral of article 1 only on the understanding that the Drafting Committee would consider combining the proposed options. He nevertheless feared that such consideration would mean that much of the Committee's time would be lost. Care should also be taken to formulate the article in such a way as to make it clear that diplomatic protection did not mean "a procedure" or "a process" in the sense of "any" procedure or process; it meant a very specific and precise procedure or process in each case. The article obviously required more work.

40. He had still more serious reservations on article 6. Members would recall that he was personally against its inclusion in the draft articles as being contrary to the principle of the equality of States and as having no basis in State practice. In the absence of stronger criteria, how could the Drafting Committee formulate the provisions suggested in section C of the document? In his view, the article should be reconsidered when the Special Rapporteur had put forward more solid arguments in its favour.

41. Mr. CRAWFORD said that he had no difficulty supporting the recommendation that article 6, controversial as it was, should be referred to the Drafting Committee, since that was the Commission's normal practice in such cases once a full debate in the Commission had taken place. Referring to article 1, he expressed the hope that the Drafting Committee would be careful not to infer that the principle of diplomatic protection was applicable in respect of injury to a person occurring outside the territory of the responsible State. As to the use of the term "national" to cover both individuals and corporations, he would be concerned if the last sentence of paragraph 3 of the report of the informal consultations raised any expectation that the Commission was likely to exclude corporations from the scope of the articles in future.

42. Mr. GALICKI said that he shared Mr. Economides' doubts about article 6. In his view, the time had not yet come to refer the article to the Drafting Committee. Many differences of opinion remained to be resolved. Should the article be treated as a reflection of current customary international law? He personally had grave doubts on that score. Or was it an instance of the progressive develop-

ment of international law? If so, it had to gain a greater measure of support from the members of the Commission than would appear to be forthcoming at present. While agreeing to the suggestion that the other articles should be referred to the Drafting Committee, he felt that the Commission should continue its discussion on article 6 during the second part of its current session, preferably within the framework of informal consultations.

43. Mr. ROSENSTOCK said that, in his view, there was sufficient State practice in support of article 6. The contrary opinion reflected a lack of awareness of present-day realities. As was well known, the Drafting Committee was not limited strictly to word polishing; it also looked at the overall balance and, to some extent, at the substance of proposals. On that basis, he strongly supported the recommendation of the informal consultations and thought that a resumption of the debate in the Commission would be most unfortunate.

44. Mr. SIMMA said that he, too, was strongly in favour of referring article 6 to the Drafting Committee. True, only a very few members had attended the informal consultations, but those present had been almost unanimous in supporting the principle embodied in article 6. If the article was an exercise in the progressive development of international law, then that was the course the Commission should take.

45. Mr. GOCO said that, if article 6 were referred to the Drafting Committee, he hoped that the reservations he had expressed during the debate in the Commission would be duly taken into consideration. Referring to article 1, he said it should be made clear in the commentary that the only reason for not including a reference to the concept of denial of justice was that it belonged to the realm of primary rules.

46. Mr. HAFNER said that he shared the views expressed by Mr. Crawford, Mr. Rosenstock and Mr. Simma on the referral of article 6 to the Drafting Committee. When dealing with reservations to treaties, the Commission had decided to refer all the draft guidelines to the Drafting Committee, although not all of them had been endorsed by all members. He saw no reason why the draft articles on diplomatic protection should be treated differently.

47. Mr. Sreenivasa RAO said that article 6 was a very difficult provision involving important questions of policy in bilateral relations. His own view was that the terms "dominant" or "effective" nationality were far from clear and that the article did not allow of an unambiguous interpretation. Since the debate in the Commission had been inconclusive, he agreed with previous speakers that further discussion would help clarify the issue. As to the parallel with the draft guidelines on reservations to treaties drawn by Mr. Hafner, he noted that a more central policy issue was involved in the current case.

48. Mr. DUGARD (Special Rapporteur) said that there was no problem with referral of draft articles 1, 3, 5, 7 and 8, as Mr. Economides had conceded that outstanding issues relating to article 1 could be dealt with by the Drafting Committee. With regard to article 6, he said that the comments in his first report (A/CN.4/506 and Add.1) reflected both positions on the issue. A full debate in the



Commission had shown that opinions continued to be divided and informal consultations on article 6 had therefore been held. The consultations had not been very well attended, but a good discussion had taken place and it had been unanimously agreed that article 6 should be referred to the Drafting Committee, accompanied by the suggestion that consideration should be given to the inclusion of safeguards to prevent abuses. If the Commission now decided not to refer article 6 to the Drafting Committee, he was not sure what purpose would be achieved by another full debate or further informal consultations.

49. Mr. Sreenivasa RAO suggested that it would be helpful if the Special Rapporteur could prepare a short note proposing a definition of the concept of “dominant” or “effective” nationality. If agreement could be reached on that crucial point, he would have no further objection to referring article 6 to the Drafting Committee.

50. Mr. ECONOMIDES said that he endorsed those comments. A note by the Special Rapporteur summing up the debate on article 6 would be useful. Section C of the report of the informal consultations suggested three areas for further work on article 6 and that work could be done only by the Special Rapporteur, not by the Drafting Committee. The Special Rapporteur should look into those matters and submit his findings to the Commission, where additional debate might perhaps take place before the article was referred to the Drafting Committee. Such an additional effort had to be made by the Commission because of the delicate and controversial nature of article 6.

51. Mr. GOCO said that he had reservations about substantive aspects of article 6 and was not sure that the Commission should refer it to the Drafting Committee, although the proper procedural approach would be to do so. If that would not create too many difficulties, the best course might be to resume the discussion of article 6 in plenary.

52. Mr. ROSENSTOCK said the matter had been discussed in plenary and informal consultations, from which no one had been barred, had been held. In reporting back to the Commission, the informal consultations had unanimously recommended that article 6 should be referred to the Drafting Committee. It would be very poor practice at best, and was unlikely to advance the work on article 6, for the Commission to send it back to informal consultations. Even if the Commission referred the article to the Drafting Committee, that did not mean it was approving it. The questions raised could be legitimately discussed while getting on with the work if the Special Rapporteur were to produce a few paragraphs indicating, on the basis of existing practice, which criteria had been used to determine dominant nationality and which were relevant in the context of article 6.

53. Mr. RODRÍGUEZ CEDEÑO said it was true that the question of procedure was closely linked to one of substance. A useful exchange of views had taken place, revealing a lack of agreement on substance which gave rise to doubts as to whether the Drafting Committee should discuss article 6. If the Drafting Committee was to consider the article, however, it must do so with a view to including safeguards, as suggested in section C of the report of the informal consultations.

54. Mr. GALICKI said that his comments on article 6 had been aimed at avoiding problems at a later stage. The Drafting Committee had a narrower field of manoeuvre than working groups or informal consultations did and, if the article was returned to the Commission, but was strongly opposed there, there would be no possible outcome other than rejection.

55. It would be wiser for the Commission to request the Special Rapporteur to prepare some additional materials on the problem of dominant nationality, which he himself saw as crucial, and to discuss the problem again during the second part of the session. He had opposed the article as originally drafted and believed that additional consideration in informal consultations would be useful.

56. The CHAIRMAN, summing up the discussion, recalled that the substance had already been extensively debated in the Commission and all views were reflected in the summary records and in the report of the Commission to the General Assembly. It was the Commission's prerogative to accept or reject the unanimous recommendation by the informal consultations that article 6 should be referred to the Drafting Committee, but, if, contrary to established practice, the issue was reopened, that would create difficulties.

57. He suggested that the Commission should follow the traditional approach of requesting the Drafting Committee to consider all the articles, taking into account all the views expressed, the report of the informal consultations and an additional contribution to be made by the Special Rapporteur. If the Drafting Committee arrived at a point where further progress on article 6 was impossible, the Chairman of the Drafting Committee could always request a plenary debate on the specific problem involved.

58. Mr. CRAWFORD said that he supported that approach. He pointed out that the Commission did not merely rubber stamp the output of the Drafting Committee. When the Drafting Committee had submitted article 6, it had been entirely open to the possibility that the large number of members who had problems with that article might propose its deletion or amendment. He believed it was important to maintain regular procedures, on the understanding that article 6 would probably be amended in some respect.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the approach he had just suggested.

*It was so agreed.*

#### **Organization of work of the session (concluded)\***

[Agenda item 2]

60. The CHAIRMAN announced that the Planning Group had met to discuss the date and place of the Commission's fifty-third session, in 2001, but the discussions had been inconclusive, although there was an emerging

\* Resumed from the 2622nd meeting.

consensus in favour of holding a split session. As a decision had to be taken in the Commission in mid-July if the necessary meeting facilities were to be secured, the Bureau had decided that the working group on split sessions should be re-established. At the preceding session, Mr. Rosenstock had chaired the group and he had agreed to do so again. He had also agreed to conduct extensive informal consultations on the date and place of the next session at the very start of the second part of the current session, and members who wished to express their views on those points should contact him.

#### **Gilberto Amado Memorial Lecture**

61. Mr. BAENA SOARES recalled that, every two years, the Commission held a commemorative lecture in

honour of Gilberto Amado, a founding member who had made valuable contributions to the Commission's work for many years. The practice would be continued at the current session, as Mr. Pellet had agreed to give the lecture, which would be entitled "Human rights and international law" (*Droits de l'homme et droit international*) and be held on Tuesday, 18 July 2000, at 5 p.m.

62. The CHAIRMAN announced that the Commission had completed its work for the first part of its session. He thanked the secretariat staff for their cooperation and assistance.

*The meeting rose at 11.45 a.m.*

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