Document:-

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Summary record of the 2638th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2000, vol. I

concerned because it was clear from the debate on article 40 what lay ahead. The articles had to be drafted so that they could be invoked by the injured State in a bilateral context, by one of several States injured in a multilateral context, or indeed by States which were in the position of Ethiopia and Liberia in the *South West Africa* case. Restitution could be sought by different States, and compensation could be sought on behalf of a variety of interests. The continued tendency to treat everything as if it was bilateral lay at the heart of the restructuring of Part Two. Mr. Pellet had accused him of not taking the detail of article 44 sufficiently seriously, but the issue was still open and if the Commission wished he would be happy to propose more detailed articles dealing with more specific issues at the next session.

72. The point was that each of the articles could be invoked by different States. If Germany, having won the *Chorzów Factory* case had then sought double recovery because money had already been paid to the factory owners, that would have been excluded. It was essential to take account of the different legal relations involved, including legal relations with non-State entities. It was not possible to reduce everything to the State-to-State bilateral context. If there was any virtue in his third report, it was in the reconception of responsibility in that multi-layered way, which was the only way to achieve a responsive, modern conception of responsibility.

73. In terms of the formulation of restitution, Mr. Economides had agreed with him that the words "in kind" were unnecessary, but that was a matter for the Drafting Committee. Personally, he was irrevocably opposed to introducing Latin into the draft articles. Efforts should always be made to find vernacular expressions, and reference to a dead language in order to paper over difficulties could not be tolerated.

74. On the question of *lucrum cessans*, loss of profits, there was a majority view in the Commission that the reference to it should be reintroduced. However, the difficulty with that in regard to article 44 was that it decodified the existing law on loss of profits. If the Commission thought that the reference should indeed be reintroduced, then a further article was required. He had sought to address the various issues involved by means of the commentary, drafted with considerable effort. The issues would also be raised in connection with article 45 bis, and, they could be dealt with when that article came to be discussed. His own strong preference was to retain the separate identity of article 45 bis and not to subsume it into article 44. The tendency to subsume everything into article 44, which had certainly been evident on first reading, was one of the reasons why only general formulations were possible. A specific formulation on interest was possible, and a specific treatment of loss of profits might also be possible. Neither of them, however, should involve vague formulations in general articles that were quite different in scope.

75. It was perfectly plain that article 44 covered moral damage to individuals, whereas what was called moral damage to States was intended to be dealt with in article 45. The use of the term "moral damage" was itself confusing for reasons he explained in relation to article 45. The content of the position should be made clear, and questionable terms like "moral" should be left to the commentaries.

76. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 43 and 44 to the Drafting Committee.

It was so agreed.

77. Mr. ROSENSTOCK, speaking on a point of order, asked whether the specific proposals made by Mr. Economides in relation to articles 43 and 44 would also be forwarded to the Drafting Committee.

78. The CHAIRMAN said that indeed they would. Furthermore, several members had refrained from speaking in the debate on the understanding that they would make their views known in the Drafting Committee.

The meeting rose at 1.15 p.m.

2638th MEETING

Wednesday, 12 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. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 45, 45 bis and 46 bis proposed by the Special Rapporteur in chapter I, section B, of his third report (A/CN.4/507 and Add.1–4).

[1] 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.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

2. Mr. HAFNER said that he would devote the first part of his statement to article 45, which he saw as the thorniest of the draft articles. He endorsed the proposal to replace "moral damage" by "non-material injury", not only for the reasons given by the Special Rapporteur, but also because the adjective "moral" seemed to connote the concept of morality. Satisfaction was designed to cover all damage that could not be covered either by reparation or by compensation and thus certainly involved more than a breach of morality. On the other hand, it was clear that even loss of life could give rise to the duty of compensation rather than of satisfaction. Thus, when, during an official hunting party in the then Yugoslavia, the Austrian ambassador had accidentally killed the French ambassador, his widow had sued the Austrian State, seeking financial compensation. The Austrian courts had precisely calculated the losses suffered. The amount paid would certainly constitute compensation, not satisfaction. What, in such a context, should be covered by satisfaction would be reparation for the moral or emotional damage caused by the loss. Incidentally, he saw no reason why paragraph 1 should refer to the injury "occasioned" by the act, rather than "caused", the formulation used in the other articles.

3. Generally, he considered that the list of measures enumerated in paragraph 3 should be non-exhaustive. He was not convinced that acknowledgement of the breach must be the first step, unless the injured State insisted on that form of satisfaction. It was often very important for the wrongdoing State to save face, for instance, by expressing its regret without expressly acknowledging the breach. In such a situation the question whether an internationally wrongful act had or had not been committed remained pending, but a court to which the victim might subsequently have recourse would have to recognize that expression of regret as part of the satisfaction offered by the other State. On the other hand, the victim was certainly entitled to declare itself satisfied only in certain circumstances, which could include explicit acknowledgement of the breach.

4. As to nominal damages, there was no need to include them in the article in view of the non-exhaustive nature of the list and the rather exceptional nature of the case. As to punitive damages, it must be acknowledged that they were not recognized in international law. In that connection it might be interesting to refer to great philosophers such as Kant, who had rejected the concept of punitive damages because they could exist only in a system based on subordination, whereas international law was governed by the principle of equality.

5. Paragraph 3 (*b*) referred to "damages reflecting the gravity of the injury", an expression that gave rise to some problems. The text implied that those damages were a component of full reparation, in other words, that they were necessary in order to eliminate all the consequences of the wrongful act. The expression "gravity of the injury" could be interpreted in two ways: it might refer either to the gravity of the wrongful act or to the gravity of the harm suffered. Normal usage seemed to favour the first sense, in which case the question arose whether elimination of all the consequences of the wrongful act was the real purpose of damages of that kind, since it could be inferred from the text that the extent of the consequences of the wrongful act depended on the gravity of the offence. Hence, it was not the damage suffered by the victim that determined the consequences of the wrongful act, but the wrongful act itself and the circumstances in which it had been committed.

6. If the word "gravity" was taken in the second sense, that of the gravity of the damage suffered by the victim, one might ask what circumstances defined that gravity. The determining factor could not be the amount of the damage, since that aspect was already covered by the definition of reparation, which was to re-establish the situation which had existed before the wrongful act was committed. Hence, the gravity could be defined only on the basis of a subjective assessment by the victim, who might be tempted to make exorbitant claims, the justification for which could not be assessed in the absence of an appropriate procedure for so doing. Did the gravity of the injury depend, then, on the particular nature of the primary rule breached or on the manner in which the wrongful act had been committed?

7. It seemed preferable to restrict the scope of damages to cases of "gross infringement of the rights of the injured State", the formulation used in article 45, paragraph 2 (*c*), as adopted on first reading. In paragraph 191 of his report, the Special Rapporteur explained his reasons for excluding that restriction, but it would be interesting to know why damages had been awarded in the cases he had cited: was it because of the gravity of the injury or for some other reason? There were also cases where the damages awarded, while not nominal, had also not been excessive. Yet the formulation proposed established no quantitative limitation and gave the impression that damages could always be claimed and were subject only to a general limitation. He would thus prefer a tighter formulation of that provision.

8. Paragraph 3 (*c*) raised the question of the meaning of the expression "serious misconduct". Whether a State initiated proceedings against one of its officials only in cases of serious misconduct or also in cases of, for example, negligence would depend on its internal law. As the introductory phrase of the paragraph restricted its scope to cases where "circumstances so require", the adjective "serious" could be deleted. Moreover, if the primary rule already required action to be taken against State officials in cases of misconduct, that qualifier would encroach on the primary rule.

9. As to article 45, paragraph 4, the words "should not" needed to be taken as not necessarily excluding humiliating acts, for instance, where the initial wrongful act had itself been extremely humiliating. Furthermore, the very act of acknowledging the breach might be considered as humiliating by certain States and it must thus be clearly indicated that the rule in paragraph 4 must not be understood as applicable *in extenso*.

10. Turning to the other proposed articles, he said that interest, dealt with in article 45 bis, might be regarded as already covered by the duty to compensate in respect of *lucrum cessans* under article 44. Accordingly, that provision could be dispensed with. If there was nevertheless a need to refer explicitly to interest, one could delete the second sentence of paragraph 1, and also the whole of

paragraph 2, whose content was already covered by the concept of full compensation.

11. Article 46 bis was based on two ideas, contributory fault and the duty to mitigate the damage. With regard to the former, he wondered to what extent article 27, on aid or assistance, applied to the situation envisaged. It could be argued that the State contributing to the damage within the meaning of article 46 bis, subparagraph (*a*), was in the situation of a State aiding or assisting another State in the commission of a wrongful act as envisaged in article 27. It could of course also be argued that the victim State could not commit a wrongful act against itself; but, as formulated, article 27 did not require the contributing State to have committed an independent delict; it spoke only of a fiction. It could also be argued, to the contrary, that article 46 bis referred only to a contribution to the damage, and not to a contribution to the wrongful act. Some clarification in that regard would be helpful.

12. The reference to different degrees of fault, or to *mens rea*, raised another problem: would "negligence" refer only to gross negligence or also to slight negligence? That concept was referred to in the Convention on International Liability for Damage Caused by Space Objects. In his view, only "gross" negligence or serious misconduct could be regarded as limiting the extent of reparation.

13. The second issue addressed in that article was certainly connected with the first. It was to be noted that subparagraph (*a*) referred to "any State, person or entity", whereas subparagraph (*b*) referred, according to paragraph 222 of the report, only to the injured State. Thus, if a private company suffered an injury, could one not proceed from the assumption that it had taken measures to mitigate the damage? Of course, it could be argued that one could not impose a duty on private entities; however, neither ICJ in the *Gabčíkovo-Nagymaros Project* case nor subparagraph (*b*) presupposed a legal duty to mitigate the damage: the subparagraph simply stated that account must be taken of whether measures to mitigate the damage had been taken. What was the reason for that different approach?

14. The economic calculation entailed by such a rule had the result that, if a wrongful act had caused damage and the victim State had taken protective measures, that State was entitled to full reparation, including, it was to be hoped, the cost of those measures. Where it had taken no such measures, its entitlement to reparation would be reduced. Consequently, each and every State must always reckon with the possibility that a wrongful act might be committed and must take precautionary measures against that eventuality. In the worst case, a State would be obliged to maintain an army in order to defend itself and to make use of it, for, if the aggressor State met with no resistance, the State attacked could not demand full reparation. In his view, the duty to take mitigating measures applied only in the field of environmental law. It could be deduced from the primary rules and there was no need to include it in the general context of that provision.

15. Lastly, the question arose whether conditions for mitigation of responsibility also applied to restitution. If so, the object of the restitution could be restricted. Would it then be for the wrongdoing State to decide on the extent of the restitution?

16. Mr. GAJA noted that, whereas the responsible State was "obliged to make restitution" and "obliged to compensate" in articles 43 and 44, respectively, under article 45 it was obliged simply to "offer" satisfaction for any non-material injury occasioned. That concept of "offering" was probably due to the perception that satisfaction could hardly be defined in the abstract. Admittedly, the other terms were also vague: the word "restitution" covered a concept that was to some extent controversial, but which implied re-establishment of the situation existing before the commission of the wrongful act; and the word "compensation" was not fully defined either, but always implied the payment of a sum of money. "Satisfaction" was much vaguer because its modalities could be very heterogeneous. Moreover, the wrongdoing State would generally be reluctant to give satisfaction, unless it was certain that to do so would settle a claim against it.

17. Generally, satisfaction was given only on the basis of an agreement specifying the form it would take. Examples of the various possible modalities could be given in the commentary. If that course were to be adopted, the drafting of article 45 could be greatly simplified, so as to read: "The wrongdoing State has a duty to give satisfaction. The specific modalities of satisfaction are to be agreed by the States concerned". It would then be easier to include in the concept of satisfaction the case of a declaration of wrongfulness made by judgement of an international court or by an arbitral award. That type of reparation, to which the Special Rapporteur drew attention in paragraphs 183 to 185 of his report, had been awarded also by the International Tribunal for the Law of the Sea in *The M.V. "Saiga" (No. 2)* judgement. The agreement of the parties could be to the effect of empowering a tribunal to define what form reparation, if any, should take. In way of satisfaction, the tribunal might order disciplinary action to be taken against the State officials guilty of misconduct or decide that the mere fact that it had found that a wrongful act had been committed constituted sufficient satisfaction. That case would be much more difficult to comprehend if the idea that satisfaction must be "offered" by the wrongdoing State was retained.

18. Mr. GOCO said that he wondered why Mr. Hafner endorsed the Special Rapporteur's wish to replace the term "moral damage" by the term "non-material injury". The concept of moral damage existed in internal law, where it gave rise to no confusion.

19. Referring to the version of article 45 adopted on first reading, he said it was his understanding that satisfaction was by definition necessary in order for full reparation to be made. Yet it seemed that reparation could follow the claim for satisfaction: for instance, the aborigines of Australia had requested the Australian head of Government to apologize to their people for its past actions. The head of State was refusing to apologize, apparently for fear that an official expression of apology might result in an inundation of claims for reparation.

20. Mr. CRAWFORD (Special Rapporteur) replied that the "moral damage" provided for in some internal legislation was already covered by article 44: compensation could make reparation for pain and suffering to individuals. Using the same term in a different sense in article 45 would give rise to confusion. The latter article was

concerned with the very vague concept of *injuria*, namely, harm that was not readily economically assessable. One of the experts in that field, Dominicé, also proposed the term "non-material injury".[3]

21. As for the requirement to offer apologies, that was a very well attested concept. In paragraph 2, the requirement was qualified by the proviso "as appropriate". It would be rather odd if a State that had obtained restitution and compensation were also to demand satisfaction and, having not obtained it, were to take countermeasures.

22. Mr. Gaja had made an interesting proposal which would make it possible to include the role of an international court or international arbitral award in the context of satisfaction. But the Commission could not formulate its draft articles from the perspective of an international court because it could not assume that such a court would one day exist. If one could be sure of that, many of the drafting difficulties would disappear, for instance, with regard to the calculation of interest.

23. Mr. HAFNER, responding to Mr. Goco's remarks, said that the law also used the term "moral person", without any confusion arising. That being said, in addition to the reasons given by the Special Rapporteur to justify the choice of the term "non-material", it had also to be borne in mind that the proposed change allowed for a symmetrical contrast between article 44, concerning material injury, and article 45, concerning non-material injury. That format made it very clear that the two forms of reparation, namely, compensation and satisfaction, did not overlap.

24. Mr. PELLET, continuing with the general comments he had begun to make (2637th meeting) about the approach adopted by the Special Rapporteur, said he thought that the idea of deferring the discussion on crime or at least its conclusion would not only complicate the Commission's life and work but could also place the Special Rapporteur in the same position as his predecessor, namely, discovering too late that certain phenomena he had found anomalous could be explained by bringing in the notion of crime. Thus, while the victim State usually had a choice between *restitutio in integrum* and compensation, that choice no longer existed when the internationally wrongful act constituted a crime, i.e. at least a breach of a peremptory norm of general international law, because it could not refrain alone from applying a norm that the international community as a whole was concerned to see respected. Moreover, the Czech Republic, cited in paragraph 174 of the report, had rightly suggested in connection with paragraph 2 (*c*) of article 45 adopted on first reading (which had become paragraph 3 (*b*) in the text proposed by the Special Rapporteur) that damages on a more than nominal scale were conceivable in the case of crimes, but not in the case of lesser offences (*délits*) or mere internationally wrongful acts.[4] It was for that reason too that he was opposed to the deletion of the reference to the gravity of the infringement, a step that he feared was due to the Special Rapporteur's opposition to the notion of a crime rather than to any rational considerations. Paragraph 2 (*d*) of article 45 adopted on first reading, which had become paragraph 3 (*c*) of proposed new article 45, would have benefited from consideration in the light of the notion of a State "crime" and it would have been instructive to draw a parallel between "the serious misconduct of officials or … the criminal conduct of any person" and article 19, on crimes, and to examine the possible relationship between the two —or three—concepts involved. He stressed that the other general comments he had made (ibid.) were also applicable to article 45, above all the idea that the Commission should adopt as a guiding principle and an iron law the need for full reparation, i.e. that, on the one hand, the damage caused by the internationally wrongful act must be fully repaired and, on the other, that the reparation should not exceed the actual compensation for the damage.

25. Given his views on those points, he had serious reservations about both the old version of article 45 and the new version proposed by the Special Rapporteur.

26. The wording of paragraph 1 should clearly be brought into line with the drafting changes to be made to the articles on *restitutio in integrum* and compensation. In particular, the term "non-material injury" was unconvincing for two reasons. First, while the term "moral damage—or injury" was well established, that of "non-material injury" was considerably more innovative, although it meant exactly the same thing. What the Special Rapporteur was referring to—and he agreed with him in substance—was the moral damage suffered directly or immediately by the State itself as opposed to the moral damage suffered by its nationals on behalf of whom it exercised diplomatic protection. The problem—and the second point on which he disagreed with the proposed wording—was that it omitted the crucial detail that the purpose—and doubtless the sole purpose—of satisfaction was to repair the moral damage suffered by the State itself. In a footnote to paragraph 181 of the report, the Special Rapporteur mentioned that he had taken the term "non-material injury" from an article by Dominicé. After thinking that it might be sufficient to reflect that detail in article 45, paragraph 1, by referring to the "moral injury suffered by the State", he agreed that it failed to solve the problem because, when a State exercised diplomatic protection "on behalf of one of its own", it was supposed to be exercising its own right. The notion of "immediate moral damage"—a familiar term in French legal scholarship—should perhaps therefore be included in paragraph 1, with a definition in the commentary. In any case, it was a detail that could not be omitted.

27. Turning to paragraph 2, he said that the expression "In the first place" was totally redundant. He also had serious reservations about the use of the conditional "*devrait prendre*" in a legal text. As a declaration was, in his view, the minimum form of satisfaction, the precautionary use of the conditional was uncalled for. On the other hand, he agreed with the Special Rapporteur that a court's findings of wrongfulness should not be mentioned, not so much for the reasons set forth in paragraphs 183 and 184 of the report as for that contained in paragraph 185, namely, that the Commission's draft articles concerned relations between States and not the powers of international tribunals and arbitrators. And it was just as unnecessary, in his view, to mention declaratory judgements as it was to mention judicial or arbitral awards of

[3] See 2635th meeting, footnote 3.

[4] See 2613th meeting, footnote 3.

compensation. Lastly, he expressed disapproval of the expression "as appropriate", which he was inclined to view as a means of evading the issues, but he was willing to accept it if the Commission did not wish to be more precise and if the "cases" referred to were explained in the commentary and illustrated by examples.

28. He had five comments to make on paragraph 3. First, the phrase "where circumstances so require" could be criticized on the same grounds as "as appropriate" because what was interesting and useful for States, courts and arbitrators to know was in precisely what cases and circumstances a particular step should be taken, but there again he was willing to accept the phrase if the omissions were partly offset in the commentary. Secondly, he approved of the renewed reference to "full reparation" in the *chapeau* of paragraph 3. Thirdly, the words "inter alia" duplicated, to say the least, the words *telles que* in the French version and "including" in the English version.

29. Fourthly, while admitting, in principle, that damages could replace satisfaction, he strongly disagreed with the Special Rapporteur's analysis of damages. On the one hand, damages could not be anything but nominal (it being understood that their symbolic nature could be modified) in cases where there had been no crime; however, if punitive or aggravated damages, i.e. not purely nominal damages (a subtle difference that did not exist in civil law), were acceptable, the only possible ground for such acceptance was the commission of a crime. While that therefore constituted one of the consequences of a crime that should be added to article 52, it had no place in article 45. He rejected the idea that a State could be "punished" in such a way for a "mere" infringement of international law because he was still convinced that the notion of fault was out of place in the international law of responsibility save in cases of crime. In other words, aggravated or non-nominal damages were acceptable only in cases of "gross infringement"—a term that the Special Rapporteur unfortunately proposed to delete—of a rule of fundamental importance, not only for the injured State, but also for the international community as a whole, i.e. what was called —or what should be called—a crime, constituting, in fact, one of its consequences. Furthermore, the damages reflected the gravity of the infringement because the latter could be assessed in financial terms, so that what was involved was no longer satisfaction, but compensation. It followed that, in the case of the first two subparagraphs of paragraph 3, he was in favour of retaining subparagraph (*a*) on nominal damages and of deleting subparagraph (*b*) from article 45 and transferring it to the chapter on the consequences of crimes, i.e. the consequences of gross infringements of rules of fundamental importance for the international community as a whole.

30. Fifthly, subparagraph (*c*) seemed somewhat inconsequential, despite the existence of precedents such as in the case of the *"Rainbow Warrior"*, and gave rise to many problems. Thus, if breaches were not due to the serious misconduct of persons acting in their official capacity, they did not entail State responsibility and therefore had no place in the draft articles. On the other hand, if they were committed by persons acting in their official capacity, it could be asked whether such "transparency" of the State was appropriate. In his view, an affirmative answer could be given only in the case of an international crime and the question of State transparency should therefore be addressed in the chapter on crimes or any equivalent concept. In any case, subparagraph (*c*) could be omitted from article 45, especially if the list in paragraph 3 was not exhaustive.

31. With regard to paragraph 4, the principle of proportionality obviously presented no problem, but he thought that, as it did not relate specifically to satisfaction, it might be placed more appropriately either in article 37 bis or in the overall *chapeau* of chapter II. At all events, he restated his opposition to the last phrase of paragraph 4 because he saw no reason to show consideration for the dignity of a State that had humiliated another State. In any case, the types of satisfaction mentioned in paragraphs 2 and 3 were in no way "humiliating": in the case of a State, it was only a matter of acknowledging that it had failed to respect a rule of international law—a failure that could perhaps be described as "humiliating" rather than its acknowledgement.

32. As to article 45 bis, on interest, first of all, he agreed in principle that an article on the subject should be included in the draft articles. Moreover, he noted that the Special Rapporteur, after observing that the rules of positive law were vague, proceeded undeterred to sketch at least a few broad guidelines that represented a solid advance compared with the silence of the existing draft articles. He had adopted a slightly different approach, however, to compound interest. No matter how cautious previous judicial opinion had been on that score, if compound interest was necessary for full reparation, there was no reason to rule it out and the commentary should adopt a less negative approach to the issue.

33. As to the actual wording of article 45 bis, he was surprised at the complication introduced by the phrase "on any principal sum payable under these draft articles". Surely it would be far simpler to speak of the compensation due, where appropriate, under article 44. Although no such statement was made in the report, the Special Rapporteur seemed to think that the "principal sums payable" included both compensation in terms of article 44 and damages in terms of article 45. But as damages should only be nominal, as already noted, save in the case of a crime, they should not lead to the payment of interest. Moreover, as damages always consisted of a lump sum, they could not give rise to the payment of interest save in the case of moratory interest, which the Special Rapporteur proposed to omit. He therefore suggested that article 45 bis should become article 44 bis and deal only with interest due on compensation payable under article 44. Furthermore, the Drafting Committee should reconsider the wording of the second sentence of paragraph 1, which contained an idea that seemed to be sound.

34. The first phrase of paragraph 2, which read "[u]nless otherwise agreed or decided" was unnecessary because it was a precaution applicable to all the provisions of chapter II and indeed to the whole of the draft articles. Introducing the phrase in that context rather than elsewhere might encourage inappropriate arguments *a contrario*.

35. The remainder of paragraph 2 seemed clear in terms of fixing the *dies ad quem*, but unclear in terms of the *dies*

a quo because the French and English versions diverged, although both drafts had the status of original texts. The French version was difficult to understand, but once the meaning was grasped, the underlying idea seemed preferable to that expressed in the English version, whose surface simplicity seemed to be due to an error. It was unsatisfactory to say "interest runs from the date when compensation should have been paid" because that was the regime applicable to moratory interest, which the Special Rapporteur had rightly excluded on the grounds that it was a matter of international procedure and hence outside the scope of the law of responsibility. In practice, interest seemed to be payable from the date of the wrongful act or, more precisely, from the date on which the damage had occurred or, even more precisely, from the date with effect from which the compensation no longer fully covered the damage; that was certainly the idea underlying the French text, although it was poorly formulated.

36. In the French version of article 46 bis, he proposed adding the word *de* after the word *ou* in subparagraph (*a*) so as not to give the impression that the negligence must be deliberate. Secondly, he asked for assurance that subparagraph (*a*) included, but was not limited to, the "clean hands" principle because he was puzzled by the fact that there was no mention of the principle in the brief introductory section.

37. With regard to subparagraph (*b*), he wondered whether it implied that the victim State had a duty to mitigate the damage. The reply to that question had major practical implications which would have to be specified, preferably in the article itself, at least by allusion, rather than in the commentary. An affirmative reply would mean that a State that had been in a position to mitigate the damage and had not done so should be penalized in terms of reparation; a negative reply would risk encouraging States to pursue the worst possible policies to achieve their aims. In that connection, the pleadings in the *Gab Ź kovo-Nagymaros Project* case before ICJ, especially that of Sir Arthur Watts, contained interesting developments. In his view, there was scope for progressive development in that area; the Commission could and should adopt a stance on the matter. At all events, the question was on the table, as indicated in paragraph 222 of the report, which failed to provide a clear answer, and the commentary ought to adopt a less enigmatic approach.

38. Mr. CRAWFORD (Special Rapporteur) acknowledged that the definition of the *dies a quo* in the French version of article 45 bis, paragraph 2, was unsatisfactory. It was a point that needed to be taken up later in the discussion. He also acknowledged the contradiction in the English version and noted that the word "compensation" in paragraph 2 should read "principal sum". Although the principal sum on which interest was payable would normally be equivalent to compensation under article 44, circumstances could be envisaged in which that was not the case, but interest was nonetheless payable.

39. With regard to article 46 bis, subparagraph (*a*) was not limited to the "clean hands" doctrine. He thought that ICJ in the *Gab Ź kovo-Nagymaros Project* case had established the "duty" to mitigate damage, in the paragraph of its judgment cited in paragraph 30 of the report. That stance provided authority for the proposition that it was possible, in determining the amount of reparation, to take into account the question whether the injured State had taken reasonable action to mitigate the damage. Mr. Pellet's comment on the policy of the worst possible scenario was certainly pertinent in that regard.

40. Mr. ADDO asked Mr. Pellet whether he thought that only nominal damages could be awarded in all cases involving satisfaction and, in particular, whether he viewed the US$ 7 million that France had been required to pay into a fund in the *"Rainbow Warrior"* case as a nominal sum. Would he not consider that full reparation could include damages that were not necessarily nominal?

41. Mr. PELLET offered three explanations for the *"Rainbow Warrior*" case. First, the Secretary-General had not acted as an arbiter in the strict sense of the term, as he had merely proposed a solution that had been accepted. The outcome could therefore be viewed as an amicable settlement. Secondly, France had, after all, been guilty of a serious breach of a fundamental principle of international law that could be described as a crime. The third explanation, and the one he preferred, consisted in an affirmative reply to Mr. Addo's question, namely, that there had been an award of nominal damages in the case in point, but on a substantial scale so that the symbolism struck home. It had actually been quite an exceptional settlement based on the understanding that the sum paid would be used to develop friendly relations between France and New Zealand. It was thus not a straightforward application of a rule of general international law, but an ad hoc settlement that was less embarrassing than Mr. Addo seemed to think.

42. Mr. ROSENSTOCK said he agreed with Mr. Pellet that the phrase "Unless otherwise agreed or decided" in paragraph 2 of proposed article 45 bis should be deleted. On the other hand, he was extremely puzzled by Mr. Pellet's question and the Special Rapporteur's reply about the date from which interest fell due. As he saw it, interest should fall due from the date on which the incident or damage had occurred and not from the date of the arbitral decision, which might be far removed in time from the former date.

43. Mr. CRAWFORD (Special Rapporteur) said that the wording "the principal sum should have been paid" had been used solely in order to allow some flexibility. The date on which damage had been caused could be later than that on which the breach had occurred. Various situations could arise in which a brief period elapsed and a certain amount of flexibility was discernible in court decisions. In principle, however, the decisive date was that on which the damage had occurred and certainly not that of the judgement.

44. With regard to nominal damages, he took it that Mr. Pellet used the word "symbolic" to mean "nominal" (a negligible sum) and not to mean "having the force of a symbol" because all satisfaction was by definition symbolic.

45. Mr. BROWNLIE said that the discussion of the problem of interest confirmed him in his view that it was unwise to generalize in the matter of remedies because all depended on the legal context. Once one entered into spe-

cifics, the rules of international law were set aside and replaced by the primary rules governing the payment of interest in specific cases.

46. Mr. ADDO said he inferred from Mr. Pellet's answer to his question that the words "where circumstances so require" and "as are appropriate" in article 45, paragraph 3, on satisfaction should be retained. But Mr. Pellet seemed to have previously suggested that they should be deleted.

47. Mr. PELLET said that he had not understood Mr. Addo's position on that point. With regard to Mr. Brownlie's point, it was all very well to oppose codification, but, if one decided to codify, it should be done on the basis of progressive development of international law. He thought that the extent of generalization in both article 45 and article 45 bis was very reasonable.

48. Replying to the Special Rapporteur, who seemed to imply that he was talking through his hat because he used the word "symbolic" to describe damages that were not nominal, he said that he was simply reading from the report. The Special Rapporteur did not draw a distinction between nominal damages and damages that would be more than nominal. He referred to nominal damages and there was no reason why the symbol should be expressed solely in nominal terms. If he had changed the report and jettisoned "symbolic" in favour of "nominal", he should let it be known so that the point could be discussed. He himself would not be in favour of dropping "symbolic" in favour of "nominal". In his view, it was not he who was playing with words, but the Special Rapporteur.

49. Mr. CRAWFORD (Special Rapporteur) recalled that it had not been possible on first reading to decide whether article 45, paragraph 3, should be inclusive, or not. On the basis that it was inclusive, nominal damages were clearly included in the damages reflecting the gravity of the injury and there was no need to retain paragraph 3 (*a*). If it was not inclusive, the position was different.

50. He was not trying to foist common law conceptions on the Commission in the field of State responsibility. He was simply recording the fact that the civil law Chairman of the Drafting Committee which had adopted article 45 had said that the article introduced the notion of exemplary damages. He himself had thus not done so and it was on record that paragraph 3 (*b*) was intended to deal with that question.

51. He invited the Commission to do away with all analogies with national law. The notion of moral damage of the State in international law was a rather problematic form of analogy. As it was formulated, article 45 brought out the fact that there were situations where it was necessary to express the gravity of a wrong. Those situations could not be artificially limited to grave breaches of obligations in international law. In the *"Rainbow Warrior"* case, which for him did not fall within the proper scope of article 19, there had been expressions of grave concern of that kind, as there had been in the *"I'm Alone"* and other cases. There was a function of satisfaction in that respect, and that was why paragraph 3 (*b*) was entirely appropriate. He would be dealing with the article 19 issue in chapter IV of his report. If article 19 were taken seriously, there was no alternative but to propose punitive damages for breaches in that category. Paragraph 3 (*b*) did not concern punitive damages.

52. Mr. ECONOMIDES pointed out that, in his reply to Mr. Addo, Mr. Pellet had not ruled out the possibility of payment of punitive damages in the case which had been cited.

53. Mr. BROWNLIE said that, in his perception, article 45 contained three sectors which were not very happily related one to another. In the first place, paragraph 3, in his opinion, referred to the notion of reparation in its normal legal sense. Secondly, there was an element which, although important, belonged to the category of consequences of an internationally wrongful act, namely, paragraph 3 (*c*) and paragraph 2, which dealt with the topics of cessation and non-repetition and did not truly belong in that part of the draft. Lastly, there was an element of a political nature which dealt with apology.

54. Reference had been made by several members to the existence of two types of sources of law. The first was the law in operation in international courts governing State responsibility, and especially in the current context of remedies. The second was what might be called the political context, in which settlements were arranged between States without the intervention of a judicial process. The literature tended to mingle the two levels together. It simply adopted an empirical approach of looking at the sources of international law and treating the two areas as being the same. That might seem to be unthinking, but it was very difficult to find an alternative approach.

55. Listening to the Special Rapporteur and other members of the Commission, he had had the impression that the choice which the Commission had made—perhaps in a not very well thought out way—was that the judicial level of operation was too rarefied and that it was going to rely on diplomatic practice. That was a dangerous choice because it went without saying that it was precisely in the context of bilateral relations between States that the majority of differences were settled not by the application of precise legal rules, but by agreement or negotiation.

56. It seemed that there was an unfortunate overlap between the way the question of damages was dealt with in article 44 and its treatment in article 45. He did not understand why the notion of moral damage created so many problems. But that aspect of article 45 more properly belonged with compensation in article 44. As for punitive damages, that was a form of punishment reserved for weak States in bygone days. Logically, the article on satisfaction in its old sense should be removed and its various elements partitioned off between the articles on the consequences of an internationally wrongful act and the ordinary forms of reparation. Otherwise, one would be importing into a technical and legal draft a piece of historical baggage which had no business there.

57. In his experience, it was not the case that States customarily made apologies. In fact, they often regarded apologies that were freely given as an admission. As had been pointed out, apology often formed part of an overall deal where it was a subject of negotiation.

58. It might be worth making explicit the fact that satisfaction was not exclusive of other remedies, including

compensation. In fact, the content of article 45 was a rather unhappy melange of the law relating to the quantitative assessment of damage and measures of satisfaction in the strict sense. The latter, which really were a form of political punishment of States, were no longer current. In the last analysis, satisfaction could not be considered a normal form of reparation and it was possibly not a form of reparation at all.

59. Mr. CRAWFORD (Special Rapporteur) said it was obvious that States did not offer apologies in advance of a settlement because that would be an admission of liability. Satisfaction was constituted either by acceptance of the offer referred to in article 45, paragraph 1, which was taken as a final settlement of the issue, or by a judicial decision which was the surrogate for that offer. In that sense, he did not think he was expressing a point of view that was different from that expressed by Mr. Gaja.

60. Mr. PELLET said that he agreed with Mr. Brownlie about documentary sources and the fact that diplomatic practice was much less interesting than judicial practice. Clearly, the draft articles should not consist of proposing minor settlements between States, but of drawing up legal rules which applied in the absence of a settlement.

61. On the other hand, he had some difficulty in going along with the distinction Mr. Brownlie had made between old and new forms of satisfaction, between remedy in general and satisfaction in the strict sense, and especially the idea that satisfaction was not a normal form of reparation. On the contrary, satisfaction was an absolutely normal form of reparation and the fact that courts so decided and considered that a statement made by them constituted sufficient satisfaction bore that out. The finding of a court was a substitute for the absence of a spontaneous declaration on the part of the State.

62. In practice, it was not true to say that States did not make apologies. In the *"Rainbow Warrior"* case, France had made formal apologies in acknowledgement of its responsibility. There was therefore nothing obsolete about that. It was a modern and convincing form of reparation. In the case in question, New Zealand had had reparation for the moral aspect of the damage it had suffered.

63. Mr. DUGARD said that, like Mr. Pellet, he had been troubled by Mr. Brownlie's observation that States did not make apologies. In recent practice, there had been a number of cases in which States had apologized for their conduct, but without admitting having breached international law. The Rwandan genocide case was interesting in that respect. The United States had apologized not for having breached international law, but for having committed an error of judgement in its conduct in the Security Council. France had remained silent, probably because apologies would have been construed as an admission of responsibility in the affair.

64. Mr. BROWNLIE said that judicial declarations of responsibility constituted a form of satisfaction that was in a different category, and that gave rise to a difficulty which the Drafting Committee had encountered. It seemed that there was a missing remedy, which was declarations by way of injunction or otherwise of rights. The problem was that they were not accepted as a diplomatic form of reparation and there was to some extent a gap in the system. Mr. Pellet's version of satisfaction was another example not of satisfaction, as envisaged in article 45, but of its judicial versions. It seemed that there was a divorce between the diplomatic and judicial levels of operation.

65. He had not said that States never made apologies. They did, but nearly always as part of a deal. Most measures of satisfaction taken recently had been part of a negotiated deal. In many cases where one might have thought that States would apologize, they had not done so.

66. Mr. SIMMA said that, in the *Paraguay* v. *United States* case, after Paraguay had submitted its memorandum to ICJ, the United States had issued an official, solemn apology and, a few weeks later, Paraguay had withdrawn its request. In another case, on which he could not go into detail because it was still pending, apologies had been issued without being part of a negotiated settlement.

67. Mr. CRAWFORD (Special Rapporteur) said that he was somewhat troubled by the distinction some were making between the diplomatic and legal spheres. He had tried to explain his position on the question in paragraph 240 of his report because the point related to certain questions about admissibility which had been raised in the context of chapter I of Part Two bis. International courts had a declaratory function and determined what the rights and obligations of the parties before them were and, although their decisions could have *res judicata* effect, it was not the courts which shaped legal relations between States; in the first place, international law applied directly to the relations between States. Although it was true that the focus of the draft articles was relations between States, the Commission was still concerned to determine the rules that were applicable to those relations. In other words, it was a question of specifying the legal relations upon which a court would be ruling in granting what would properly then be described as judicial remedies. The rules of responsibility could therefore not be formulated in terms of the powers of courts. That created a problem which Mr. Brownlie had called the "missing remedies", but he insisted that the problem had not passed him by, and that was why he had drawn a distinction between the "normal" method of satisfaction, i.e. the legal statement that a breach existed, and the forms referred to in article 45, paragraph 3, which were exceptional or at least unusual.

68. Mr. GOCO, returning to the question of apologies, said that States were most reticent in making them because there was the likelihood that they would be considered as an admission of guilt and would trigger the submission of a claim for reparation.

69. Mr. MOMTAZ asked Mr. Brownlie whether it was because the moral damage to a State was not identifiable that he considered that satisfaction was not a form of reparation.

70. Mr. BROWNLIE said he feared that Mr. Momtaz was a victim of the inherent confusion in article 45. With regard to damages or compensation in the legal context, he admitted that a State could suffer moral damage and the *"I'm Alone"* case was a good example of it in that there had been no threat of force to obtain compensation in reparation for the moral damage and no element of

power had intervened. That aspect of moral damage really belonged in article 44. But if one considered the standard cases of satisfaction, most of them were precisely intended to humiliate States and many of the historical examples would not satisfy the conditions laid down in article 45, paragraph 4. Furthermore, with regard to apologies, the question should be asked—and no one had yet done so—whether apologies were provided as a matter of *opinio juris*.

71. Mr. LUKASHUK, noting that article 45 was giving rise to an animated discussion and was provoking a number of criticisms, said that he shared most of the views that had been expressed about it. The article proposed by the Special Rapporteur did not sufficiently define the notion of satisfaction. It could be interpreted as stipulating that acknowledgement of a breach was essential only when there had been moral damage, whereas such acknowledgement was necessary in all cases because it was the first obligation that stemmed from responsibility. Furthermore, the proposed text seemed to associate moral damage with the existence of non-material damage, whereas any wrongful act, whether material or non-material, could cause moral damage. For those reasons, he proposed two variants for article 45, the first of which was of very general scope and covered all cases of satisfaction, while the second was limited to moral damage. They read:

> "The State responsible for an internationally wrongful act having caused moral damage is obliged to offer satisfaction, that is, moral reparation."

or

> "In the case where an internationally wrongful act has caused only non-material damage, the State responsible for committing it is obliged to offer satisfaction, that is, moral reparation."

72. Furthermore, like Mr. Pellet, he considered that the expression "moral damage" was preferable to the expression "non-material damage" because it was attested in many legal systems and also because the word "moral" defined the damage while "non-material", which was a negative term, did not.

73. He considered that the provision on nominal damages could be retained.

74. As for the risk that the separation of powers, referred to in paragraph 192 of the report, might prevent an individual's criminal responsibility from being engaged, the Commission had already debated the question, albeit in a different context, and had reached the conclusion that a State could not invoke domestic law in order to avoid its international obligations, particularly in the area of responsibility. In the current case, it would not be domestic law in general which would impede prosecution, but principles of criminal law such as *nulla poena sine lege*. That obstacle was not, however, insurmountable.

75. In conclusion, he considered that article 45 could be transmitted to the Drafting Committee.

76. Mr. ECONOMIDES said that article 45, paragraph 1, called for no particular comments apart from the one on form which he had already made on articles 43 and 44. Article 45, paragraph 1, should therefore read: "The State responsible for an internationally wrongful act has the obligation to give satisfaction to make good the non-material/moral damage occasioned by that act". Provisions must be worded in legal terms and there had to be a reference to an obligation and not to an offer which might or might not be accepted.

77. As for paragraphs 2 and 3, he did not think that it was necessary to distinguish between the statement of reparation and other forms of satisfaction. A single paragraph would suffice in which all forms of satisfaction would be mentioned in a non-exhaustive manner, beginning with acknowledgement of the breach. In the same way, Article 33 of the Charter of the United Nations, when it enumerated the modes of pacific settlement of international disputes, did not state that the parties must have recourse in the first instance to negotiation, even if in practice negotiation was in fact the first mode of settlement used. It could be indicated in the commentary to article 45 that acknowledgement of the breach was in general the first form of satisfaction. The proposed paragraph would begin with the following phrase, which resembled the phrase in the article adopted on first reading: "Satisfaction may take one or more of the following forms", and would be followed by the enumeration of the various forms of satisfaction. He further considered that, in the current paragraph 2, the various forms of satisfaction should be presented separately and preceded by dashes. The solution he was proposing would also enable less frequent use to be made of expressions such as "as appropriate" and "where circumstances so require", which made the text unnecessarily cumbersome.

78. As for nominal damages, he was not against their being mentioned in the draft even though their significance was very limited by virtue of the fact that the enumeration of forms of satisfaction was purely indicative. He did insist, however, that punitive damages should be set for grave breaches, particularly the international crimes covered by article 19. On that point, he shared the opinion of the Czech Republic, reproduced in paragraph 174 of the report, which stated that introducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime of responsibility for "crimes" a valuable a priori deterrent function. As Mr. Pellet had said, the possibility of imposing punitive damages on States responsible for international crimes should be a specific consequence of the commission of such acts. He therefore proposed that paragraph 3 (*b*) should be amended to read: "For grave breaches, and particularly those covered by article 19, paragraph 2, damages reflecting the gravity of the infringement". In that regard, reluctance about punitive damages was not really logical: if injured States were capable of seeing themselves awarded damages for moral damage, there was no reason why the guilty State would not be capable of paying punitive damages if it had committed very grave infringements. In order to be precise, the words "under its jurisdiction" should be added after the word "person" in paragraph 3 (*c*). Paragraph 4 should be strengthened by replacing the words "should not" by the words "must not".

79. With regard to article 45 bis, he thought that the question of interest should be dealt with in article 44,

which should also mention loss of profits and compound interest.

80. Subparagraph (*a*) of article 46 bis should speak of "any injured State or any person or entity"; that was a purely drafting change. As for subparagraph (*b*), its current wording had a flaw in that it implied that reference was being made to deliberate negligence or omission.

81. Mr. CRAWFORD (Special Rapporteur) said that subparagraph (*a*) of article 46 bis referred to "any State" in order to cover situations in which another State acted on behalf of the injured State in the context of chapter II of Part Two bis.

The meeting rose at 1 p.m.

2639th MEETING

Thursday, 13 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

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. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members to continue their consideration of articles 45, 45 bis and 46 bis, contained in chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. RODRÍGUEZ CEDEÑO, confining his remarks to article 45, said that the title should really be "Satisfaction in the context of the forms and modalities of reparation". Expressing his general appreciation for the third report and acknowledging that article 45 was a complex provision, he said it was highly appropriate that paragraph 1 had been inverted, referring first to the obligation of the State which had committed an internationally wrongful act to offer satisfaction, rather than to the entitlement of the injured State to obtain satisfaction from the responsible State, formulated in the article adopted on first reading. The sense was not changed, but it brought the article into line with the articles on restitution and compensation. In general, paragraph 1 was acceptable, although in the Spanish version "injury" should be rendered by *perjuicio* rather than *daño*. The explanations given by the Special Rapporteur in paragraphs 180 and 181 of the report were convincing. The term "non-material injury" was broader and encompassed legal and moral and even political damage: in the decision in the *"Rainbow Warrior"* case, the tribunal had established non-material injury because it was considered that the honour, dignity and prestige of New Zealand had been harmed.

3. Paragraph 2 introduced useful elements for the definition of satisfaction, namely an acknowledgement of the breach and an expression of regret or a formal apology. Paragraphs 1 and 2 could be combined in order to provide a clearer and more precise draft, but, as far as the substance of paragraph 2 was concerned, an acknowledgement of the breach should not be interpreted in such a way as to exclude subsequent expression of regret or formal apology, although in the event of the latter taking place, such an acknowledgement would be implied and might therefore not prove necessary. Nevertheless, as the Special Rapporteur had proposed, both elements should be retained.

4. Like its predecessor, the new draft article proposed by the Special Rapporteur incorporated modalities, and paragraph 3 presented an exemplary, though not exhaustive, list. He welcomed the inclusion of the concept of "full reparation", which should read *reparación íntegra* in Spanish, and was led to wonder whether satisfaction was autonomous or complementary to restitution and/or compensation. He believed it could be either. In the *Corfu Channel* case it was autonomous in that ICJ said that the statement by the United Kingdom regarding the action of its Navy constituted per se appropriate satisfaction. Satisfaction might be accompanied by or preceded by the payment of damages, even if there was no material damage, the whole being considered punitive. The paragraph covered that within the ambit of "full reparation". He agreed with those members who had stated that the declaration acknowledging a breach should be incorporated in the relationship between States, but that did not mean that the judicial and arbitral declaration acknowledging the breach and the statement of reparations were not important, and did not have consequences of various kinds, including legal consequences. Statements by jurisdictional bodies should not be regarded as a substitute for those of the State committing the internationally wrongful act.

5. Paragraph 3 (*a*) should be kept as it was, the payment of nominal damages being a proper mode of satisfaction,

[1] 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.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).