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Summary record of the 2639th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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).

but paragraph 3 (*b*) gave rise to some doubts since determination of the gravity of an injury raised the issue of assessment and subjectivity, with the possibility that the content of satisfaction would vary and be less than precise. Paragraph 3 (*c*) was acceptable, especially with Mr. Economides' suggestion that reference be made to internal jurisdiction of States.

6. Paragraph 4 covered the same ground as paragraphs 2 (*c*) and 3 of the article adopted on first reading, and it should be made clear that the injured State could not require satisfaction when it was humiliating to the responsible State. Another term could perhaps be used to reflect the concept of impairment of dignity. In his opinion, the version adopted on first reading had been clearer in referring to the right of the injured State to obtain satisfaction not justifying demands which would impair the dignity of the responsible State. That principle should be retained in the proposed new text of the draft article.

7. Mr. DUGARD, congratulating the Special Rapporteur on an excellent report, said there was no reference to negligence as a form of misconduct either in the commentary to article 45 as adopted on first reading or in the comments by the Special Rapporteur on proposed new article 45, but he presumed that the word "misconduct" in paragraph 3 (*c*) did include negligence. In any event, the matter could be dealt with in the commentary, if it was not self-evident.

8. The reference to penal action in the same subparagraph was based on an article which had preceded recent developments in the field of international criminal law. It was important to take cognizance of those developments. To illustrate his point, he invited members to assume that the military dictatorship of a State was engaged in the torture of aliens belonging to another State in a discriminatory manner. The military dictatorship was then overthrown and replaced by a civilian Government that wished to make satisfaction for the moral damage suffered. The successor Government might decide to pay compensation for the suffering of the nationals in question or make some satisfaction for the moral damage suffered. The obvious satisfaction would take the form of prosecution of the torturers concerned, but that might be politically difficult for the new regime, which could be under pressure to grant an amnesty and it might prefer to send the persons concerned to an international criminal tribunal or to extradite them either to the claimant State or to another State which wished to exercise criminal jurisdiction. He proposed that a clause be added at the end of paragraph 3 (*c*) to the effect that the disciplinary or penal action should be taken by the respondent State itself or that there should be extradition to another State or transfer to an international criminal tribunal with jurisdiction. It was not a major change, but it would take account of developments in the field of international criminal law.

9. Mr. PAMBOU-TCHIVOUNDA said that the three new draft articles taken together posed problems in terms of their interrelationship and construction. Article 45 bis caused no great difficulties regarding substance, but it would be more consistent and rational for it to be placed immediately after the article on compensation, namely article 44.

10. As for article 45, his preference lay with the text adopted on first reading because it was clearer. The new version was richer but, for that very reason, had a basic fault resulting from the juxtaposition of quite different situations and hypotheses. The structure adopted on first reading was better because the emphasis was placed on the injured State both in the text itself and, more important, in the distribution of roles. The absence of any mention of the injured party until subparagraph (*b*) of article 46 bis caused him considerable anxiety. Such marked indifference to the main addressee should be made good, if only at the level of the Drafting Committee.

11. He wondered whether the term "non-material injury" in article 45 was received terminology and, in order to stay within the spirit of the text adopted on first reading, he would prefer the term "moral injury" or "moral damage".

12. As Mr. Economides had said, the *Chorzów Factory* case imposed an obligation to make reparation according to a specific modality, and the *chapeau* of the article should state the principle that the responsible State was required to provide satisfaction for an internationally wrongful act to the injured State. That principle would be better rendered by a text that was closer to article 45 as adopted on first reading.

13. He was also concerned by the fact that paragraph 2 was in the conditional, rather than present, tense. Paragraph 1 set out the principle affirmatively; paragraph 2 should likewise be in the present indicative.

14. As to the content of paragraph 2, the matter of acknowledgement of a breach was open to debate and polemic. In his opinion, attempting to clarify in the body of the text the distinction between a bilateral breach and intervention by a third body would have very little effect regarding acknowledgement of one of the modalities of satisfaction. Again, the use of the parenthetical "as appropriate", followed by two modalities of satisfaction posed a problem. He would wish to add a reference to nominal damages.

15. Paragraph 3 also involved some difficulties, such as removing the words "inter alia", but his main concern was that subparagraph (*a*) should be moved to paragraph 2. Subparagraph (*b*), subject to the agreement of the Special Rapporteur and the Drafting Committee, should be moved to article 44, for it related to damages that were economically assessable. On the other hand, it might form the subject of a specific provision concerning damages in terms of the gravity of the injury and also the different interests affected, including the interests of the international community as a whole.

16. Subparagraph (*c*) should also be deleted, but for a different reason: it addressed a problem that was properly the concern of domestic law, not international law. Essentially, it was for the wrongdoing State to cope with the misconduct of its officials. The efficacy of disciplinary or penal action in such instances was not within the ambit of international law. Penalties were not imposed in a vacuum: they were conditioned by the legal arsenal of the State concerned. In keeping with the primacy of international law over domestic law, international law

could not be concerned with the specific penalties in national legislation.

17. Paragraph 4 had provoked a storm of misplaced criticism. He was in favour of keeping it, provided the last part, namely, "in question and should not take a form humiliating to the responsible State", was deleted or simply replaced by "caused to the injured State". Humiliation was simply one of the disagreeable aspects of making reparation, along with payment of a debt.

18. In conclusion, he congratulated the Special Rapporteur on having proposed a very open formulation for satisfaction that the Drafting Committee could now reshape so as to emphasize the essential aspects.

19. Mr. HE said that satisfaction, covered in article 45, was an important and well-grounded form of reparation in international law. The proposed formulation of the article was richer and incorporated improvements on article 45 as adopted on first reading. However, a number of points could be made for further consideration.

20. The term "non-material injury" was acceptable as a substitute for "moral injury or damage", but paragraph 1, the *chapeau* of article 45, seemed to have been drafted on the assumption that satisfaction was intended to cover only non-material damage. Satisfaction would not be applied in every case, but it should come into play in a great many instances of both material and non-material damage, in accordance with article 37 bis, which provided that satisfaction could be applied singly or in combination with other forms of reparation such as restitution and compensation. Thus, satisfaction could apply not only for non-material damage but also for other kinds of damage. Accordingly, the phrase "satisfaction for any non-material injury", in article 45, paragraph 1, should be replaced by "satisfaction for the injury, including non-material injury" or "satisfaction for the injury, in particular non-material injury".

21. He agreed with Mr. Economides that paragraphs 2 and 3 could be amalgamated. The new paragraph could start with the phrase "Satisfaction may take the form of one or more of the following to ensure full reparation:". Subparagraph (*a*) would consist of the words "an apology", to replace the bracketed phrase "nominal damages", the award of which was very rare in modern practice. Subparagraphs (*b*) and (*c*) would remain unchanged, while paragraph 4 would be renumbered. It was an important provision, since there was no justification for the award of punitive damages in the absence of any special regime for their imposition.

22. The Special Rapporteur had proposed "inquiry" as part of the second tier of the forms of satisfaction. Since a proper inquiry into the causes of an accident causing injury was closely related to other forms of reparation such as compensation and disciplinary or penal action, inquiry might have a place in the article on satisfaction, or should at least be mentioned in the commentary.

23. The prevailing view regarding article 45 bis was that there should indeed be a separate article on interest. The article enunciated the general principle that interest on the principal sum must be paid in order to ensure full reparation. Although the date when interest payments must begin was not specified, it was clearly indicated that the interest rate and modes of calculation should be the most suitable to achieve full reparation. The award of interest should cover loss of profits. In the commentary to article 44, quoted in paragraph 149 of the report, it was noted that the main objective was to avoid "double recovery".[3] In accordance with that stricture, the sum of the interest had to be limited to the equivalent of the loss of profits, and that point should be made in the commentary.

24. As to article 46 bis, mitigation of responsibility should indeed have its place in chapter II. Contributory fault was now generally recognized as being relevant to the determination of reparation such as that provided for in the Convention on International Liability for Damage caused by Space Objects. Again, under the general principle of international law relating to mitigation of damages, a State was not only permitted, but indeed obliged, to take reasonable steps to mitigate the loss, damage or injuries caused. Failure to mitigate could even preclude recovery, a point clearly made in the *GabŹ kovo-Nagymaros Project* case. The duty of an injured State to mitigate damage was not an independent obligation, but a limit on the damages which the injured State could claim. In that sense, article 46 bis contained some elements of progressive development. There could be no serious objection to its inclusion in the draft articles.

25. Mr. MOMTAZ said the controversy raised by article 45 stemmed from the fact that satisfaction, which was intended to compensate for or wipe out moral damage suffered by the injured State, was an institution to which States did not frequently have recourse. Practice and case law were not abundant in that domain, perhaps because honour and prestige, quintessential aspects of moral damage, were of lesser importance to States nowadays than their desire to expunge the material consequences of an internationally wrongful act of which they were the victims. Because satisfaction was not proving amenable to codification, the generally faithful picture of existing practice furnished by the Special Rapporteur was all the more welcome.

26. The first question that arose was whether legal rules on satisfaction really existed, whether the wrongdoing State really had an obligation to offer satisfaction to the injured State. In many cases, the wrongdoing State had no choice other than to present an apology, especially when the injured State was a powerful country. In such instances one might be tempted to speak of political opportuneness. Sometimes it was an agreement, tacit or otherwise, that gave rise to the apology by the wrongdoing State. Two examples frequently cited in the literature were the *Kellett* case, when a Vice-Consul General of the United States had been harassed by Siamese soldiers, and the more well known "*I'm Alone"* case. In both cases it had been agreed that apologies were owed to the injured State. That was why he tended to prefer the wording in article 45 adopted on first reading ("The injured State is entitled to obtain … satisfaction"), rather than to the version proposed by the Special Rapporteur ("The State

[3] See paragraph (27) of the commentary to article 8 (*Yearbook ... 1993*, vol. II (Part Two), pp. 75–76).

which has committed an internationally wrongful act is obliged to offer satisfaction"), as it was less binding.

27. As for the various forms of satisfaction, it was gratifying that the first, mentioned in paragraph 2 of the new article 45, was acknowledgement of the breach. It was in keeping with the ruling of ICJ in the *Corfu Channel* case to the effect that the acknowledgement itself was an appropriate form of satisfaction. Paragraph 2 went on to refer to the expression of regret or a formal apology. However, States were demanding such gestures much less frequently. For example, after the hostage incident with the Islamic Republic of Iran, a typical case of dishonour or moral injury for a State, the United States had not called for an apology. Another example was when an aeroplane of Iran's national airline had been shot down. Iran had not called upon the United States for an apology, but it had requested that the commander of the warship which had done the shooting be subjected to disciplinary action by the American authorities. Excessive recourse under article 45, paragraph 3 (*c*), to disciplinary action as a type of satisfaction must nonetheless be prevented, as it might amount to interference in the internal affairs of the wrongdoing State. That was why the scope of the provision should perhaps be restricted solely to criminal acts of State agents. He endorsed the pertinent remarks made in that context by Mr. Pambou-Tchivounda.

28. He experienced serious doubts as to whether article 45, paragraph 3 (*b*), should be retained. Damages reflecting the gravity of the injury, which could be described as punitive damages, had not been designated as a form of satisfaction by the Institute of International Law in its draft on the subject in 1927.[4] The simple acknowledgement of a breach and the accompanying publicity often constituted elements that were sufficiently punitive to preclude the need for any other punitive action. Diverging views had been expressed about whether satisfaction was compensatory or punitive in nature. He himself considered it to be compensatory. It would hardly be acceptable for an injured State, above and beyond the payment of material damages, to be able to demand an additional sum by way of satisfaction. The best course might be to delete paragraph 3 (*b*).

29. Paragraph 4 of new article 45 was a timely and acceptable provision which would counteract the imbalances that had often in the past enabled powerful States to impose humiliating forms of satisfaction on weaker ones, in violation of the dignity and equality of States.

30. Lastly, he wished to draw attention to an inaccuracy in a footnote to paragraph 206 of the report, where the reference to "Guardian Council" should be replaced by "Council of the Guardians of the Constitution".

31. Mr. BROWNLIE said the comments he had heard reinforced his desire to see article 45 broken down into three sections. One section would be the article on compensation, reparation in the legal sense, damages being simply nothing more than quantum problems. Another section formed part of the consequences of an internationally wrongful act: there was a strong relationship between paragraph 4 and the concepts of cessation and non-repetition. Finally, a section would be included on purely political measures such as requiring an apology. In that regard, he was not convinced that the practice relating to regrets and apologies had an *opinio juris* behind it.

32. Thanks to the statements made in the course of the meeting, he could now see that paragraph 3 (*c*) should be placed in the section on the consequences of an internationally wrongful act. Mr. He had been absolutely right to point out the need for an inquiry in that context. Cases of State responsibility as a result of negligence or breaches of international standards could occur without there clearly being any responsibility, let alone criminal responsibility, on the part of individual officials. Contrary to the interesting remark made by Mr. Dugard, in the case of international crimes, especially those that were the subject of multilateral conventions, there was an independent duty under international law to prosecute the individuals concerned.

33. Many of the steps taken by Western States in the late nineteenth century to impose indemnities and punish officials had had nothing to do with justice but had been aimed purely at political punishment and humiliation of the State through the requirement that its officials be punished even though they had not necessarily committed a crime. Such political vengeance was the subject of subparagraph (*c*), and more thought should be given to whether it was worthy of inclusion in the draft. The more acceptable parts of article 45, on the other hand, should be partitioned off to other articles.

34. The institution of State responsibility was like a classic vintage car, and rather than tinker with it, the Commission should give it a proper tune-up. More in-depth analysis was needed of both the issues and the literature.

35. Mr. KABATSI said that the third report of the Special Rapporteur would enable the Commission to improve greatly on its previous attempts at the codification and progressive development of the law on State responsibility. Further precision and clarity had been brought to a monumentally complex topic. He broadly welcomed the amendments suggested by the Special Rapporteur and other members over the past few days. Articles 45 bis and 46 bis presented no difficulties and should be referred to the Drafting Committee.

36. Article 45 was more problematic. In the first place, the term "satisfaction" was not defined within the context of the article. It was unclear whether it referred to contentment of the injured State, after the State responsible for the commission of the internationally wrongful act had paid full reparation, in the context of paragraph 3, acknowledged the breach and, where appropriate, expressed regret, or whether it could have other meanings. The word "restitution" had been defined in article 43 and a definition of "satisfaction" would also have been useful in the current instance. Regarding paragraph 1, he would have had no objection to the word "moral", as opposed to "non-material", but the latter was marginally better. It was also better to retain the word "occasioned" rather than "caused", as suggested by some members. "Caused" to his mind implied *mens rea* or direct

[4] Draft on "International responsibility of States for injuries on their territory to the person or property of foreigners" (*Yearbook . . . 1956*, vol. II, p. 227, document A/CN.4/96, annex 8).

wilfulness. Paragraph 3, subparagraphs (*a*) and (*b*), had given rise to considerable criticism, largely because the provisions therein might carry different meanings for different people. He was more concerned by the punitive import, especially in subparagraph (*b*). It might have been preferable to include it under article 19 and articles 51 and the following, as suggested by Mr. Pellet.

37. Although satisfaction was admittedly a long-established practice of States and resorted to by international courts as a remedy or form of reparation, it should be handled with great care to avoid adding any taint of humiliation to the facility of satisfaction. He was therefore strongly opposed to deleting the second half of paragraph 4, as some had suggested. Indeed, he concurred with Mr. Economides in the view that the word "should" ought to be replaced by "must" or "shall"; he himself favoured the latter. With the Special Rapporteur, he hoped that the days when the requirement to salute a foreign flag, as a form of satisfaction, were gone. Humiliation should be discouraged, even if it was by way of being a quid pro quo, since it would not restore public order or achieve reconciliation between States. Any such aggravation on the part of the responsible State would, in any case, have been adequately dealt with under the provisions of paragraph 3 (*b*), in the form of damages reflecting the gravity of the injury.

38. Mr. ROSENSTOCK said the only changes that he would favour to an excellent draft were largely of an editing nature or could be covered by suitable material in the commentary. The point that should dominate the draft articles—or at least Part Two—and the relevant commentary was that a State that had been injured by a wrongful act of another State was entitled to full reparation and to obtain it from the wrongdoing State. If the Commission failed to provide for compound interest from the date of the injury or lost profits, the wrongdoing State was benefited at the expense of the injured State. He did not advocate payment of interest on the capital and payment for lost profits in the same case, but no one had called for double recovery and there was no suggestion of such a provision in the text. The same did not, however, apply to the payment of moratory interest, for long delays could give rise to much suffering. In stipulating that satisfaction must be proportionate but should not take a humiliating form, the Commission risked being understood to say that, although the injured or victim State might have been humiliated, the sensibilities of the wrongdoing State must be safeguarded. It was, admittedly, hard to imagine a specific example of a situation in which such conditions would apply, but that should not affect concern for an injured State that had been humiliated and the potentially superior deterrent effect of a simple proportionality criterion.

39. With regard to article 45, he understood the desire of some members to change "offer" in paragraph 1 to "provide", but questioned the advantage, since it was clear from the current text that the wrongdoing State was being obligated to offer satisfaction and the situation of a reasonable offer unreasonably rejected was clearly untenable. Perhaps the commentary was the place to deal with such an eventuality. As for the word "should" in paragraph 4, it was not unacceptable in context but he saw the value of avoiding its use. The rest of the draft article should be accepted as it stood. There was no need to create qualitative distinctions with no basis in positive law. He would add that nineteenth-century instances of political vengeance did not invalidate paragraph 3 (*c*); they merely acted as a warning to avoid abuse.

40. The central thrust of article 45 bis was welcome. Some redrafting and some commentary were necessary if it was to be consistent with the fundamental function of Part Two, which was to ensure that the injured State was made whole, by the wrongdoing State. Article 46 bis, while in some ways an improvement on article 42, paragraph 2, as adopted on first reading, nonetheless raised various concerns relating to the possible—albeit unintended—mixing of the measure of damages with the primary rule establishing responsibility and the principle of *expressio unius est exclusio alterius*, which had been cited by the United Kingdom in its comments.[5] He would not object to the deletion of the draft article and wondered whether anyone else would. Conversely, so long as the commentary made it clear that the point at issue was not the primary rules but a factor that might be taken into account in determining the magnitude of the damages owed, the draft article would not do irreparable harm. It was not totally unacceptable if its inclusion was important to other members of the Commission.

41. Mr. SIMMA said that the most important aspect of article 45 was the guiding principle according to which the injured State had a choice as to forms of satisfaction, which implied flexibility in accommodating the particular features of each case. In his view, however, there was a tension—far greater than in the other draft articles—between that principle and the hierarchy expressed in the text, particularly paragraph 2.

42. With reference to paragraph 1, he concurred with those who would replace "offer" by, for example, "provide". The phrase "non-material injury" was an improvement on "moral damage". On the other hand, the word "caused", which had been used in the article adopted on first reading, was preferable to "occasioned": it was surely right to show the causality between the harm inflicted and the breach. As for the word "obliged", it stood in strange contrast to the other paragraphs of the article—especially paragraph 3—which were hedged about by so many provisos that there was a danger of vitiating the article's intention.

43. The difficulties raised by paragraph 2 were more fundamental. He was concerned about the Special Rapporteur's emphasis on the fact that a judicial pronouncement of illegality was the most natural form of satisfaction. As the phrase "in the first place" in paragraph 2 showed, the injured State's first request, if a third party settlement procedure was available, would be a statement that international law had been breached. As paragraph 185 of the report showed, however, the Special Rapporteur recognized the rarity of such third party settlements and therefore advocated the replacement of a pronouncement by an acknowledgement of the breach. He nonetheless questioned whether acknowledgement really deserved its "first place", at the State-to-State level. In practice, States tended not to rub salt into a wound. An acknowledgement might well be implied by an expres-

[5] See 2613th meeting, footnote 3.

sion of regret or an apology. He noted that, by contrast, some States offered apologies freely, without acknowledging the breach, rather in the manner of an *ex gratia* payment. In yet other instances, apologies were offered to avoid any further consequences of a breach. For those reasons, he considered that paragraph 2 sat uneasily in article 45.

44. In addition, the Special Rapporteur seemed to have downgraded the status of apologies. In the draft adopted on first reading, apologies had figured as one, self-contained form of satisfaction. In the proposed new draft articles, they were mentioned only as possible accompaniments of an acknowledgement of a breach. The fact that apologies were historically charged—like those forced on China after the Boxer Rebellion—and had often been abused did not invalidate the remedy as such. In that context, he pointed out that it was not always weak States that apologized to powerful ones, as Mr. Momtaz had suggested. The United States had recently apologized, fully and unequivocally, to Paraguay.

45. With regard to paragraph 3, he agreed with Mr. Pellet that "damages reflecting the gravity of the injury" were particularly appropriate in relation to crimes. However, paragraph 3 (*b*) should not be restricted to crimes and should be retained unchanged, particularly if a case such as the *"Rainbow Warrior"* incident fell into the category of a crime, as Mr. Pellet seemed courageously to have suggested. In that connection, he noted that paragraph 170 of the report referred to former article 19, which he suggested was a case of wishful thinking.

46. With regard to paragraph 3 (*c*), it should be clarified that the criminal conduct of private persons related to State responsibility only qualify a State's breach of the duty of prevention. Any penal action against private individuals was merely the belated performance of a primary obligation. As for paragraph 4, the proportionality of satisfaction was difficult to determine or implement. An extreme example had been the beheading of a Swiss citizen in the seventeenth century in front of the embassy whose Government he had criticized. He would strongly support replacing the word "should" by "shall". The purpose of reparation, after all, was to establish a legal peace, yet humiliation might breed the conditions for a further breach.

47. As to article 45 bis and Mr. Hafner's reference (2638th meeting) to the relationship between *lucrum cessans* and interest, that problem was under consideration by the Drafting Committee, which was pursuing a line of thought proposed by Mr. Pellet. He also agreed with Mr. Hafner that the second sentence of paragraph 1 was unnecessary and should be deleted. He would, however, retain paragraph 2, with the substitution of the phrase "principal sum" for "compensation", as the Special Rapporteur had suggested.

48. With reference to article 46 bis, he recalled that Mr. Pellet had asked (ibid.) the Special Rapporteur whether subparagraph (*a*) was an aspect of "clean hands" and the answer had been in the negative. Nevertheless, the notion of "clean hands" was extremely unclear. If considered in its broadest sense as a number of connections between wrongs, he would find no difficulty in regarding subparagraph (*a*) as an expression of the "clean hands" doctrine. In that context, even if one favoured the inclusion of fault in secondary rules, the reference to fault as a subjective element in subparagraph (*a*) should, in the interests of consistency, be excluded at the current stage of drafting, since, even in the context of subparagraph (*a*), it could be found within the primary rules.

49. As for mitigation, he saw no obligation to mitigate under article 46 bis, subparagraph (*b*), in the sense that if that obligation was violated, secondary rules applied and reparation had to be made. Rather, failure to mitigate should lead to a limitation on recoverable damages. The principle was an expression of good faith, or *venire contra factum proprium*.

50. Mr. BROWNLIE said, in response to the statements by Mr. Rosenstock and Mr. Simma, that his views on satisfaction could not be dismissed as being based on out-of-date history. Strange though it might seem, present texts on the subject, to which he himself referred on points of damages, had retained the mindset of the past. The matter presented a severe analytical and structural problem, which was particularly apparent in article 45, paragraph 3 (*c*). There was not necessarily a link between the existence of international responsibility and the consequence of a duty to make full reparation, on the one hand, and the trial of individuals for actions that might not constitute crimes, on the other. It was essential to think the problem through.

51. Mr. PELLET said he found Mr. Brownlie's position intriguing. Apologies were by no means obsolete; they were in many instances an appropriate form of reparation and, as he and Mr. Simma had pointed out, continued to be made. As for the question of "clean hands", he had found the Special Rapporteur's reply to his question unconvincing. He had expected the Special Rapporteur to say that the general formula used was not confined to "clean hands" but covered the clean hands doctrine in the sense that, if a private individual had contributed to the damage, that contribution reduced the amount of the reparation. The point at issue, however, was mitigation of the reparation, not of the responsibility, which was still full responsibility.

52. Responding to a remark by Mr. Simma, he said he saw nothing courageous about a member adopting a severe stance vis-à-vis the country of which he was a national. Members were independent of their Governments, and he for one had nothing to fear from his own administration. That being said, he wished to clarify the remarks he had made regarding the *"Rainbow Warrior"* case (ibid.). In response to a remark by Mr. Addo, he had said that there were three possible interpretations of the payment of a relatively substantial sum by France to New Zealand in connection with that case. The payment could be regarded as a token payment; as the consequence of a crime; or—his preferred interpretation—as an ad hoc diplomatic arrangement stemming from the ruling by the Secretary-General of the United Nations. France had patently incurred international responsibility by breaching a rule of international law, one of fundamental importance to the international community as a whole since it had concerned New Zealand's territorial sovereignty. However, the breach could not in his view be regarded as a

"crime", as it had been neither "massive" nor "systematic" in character. Both those elements were, in his opinion, integral to the definition of crimes, although he conceded that, as now worded, article 19—which he did not regard as obsolete, but which certainly warranted further serious debate—contained neither element, except as implied in the examples cited in its paragraph 3.

53. Mr. GOCO said he welcomed the more prominent role accorded to apology as a form of satisfaction in the proposed new article 45. *Pace* Mr. Simma's reservations in that regard, apology could serve as a valuable tool in the volatile world of international diplomatic relations.

54. Mr. Sreenivasa RAO said that, more often than not, States attempting to resolve a protracted dispute would be seeking reconciliation, rapprochement and new forms of cooperation, and would thus show flexibility in choosing from a range of available options in the light of a political assessment of the situation. The object of the current exercise should thus be to set out a range of political options and entitlements open to States, rather than a rigid sequence of consequences and obligations that would inevitably follow the commission of an internationally wrongful act. In its current over-schematic formulation, however, chapter II took no account of such political niceties, instead giving the misleading impression that an internationally wrongful act automatically triggered just such a rigid sequence of consequences, one that must be followed mechanically. Yet apology, for example, was just one of a number of options open to States, not an indispensable component in a package of measures together amounting to full reparation, as the proposed new article 45 implied.

55. Turning to specifics, he said he had no difficulty in accepting the Special Rapporteur's proposal to replace the term "moral damage" by "non-material injury". In his view, article 45, paragraph 3 (*a*), referring to nominal damages, should be retained, as a useful additional option for States, perhaps as an alternative to a formal apology. The commentary should, however, stress that the forms of satisfaction set out in paragraph 3 were alternatives, not mandatory consequences.

56. If the opening phrase of article 45, paragraph 3 (*b*), were to be deleted, the deletion should be without prejudice to future consideration by the Commission of the issue of punitive damages. As reformulated, paragraph 3 (*b*) seemed to relate to the sphere of compensation rather than satisfaction. The Drafting Committee should consider the question further. He had few problems with article 45 bis, or with article 46 bis, which should be retained and further refined if necessary. Many of the problems relating to interest should be left to the discretion of the courts. Injury was not always so easily quantifiable as Mr. Rosenstock asserted, nor was it necessarily helpful, in the broader context of satisfaction, to insist on compensation to the last penny. Lastly, in any consideration of the consequences of an internationally wrongful act, due weight must be given to the rights of the accused.

57. Mr. ROSENSTOCK said that in domestic societies most disputes were settled by negotiation, and were thus compromises. Doubtless that was also true at the international level—perhaps more so. That being the case, there was still a need for vigorous criteria with which to measure the loss. The absence of such criteria was bound, in the long run, to place the injured State at a disadvantage with regard to compensation for the damage suffered. That was why it was useful to have a rigorous format within which negotiations could be conducted.

58. Mr. KUSUMA-ATMADJA thanked colleagues for their enlightening contributions to the debate. In particular, he endorsed Mr. He's view that inquiry had its place in the article on satisfaction; Mr. Pellet's remarks concerning the independence of members of the Commission; and Mr. Sreenivasa Rao's comments on the need for a more flexible procedure in article 45. He also expressed doubts as to whether the arrangement proposed in article 45 bis, paragraph 2, was workable in practice.

59. The CHAIRMAN said that a decision on referring articles 45, 45 bis and 46 bis to the Drafting Committee would be taken following the conclusion of the debate on those articles at the next plenary meeting. Meanwhile, if he heard no objection, he would take it that the Commission agreed to authorize the Chairman of the Drafting Committee to take informal account of the contributions made to the plenary debate thus far when the Committee considered those articles at its meeting that same afternoon.

It was so agreed.

The meeting rose at 1 p.m.

2640th MEETING

Friday, 14 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, 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. 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]

[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).