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**Summary record of the 2636th meeting**

Topic:  
**State responsibility**

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## SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-SECOND SESSION

*Held at Geneva from 10 July to 18 August 2000*

### 2636th MEETING

*Monday, 10 July 2000 at 3.05 p.m.*

*Chairman:* Mr. Chusei YAMADA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

#### 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 members of the Commission to resume their consideration of draft articles 43 and 44, contained in chapter I, section B, of the third report on State responsibility (A/CN.4/507 and Add.1-4) which had been introduced by the Special Rapporteur (2634th meeting) during the first part of the session.

2. Mr. CRAWFORD (Special Rapporteur) said that the debate during the first part of the session had raised a number of questions, for example, on the relationship between restitution and compensation and the usefulness of devoting an entire article to compensation. In response

<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).

to a comment by Mr. Rosenstock (*ibid.*), he had provided a commentary on article 44 in the light of which members of the Commission could decide whether the article itself should be expanded or whether the relatively simple version that he was proposing was sufficient.

3. Mr. ECONOMIDES said that he would refer to articles 43 and 44, but would also make a few remarks on article 45 bis, which he saw as being inextricably linked to article 44.

4. With regard to article 43, he fully shared the view that restitution must be considered as the primary form of reparation, even though compensation was in fact the form most often used. In each case of responsibility, the objective was to wipe out as fully as possible all traces of the internationally wrongful act by restoring the prior situation, in other words, the status quo ante, through restitution in kind. He could agree to the deletion of the exception provided for in article 43, subparagraph (*d*), as adopted on first reading, namely, serious jeopardy to the political independence or economic stability of the responsible State, for two fundamental reasons which the Special Rapporteur mentioned in his third report, namely, that the case was extremely rare and was in any event largely covered by article 43, subparagraph (*c*). He could likewise agree to the deletion of the exception mentioned in subparagraph (*b*)—breach of an obligation arising from a peremptory norm of *jus cogens*—as long as article 29 bis would definitely apply; that was something which the Drafting Committee should consider carefully.

5. A number of drafting changes would be desirable. The phrase “which has committed an internationally wrongful act” should be replaced by the word “responsible”, as had already been done in many instances; in the French text, the word *obligé* should be replaced by the word *tenu*, which was a stronger term more in line with legal usage; and the provision could be made more precise if the words “in kind” were used to modify the reference to restitution. The French text of the *chapeau* of article 43 would thus read: *Tout État responsable est tenu de restituer en nature, c'est-à-dire de rétablir la situation qui existait avant qu'il n'ait commis le fait internationalement illicite, dès lors et pour autant que cette restitution en nature . . . .* The words *ceux qui sont lésés* (those

injured) in subparagraph (c) could be replaced by the words *l'État ou les États lésés* (the State or States injured).

6. With regard to article 44, he favoured wording that was flexible, but as precise as possible, similar to that adopted on first reading. He could agree to a limitation on compensation in a provision such as the one contained in article 42, paragraph 3. He also thought that interest, which was a key element of compensation, should be covered in article 44, paragraph 2 of which could perhaps be expanded for that purpose. The questions of loss of profits and compound interest should be treated with great care in the draft article itself and not only in the commentary. Article 44 should therefore read:

“1. A responsible State is obliged to compensate for the damage caused by the internationally wrongful act that it has committed, to the extent that such damage is not made good by restitution in kind.

“2. For the purposes of the present article, compensation covers any economically assessable damage, interest on any principal sum payable, to the extent necessary to ensure full reparation and, possibly, in certain cases, loss of profits or compound interest.”

Lastly, the part of the Special Rapporteur's proposed article 45 bis relating to the interest rate and mode of calculation, as well as the time period for the payment of interest, could be the subject of a paragraph 3 to be added to article 44.

7. Mr. HE said that chapter II of Part Two, entitled “The forms of reparation”, as proposed by the Special Rapporteur, was based on the fundamental principle of international law that any breach of an engagement involved an obligation to make reparation. That principle, formulated by PCIJ in the *Chorzów Factory* case, had been confirmed by decisions of ICJ and was applied by various international courts and tribunals to the breach of any engagement capable of giving rise to international responsibility. The content of the obligation of reparation could be seen from many angles. In its general sense, it must wipe out as far as possible all the consequences of the internationally wrongful act and re-establish the situation which would have existed if that act had not been committed. Hence the general objective of “full reparation” at which the provisions of chapter II were aimed. Secondly, the obligation of reparation, as the main legal consequence of an internationally wrongful act by a State, did not extend to the indirect or remote results of a breach, as distinct from those flowing directly or immediately. The customary requirement of a sufficient causal link should be clearly spelled out in the relevant provisions on reparation or compensation, or at least in the commentary. Thirdly, there were different views on the issue, but “full reparation” must include *lucrum cessans* and interest because, if it did not, that would run counter to the majority of case law, as well as to the principle of full reparation. Lastly, the relevant text should express or reflect the necessary proportionality between reparation and the loss suffered. The idea that a penalty should be superimposed on full reparation was unacceptable and would be rejected, since the duty of reparation implied in the notion of responsibility should go no further than to wipe out all the consequences of the wrongful act. That was in agreement with the proposition

that, where no damage, material or moral, was proved, no indemnity could be awarded.

8. With regard to restitution dealt with in article 43 proposed by the Special Rapporteur, he said that one approach under which restitution should take precedence over any other form of reparation, including compensation, had been criticized as too rigid and inconsistent with practice by the advocates of a more flexible relationship between restitution and compensation ensuring that the injured State was free to choose whatever forms of remedy it deemed appropriate. The Special Rapporteur, while upholding the primacy of restitution, had endorsed a qualified priority for it, particularly in cases involving legally seized territory or persons or historically or culturally valuable property. The principle of priority would thus be retained in the proposed article 43, subject to certain defined exceptions. In article 43 adopted on first reading, if restitution amounting to full reparation was possible, the author State must not be able to opt for compensation, but was it possible in such cases for the injured State to opt for compensation?

9. With regard to article 44 proposed by the Special Rapporteur, the main question, as the Special Rapporteur indicated in paragraph 166 of the third report, was whether a more detailed formulation of the principle of compensation was required. In view of the importance of compensation as a main method of reparation and the fact that the function of article 44 was to define the scope of compensation, it seemed necessary for the main elements and conditions relating to compensation to be specified, so that the amount thereof could be better assessed. A mere mention of “any economically assessable damage” was not sufficient in the absence of some determining factors. Among them, the customary requirement of a causal link between harm and the internationally wrongful act should be specified and loss of profit should also be indicated, even though there was a separate article on interest which related mainly to the method of calculation. In the light of the unsettled state of law and the divergence of State practice, it would be difficult to draft a more detailed rule on compensation, but article 44 as it now stood was too simplistic to do justice. Although flexible wording could be found for the modalities of reparation, the basic principle of full reparation in the form of compensation should be fully respected and embodied in more detail in the article itself. At the same time, in order to avoid possible abuses, it might be useful to stipulate that no compensation should go beyond the damage caused by the wrongful conduct.

10. Mr. HAFNER pointed out that any comments on articles 43 and 44 depended very much on the outcome of the deliberations on articles 40 and 40 bis. The comments he would now make were based on the assumption that the draft articles related first of all, if not exclusively, to those injured States, in the narrow sense, which could claim the full set of reparations arising from an internationally wrongful act. Secondly, since the final wording of the draft articles depended to a certain extent on the final version of the commentary, he reserved the right to adjust his views on the basis of the commentary if the need arose.

11. On the whole, he endorsed the general approach adopted by the Special Rapporteur to the part of State responsibility under consideration. He favoured a general formulation of the draft articles, since too much detail would make it extremely difficult, if not impossible, to reach general agreement on the text and would create new areas of conflict among States. The most important issue in the field of State responsibility was the acknowledgment of responsibility, not the assessment of damages. That view had been confirmed by ICJ in the *Gab Ž kovo-Nagyvaros Project* case, where, as indicated in paragraph 155 of the report, the Court did not regard issues of compensation as being at the heart of the case. Hence, in quite a number of cases, the amount of damages was left to negotiation. In that connection, he expressed reservations about the idea of resorting more frequently to arbitration awards, which undoubtedly constituted a major source for the ascertainment of existing law. In the first place, arbitral awards did not take account of the fact that State responsibility was often decided directly by the States concerned or national courts and, in the second, they were very often kept secret as one of the conditions of the settlement of disputes.

12. Turning to article 43, he said that *restitutio in integrum* was certainly the preferred reaction to a wrongful act, subject to the choice of the injured State. If it was not as frequent as, for instance, compensation, that was because of its limitations, not because restitution was of a subsidiary nature. Paragraph 142 made it clear that the duty of restitution amounted to the re-establishment of the situation which would have existed without the wrongful act, not to the mere re-establishment of the status quo ante. He had certain problems with the text of the article itself in that connection: account must be taken of the fact that everything was in a state of flux. As to the limitations on the duty of restitution, reference to material impossibility also raised certain problems. It must be asked whether it included legal impossibility. The various theories on the relationship between international and national law gave different answers to that question. The dualistic view seemed to include legal impossibility within material impossibility, contrary to the monistic view, which gave priority to international law. In that context, the Commission must also consider the relationship of article 43 to article 4 of the draft, which excluded resort to national law. In other words, it could be argued that the responsible State could not avoid the duty of re-establishment by reference to its domestic legal order. That would, for instance, be the consequence of a formulation similar to that of article 27 of the 1969 Vienna Convention. However, the formulation of article 4 was not such as to produce the same effect. Hence the question remained as to whether or not material impossibility included legal impossibility and it would be helpful if the commentary at least could address the issue. As to the limitation under article 43, subparagraph (c), the words “those injured” could cause problems if they referred back to article 40 bis. The question was whether the benefits in question were those gained by the individuals suffering from the wrongful act or by the relevant State. Since article 40 bis spoke only of States as the injured entities, that might give the impression that only States were meant in the context of article 43, subparagraph (c), as well. Some clarification in the commentary would therefore be welcome.

13. The new, short and more general form of article 44 proposed by the Special Rapporteur was preferable to the version adopted on first reading, contrary to the views expressed by Mr. Economides. The quantification of damages was not an issue to be dealt with under diplomatic protection, as suggested in paragraph 158. It was certainly impossible to describe the quantification of compensation in more detail. The various decisions adopted in that area prescribed a certain amount of compensation without indicating the criteria used to calculate it. In the “*Rainbow Warrior*” case, for example, no one had been able to discover the criteria considered decisive for the determination of the exact amount of compensation. In the more recent case of the shelling of the Chinese embassy in Belgrade, instead of compensation *stricto sensu*, a sum more or less equivalent to the damage had been paid *ex gratia* and it would certainly be difficult to find out precisely what criteria had been used to determine the amount paid. The principle should be that the compensation offered should ensure that the victim of the wrongful act considered the matter settled.

14. As to the wording of the article, questions could be raised as to whether the term “economically” should be retained, since it might create certain problems. Would it apply, for example, to the consequences of the wrongful extinction by man of an endangered species? The term seemed to have been used so far in a very loose way. Of course, the answer to the question also depended on the meaning of “moral damage” in article 45. Perhaps the solution might be to use the expression “material damage” in article 44 and the phrase “non-material damage” in article 45. The qualifier “material” would certainly be broader than “economically assessable”. Such a choice of terminology would also be justified by the following considerations. Since article 44 spoke of compensation for economically assessable damage, it could be concluded that other forms of damage fell into the ambit of article 45, which spoke of non-material damage. Hence article 44 was obviously intended to cover material damage. There remained a problem resulting from a comparison of article 43 with article 44. The proposed new article 43 spoke of the benefit that those injured would gain from obtaining restitution. Article 44 did not say on whom the damage was inflicted: the injured in the sense of article 40 or 40 bis, or the real injured, such as individuals. It seemed to him that, in both cases, the same subject was meant, namely, the State or individual having suffered from the wrongful act. Some clarification, at least in the commentary, would be helpful. A further question in that context was to whom the compensation was due? To the real victim? Did that mean that the State exercising diplomatic protection had the duty to transfer the compensation to the victim? It seemed to him that, before answering those questions, the Commission must first decide whether the matter came within the scope of diplomatic protection or that of State responsibility. In any case, he would not object to spelling out, at least in the commentary, the duty of compensation as derived from the ordinary meaning of “compensation”. As to the limitations on compensation discussed in paragraphs 161 to 164 of the report, the question had usually been raised in the context of liability, where a wrongful act was not required for compensation. There was a general tendency to limit the amount of compensation, since it would otherwise be

impossible to obtain an insurance contract for certain activities. That situation, referred to in paragraph 163 of the report, did not exist in the context of State responsibility, however. Although he generally agreed with the Special Rapporteur's views on that issue, he thought that the example of ultra-hazardous activity was not an appropriate one in the context. Other considerations could apply. It could be asked whether a State which was required to pay a huge amount of compensation could be led to infringe its human rights obligation to protect the lives and health of its population. Consequently, certain limitations on compensation which the obliged State could invoke in relation to the other State could be derived from such duties under human rights. Another question was whether a State obliged to make compensation could resort to article 33 on state of necessity in order to limit its obligations. That question could perhaps be dealt with in the commentary.

15. Mr. GOCO said that he got the impression from the statements by Mr. Economides and Mr. He that they envisaged a hierarchy in the forms of reparation, in that a State must first seek restitution before it could seek compensation. Restitution, however, was an entitlement, which meant that the injured State was free to exercise it or not. He hoped that the Special Rapporteur could clarify the situation in that regard. According to some statements, the injured State might prefer to seek outright compensation, without going through the process of restitution. He wondered whether seeking restitution should be considered a precondition, whether it had to be proved that restitution was impossible before compensation could be sought and, in other words, whether there was an analogy with civil law, under which restitution had to be sought before action was taken against the guarantor.

16. Mr. CRAWFORD (Special Rapporteur) said that, obviously, in cases where the injured State had the choice to prefer compensation, the election to seek compensation rather than restitution would be legally effective. There was certainly no requirement that all attempts to secure restitution must first be exhausted. In ordinary situations, that was a matter for the injured State. It was possible to think of situations in which the injured State might have no choice and restitution was the only possible outcome, but those were extreme cases. They were better covered under the notion of cessation rather than restitution. The draft articles, particularly in Part Two bis, would make it clear that the injured State—defined in the narrow sense, as Mr. Hafner had said—had the right to elect. That right would be effective in ordinary circumstances and restitution would then become irrelevant, as it often was in practice. There would, of course, be other situations in which it was absolutely clear that restitution was excluded, for example because a loss had definitively occurred, as in the case of a death or a serious and irreversible injury. As for the question of guarantee, mentioned by Mr. Goco, chapter II of Part Two did not deal with the law of guarantee or with situations in which two different States were responsible for different aspects of wrongful conduct. It was concerned only with a single State and the relationship between different forms of reparation in relation to that State. Cases involving a plurality of States would be dealt with during the consideration of chapter III, section B, of his report.

17. Mr. MOMTAZ said that, according to his understanding, the Special Rapporteur would be considering the

question of a plurality of injured States, which he mentioned in paragraph 126 and which the Commission had decided to reconsider at its forty-fifth session, in 1993. He looked forward to seeing how the Special Rapporteur would develop the theme.

18. With regard to article 43, restitution was generally acknowledged to be the form of reparation that conformed most closely to the general principle of responsibility, whereby a State which was the author of an internationally wrongful act was bound to eradicate all the legal and material consequences of that act by re-establishing the situation which had existed before the act had been committed. There also existed an approach to restitution that could be termed "purely restitutive". That seemed to be the approach for which the Special Rapporteur had opted, since the draft article he proposed stated that a State that had committed an internationally wrongful act was "obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed". Such restitution was, of course, without prejudice to any compensation.

19. In the new draft article, the Special Rapporteur reduced the number of exceptions to the obligation to make restitution from four to two. The first exception, material impossibility, raised little difficulty, since it followed from the saying "no one is bound to do what is impossible". The same applied to the second of the exceptions appearing in the text adopted on first reading, which the Special Rapporteur had retained: it went without saying that the wrongdoing State did not have to make restitution if that would involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution instead of compensation.

20. The deletion of the other two exceptions gave rise to some difficulty. The deletion of the exception concerning a breach of an obligation arising from a preemptory norm of general international law seemed to have been based on two arguments. The first was that formulated by France in its observations<sup>3</sup> in the form of a question, and seemingly adopted by the Special Rapporteur, namely, how a reversion to legality could be contrary to a preemptory norm. The second was the fact that no example of a situation in which restitution would breach such a norm had been provided by the previous Special Rapporteur. It seemed that it was the reference to *jus cogens* which had been the real problem and had been the reason for deleting the exception. The fact remained that, in certain cases, restitution risked coming up against insurmountable legal obstacles, and not in some simple, hypothetical instance. In his preliminary report,<sup>4</sup> the previous Special Rapporteur had indicated that situations could be imagined in which restitution would be contrary to some provisions of the Charter of the United Nations, particularly Article 103, or to the rules of treaty law or customary law. He had given the example of nationalizations whose legality was no longer in question. It was indisputable that a State which carried out a lawful nationalization could not be bound by an obligation of restitution. He therefore thought that it

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

<sup>4</sup> *Yearbook . . . 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

might be appropriate to add a third exception to the obligation of restitution, to cover cases where restitution would come up against an insurmountable legal obstacle without necessarily involving a breach of a peremptory norm of general international law. Such an exception would also cover the exception involving a serious threat to the political independence of the wrongdoing State, which appeared in subparagraph (d) of the text adopted on first reading and which could then be deleted.

21. The text proposed by the Special Rapporteur for article 44, relating to compensation, provided for compensation for “any economically assessable damage”, a formula which encompassed at once material damage, moral damage and loss of profits. The need for compensation for material damage arising out of an internationally wrongful act was unanimously agreed and posed no difficulty. As for moral damage, a distinction should be drawn between the moral damage suffered by the person of a national or an agent of the injured State and the moral damage suffered by the State itself. He considered that satisfaction should be the compensation for the latter form of damage, while the compensation for moral damage provided for under article 44 should be restricted to the damage suffered by physical persons. That would be in accordance with current practice. In that regard, reference could be made to the ruling handed down by ICJ in the *Corfu Channel* case, in which compensation had been granted as reparation for psychological damage, and to the decision in the *McNeill* case by the Anglo-Mexican Special Claims Commission.

22. As for loss of profits (*lucrum cessans*), there could be nothing but approval for the conclusion which the Commission had reached at its forty-fifth session and to which the Special Rapporteur referred in the report.<sup>5</sup> The compensation of loss of profits was not universally accepted either in principle or in practice and, since legal authorities were extremely divided in that regard, it was hard to isolate precise rules that would enjoy wide support. Nonetheless, the wording put forward by the Special Rapporteur—“any economically assessable damage”—should be interpreted in an extensive sense, to cover loss of profits, as well. It might be appropriate to say as much in the commentary.

23. With regard to limitations on compensation, the Special Rapporteur himself recognized in paragraph 162 of the report that the issue of crippling compensation claims—those which could deprive a population of its own means of subsistence—merited consideration. Such a problem might well be placed in the category of massive and systematic human rights violations and, without advocating a special regime for human rights, he believed that the Commission should focus on the issue and indicate in the commentary that compensation might be limited in such cases.

24. Mr. GOCO said that the Special Rapporteur’s commentaries on restitution were extremely instructive and the remarks appearing at the end of paragraph 124 and at the beginning of paragraph 126 of the report deserved to be emphasized. The injured State had a choice and it could

very well ask for compensation outright rather than restitution. In the case of a plurality of injured States, the wrongdoing State could be faced with a variety of demands for reparation, some States opting for restitution and others for compensation.

25. One of the wrongful acts that gave rise to an obligation of reparation was the illegal occupation or annexation of territories in a conflict situation, with the accompanying suffering and damage. Thus, the Philippines had undergone enormous suffering during the Second World War, from which it had taken years to recover economically. Manila had been reduced to rubble and had undoubtedly been one of the cities to be most devastated by the war. In cases of war, restitution in kind was not possible, and that was why the Philippines had concluded the Reparations Agreement.<sup>6</sup> Shortly afterwards, the Philippines Congress had adopted Republic Act No. 1789, on the establishment of a reparations commission to utilize all reparations payments to ensure the maximum possible benefits for the people. There was no question of a return to the status quo ante; only compensation had been possible. While article 43 might be helpful, it did not prevent injured States from making agreements on the form of reparation. If the draft article was to be retained, it should therefore be made inapplicable in cases of major upheavals or wars resulting in the total destruction of a country and the loss of thousands of lives. The new version proposed by the Special Rapporteur was clearer than the original wording and had the merit of pointing directly at the obligation of the wrongdoing State rather than at the entitlement of the injured State.

26. He subscribed to the reformulation of article 44 proposed by the Special Rapporteur; it was simpler, clearer and more concise than that adopted on first reading.

27. With regard to remarks that he had made earlier, he had, in speaking of the concept of a guarantee, simply meant that the submission of a demand for restitution was not a precondition for recovery from the guarantor. The Special Rapporteur’s phrase “any economically assessable damage” had the advantage of being broad enough to comprehend all kinds of damages, including *lucrum cessans* and, indeed, interest.

28. Mr. ROSENSTOCK, referring to a remark by an earlier speaker, said that the question at issue was only restitution by the responsible State and hence a situation in which an illegality had occurred. Whether a nationalization or a transfer of territory was involved, the fact that it could have occurred legally did not mean that there need be any bar to restitution.

29. The CHAIRMAN, speaking as a member of the Commission, noted that, in paragraphs 136 to 143 of the report, the Special Rapporteur cited the *Great Belt* case and dealt fairly extensively with the question of indication of provisional measures. He believed that injunction was outside the classic concept of restitution and wished to know how the Special Rapporteur intended to proceed in that regard.

<sup>5</sup> See paragraph (27) of the commentary to article 8 (*Yearbook . . . 1993*, vol. II (Part Two), p. 73).

<sup>6</sup> Signed at Manila on 9 May 1956 (United Nations, *Treaty Series*, vol. 285, No. 4148, p. 3).

30. As to compensation, he noted that paragraph 155 referred to the *Gabčovo-Nagymaros Project* case, stating that the ICJ had suggested a zero-sum agreement. Moreover, in the *Klöckner* case, the Arbitral Tribunal had found that both parties had equally violated their contracts. He asked whether the Special Rapporteur was contemplating introducing the concept into the draft articles.

31. Mr. CRAWFORD (Special Rapporteur), replying to the Chairman's remarks, said that he did not consider the indication of provisional measures to be within the scope of reparation. He had cited the *Great Belt* case because, at the provisional measures stage, one party had argued that, if the bridge was to be built, the disadvantage of demolishing it would outweigh the loss to Finland. There had therefore been no case for provisional measures. Although the preparations for the bridge had been in a reasonably advanced state, it had not yet been built and the ICJ had not been prepared to accept the argument at that stage, stating that it could not exclude the possibility that it would order the demolition of the bridge if it considered it an impediment of a right of passage.

32. As for the second question raised by the Chairman, he said that he had been trying to grapple with a problem raised by Mr. Arangio-Ruiz and other writers, namely, the sharp contrast between the theory and the practice. Everyone said that restitution was the first means of reparation, but, in practice, that was rare. As for the issue of offsetting one party's violations by another, that related, in part, to a procedural issue, sometimes known as set-off, which was not really part of the law of responsibility.

33. Lastly, he recalled that another issue had arisen in the *Klöckner* case mentioned by the Chairman, namely, the exception of non-performance. He would discuss the issue in chapter III, after considering the issues relating to countermeasures. He thought, however, that the application of the exception was virtually limited to obligations arising by virtue of treaties. There was therefore no need for it in the draft articles.

*The meeting rose at 4.40 p.m.*

## 2637th MEETING

*Tuesday, 11 July 2000, at 10 a.m.*

*Chairman:* Mr. Peter TOMKA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, 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 Commission to resume its discussion of chapter I, section B, of the third report (A/CN.4/507 and Add.1–4), and specifically, articles 43 and 44, with a view to referring them to the Drafting Committee.

2. Mr. SIMMA said the Special Rapporteur deserved high praise not only for the sheer volume of material he had provided but above all for his special talent, which lay in his ability to make constant improvements on earlier work.

3. In his view, the discussion still suffered from a certain lack of clarity about other parts of the draft that were of relevance to the current discussion. Thus, Mr. Hafner had mentioned (2636th meeting), that there was a close relationship between remedies themselves and the question of who could invoke which specific ones, a relationship expressed in article 40 bis. For example, in the event of an egregious breach of human rights, according to the Special Rapporteur, a State other than the directly injured State was to have the right to take countermeasures for the purpose of effecting cessation. He fully agreed with that. But could such countermeasures on the part of not directly injured States also be taken in order to gain compensation or other forms of reparation for the victim? In a case of violations by a State of the human rights of people living in that State, there was a need for such compensation, and the question was who could act, and in what way, to secure it. All that was not yet clear from the provisions so far elaborated by the Special Rapporteur.

4. The distinction between cessation and restitution played an important role in that context. According to the Special Rapporteur, restitution concerned the wiping out of past injury, whereas cessation had to do with stopping an ongoing injury. He would like clarification, however, of certain instances of an obligation of restitution mentioned in the third report. For example, if a person was illegally detained, as a matter of course restitution had to take precedence over compensation. A State could not simply demand compensation, then take the money and run, leaving the person to languish in prison. But how could one speak of restitution—in that case wiping out past injury, if the person was still in prison illegally?

5. In the matter of the priority of restitution over compensation, if a choice could indeed be made between the two, only the injured State could do it. Recalling comments made by Mr. Momtaz (*ibid.*), he said the view that, in expropriation cases, the responsible State had a choice between restitution of the property taken illegally or compensation of the victim was highly questionable. He was, of course speaking in that context of compensation under

<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).