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Summary record of the 2634th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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innovation, representing some progressive development of international law, in that it spoke of persons other than heads of State, heads of Government and ministers for foreign affairs, who could be considered authorized to act on behalf of the State. It seemed to have been generally accepted, although the Drafting Committee could look into the queries raised about the phrases "the practice of the States concerned" and "other circumstances".

74. The use of the word "expressly" in new draft article 4 made it more restrictive than its equivalent in the 1969 Vienna Convention. It had led to some comments, the majority of members being in favour of a realignment with that instrument. That point, too, could be examined in the Working Group.

75. New draft article 5 would be considered in depth by the Working Group. One member had made the very interesting suggestion that subparagraph (*g*) of the article should refer not just to a decision of the Security Council but to a decision taken by that body under Chapter VII of the Charter of the United Nations. He had deliberately avoided including that specification because, without it, the subparagraph also covered decisions by the Council when it established committees of enquiry under Chapter VI. That, too, could be discussed. One member had referred to the need to indicate who could invoke the invalidity of an act and therefore to distinguish between the various causes of invalidity.

76. A number of comments had been made about estoppel and silence. While there was perhaps little cause to include them in the materials on the formulation of unilateral acts, he believed they had to be covered in the context of State conduct and should therefore be included in a future report when he would cover the legal effects of acts.

77. Without entering into detail about the coverage in his next report, he wished to say that the Working Group had carefully examined unilateral declarations in which States offered negative security guarantees, some of which were considered by some States to be legal acts and by others to be political acts. While many such acts were documented, it was hard to know how States interpreted them. State practice was therefore difficult to analyse. It had been said that State practice had not been adequately collected and catalogued, and an effort would be made in future to do so, so that it could be used for reference purposes in the next report.

78. Mr. GOCO, noting that about 10 States had responded to the questionnaire and that those replies would assist in refining the work on the topic, asked whether any pattern could be discerned from them.

79. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that some of the replies had been critical of the treatment of the topic. That was due to the current stage of consideration; as the topic was developed, States might find it easier to accept. In some replies, States, reflecting their own practice, recognized the existence of such acts. Other replies had been more doctrinal and academic, referring to the various categories of unilateral acts. In any case, the replies had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account at a later stage.

80. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the Special Rapporteur's proposal.

It was so agreed.

The meeting rose at 1.05 p.m.

2634th MEETING

Thursday, 8 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, 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 members of the Commission to resume their consideration of the topic of State responsibility on the basis of chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that, in accordance with the approach agreed upon by the Commission, chapter II of Part Two of the draft articles dealt with the different forms of reparation from the point of view of the obligations of the State which had committed the internationally wrongful act. In the text adopted on first reading, in addition to assurances and guarantees against repetition, three forms of reparation had been envisaged, namely, restitution in kind, compensation and

* Resumed from the 2623rd meeting.

[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).

satisfaction. He had also considered that the provisions of article 42, paragraph 2, on contributory fault and the mitigation of responsibility, as adopted on first reading, belonged in chapter II rather than in chapter I, since they were restrictions on the forms of reparation. Moreover, in his second report, the Special Rapporteur at the time, Mr. Arangio-Ruiz, had proposed a separate article on interest,[3] which had been strongly criticized and eventually dropped because it focused on non-essential elements rather than on interest as such. It was clear from the discussions at the time that most members of the Commission accepted as a general principle that interest should be paid and that, if a suitable provision had been submitted to the Commission at the time, it would have been adopted. That was why the Special Rapporteur was proposing a new article on interest. At the same time, he had deleted the reference to interest in the new article 44 he was proposing.

3. No State had proposed the deletion of the provisions in articles 42 and 43. There had certainly been criticism of their wording, particularly with regard to the exceptions in article 43, and States had also requested that the provisions on certain issues such as compensation should be more detailed, but they had accepted the idea that restitution, compensation and satisfaction were three distinct forms of reparation and had generally agreed with the position taken on first reading regarding the relationship between them. He had nevertheless looked into the question of that relationship in his third report, particularly the relationship between restitution and compensation, as legal opinion was still divided on the matter.

4. Article 43 as adopted on first reading asserted the principle of the priority of restitution in kind and provided for four exceptions. Restitution was considered as the primary form of reparation and compensation as an additional form to be used where restitution did not fully compensate for the injury. He pointed out in passing that he preferred to use "restitution" rather than "restitution in kind" in the English version in order to avoid any misunderstanding, but he would not of course object to the continued use of *restitution en nature* in the French version. In fact, given the context and content of article 43, there was no possibility of confusion on the subject.

5. On the question of substance, the relationship between restitution and cessation was a complex problem concerning the content of the obligation of restitution in cases where the primary obligation was no longer effective. That problem had arisen in several recent cases. For example, in the *"Rainbow Warrior"* case, restitution would have been pointless if the underlying obligation had not been a continuing one. On the other hand, in the *Great Belt* case, the problem of restitution had arisen in the context of a continuing obligation to respect freedom of transit through the Great Belt, so that, if there had been any unlawful impediment to such transit—that point was of course in dispute—restitution would have been substantial. The relationship between cessation and reparation was dealt with in chapter I and was a suitable question for theoretical analysis, but not for inclusion in the draft article, even though it could be further developed in the commentary. The relationship between restitution and compensation was, however, more important as far as the wording of the article was concerned. Mr. Arangio-Ruiz had forcefully defended the idea that restitution was the form of reparation par excellence and that the other forms of reparation were merely substitutes in cases where it was not feasible. The problem with that position was that, in the great majority of cases, the form of reparation actually used was compensation. Whatever the theoretical standpoint, individual cases could be settled only by taking into account the particular circumstances of each case and especially the primary rules, as, by doing so, the State requesting restitution was often trying to obtain something to which it might not be entitled. Thus, in the case of the Iran-United States Claims Tribunal, the United States was under the obligation to discontinue certain judicial bodies, but not to make provision to ensure that no new bodies could be set up later as a result of a further amendment to its legislation. In the same way, a State obliged to carry out an environmental impact study or to provide notification before undertaking an activity could avoid doing so, but nevertheless had every right to carry out the activity in question. In such cases, the link between the violation and what one wished to obtain through restitution was indirect and contingent, and that affected the analysis of the court hearing the case. The reservations to which the priority given to restitution had led resulted from the fear that States would be requested to "undo" everything they had done within the framework of a lawful activity by invoking an incidental breach of international law. In his opinion, the problems posed by such situations could be resolved without denying the priority of restitution. In the context of inter-State relations, restitution was still the primary form of reparation, particularly when it was associated with a continuing obligation, and that needed to be brought out clearly in article 43 and in the commentary, since, otherwise, States would be able to avoid performing their international obligations by offering payment. He believed that the confusion among legal experts on the matter originated in a tendency to confuse restitution in inter-State relations and restitution in cases of expropriation. In such cases, the receiving State did indeed have a right of eminent domain over its territory and its resources which affected the way the principle of restitution was applied. The only decision in favour of a full-scale restitution in that context was the one handed down in the *Texaco* case and it had been much criticized; in practice, it meant that a higher level of compensation had to be paid. In his view, those questions could be left to one side because they related to the content of the substantive primary obligation in the field of expropriation and affected the relationship between investors and capital-importing States; they were not concerned with responsibility as dealt with in Part Two of the draft articles and gave no reason to modify the position taken on first reading, namely, that restitution had priority as a means of reparation.

6. The exceptions to restitution listed in article 43, subparagraphs (*a*) to (*d*), adopted on first reading had been criticized by Governments on the grounds that they made nonsense of the rule stated in the article's introductory paragraph. He proposed that two of the four exceptions should be deleted.

[3] See 2616th meeting, footnote 5.

7. The first exception, material impossibility, which was the subject of subparagraph (*a*), was universally accepted: even international law did not ask the impossible and that subparagraph had been considered satisfactory.

8. The second exception, which applied to cases where restitution would involve breaching an obligation stemming from a peremptory norm of general international law (subparagraph (*b*)), had been criticized for various reasons. For example, when it had made its comments, France had not accepted the concept of a peremptory norm.[4] Nevertheless, the most telling criticism was that it was almost impossible to imagine a situation in which restitution would involve the breach of an obligation stemming from a peremptory norm of general international law, especially when restitution was viewed in relation to cessation and a continuing obligation. In his view, the circumstances precluding wrongfulness provided for in chapter V of Part One applied to Part Two and one of those circumstances related to the performance of peremptory norms. Therefore, even if a situation such as the one envisaged in article 43, subparagraph (*b*), could arise, it would be covered by the provisions of chapter V. For that reason, he proposed that subparagraph (*b*) should be deleted.

9. The third exception concerned cases in which restitution would impose costs wholly out of proportion with the benefit the injured State could gain from restitution in kind rather than compensation and followed from a reasonable principle adopted in national legal systems. In fact, when a return to the status quo ante, though not impossible, would be so expensive and inconvenient that it would be wholly out of proportion with the benefit the injured party would gain, it was reasonable not to provide restitution and to allow compensation, which must of course be full compensation. By and large, such situations did not involve continuing wrongful acts. Mr. Brownlie had often made the point that the principle concerned should be applied in the context of the primary obligation and by reference to the way in which that obligation worked out in the particular case. He believed that subparagraph (*c*) should be retained and he proposed a wording for it that was very close to the text adopted on first reading.

10. The fourth exception related to cases where restitution would seriously jeopardize the political independence or economic stability of the State responsible for the wrongful act, whereas the injured State would not be affected to the same extent if it did not obtain restitution in kind. There had been an enormous amount of controversy over the word "whereas", which did not appear in the initial version by Mr. Arangio-Ruiz, where the emphasis had been firmly on the situation of the responsible State. In some situations, however, it was the very existence of the injured State that was at stake. Subparagraph (*d*) was certainly the most heavily criticized provision in the articles under consideration. According to most States, the situation referred to had never arisen and the subparagraph was therefore unrealistic; moreover, its wording was so broad and vague that it was in any case unclear to which situations it would apply. In his opinion, the situation was covered by subparagraph (*c*) anyway and he therefore proposed the deletion of subparagraph (*d*). He noted that the wording he was proposing for the whole article on restitution could be found in paragraph 146 and again at the end of the report. It was essentially the provision adopted on first reading with a few simplifications in the language and with the deletion of subparagraphs (*b*) and (*d*).

11. Article 44, as adopted on first reading, consisted of two paragraphs. In paragraph 1, compensation completed the reparation picture as far as material damage was concerned, while immaterial injury was covered by satisfaction. In paragraph 2, the Commission had sought to define compensation, but the paragraph contained vague references to interest and loss of profits in terms which gave no practical guidance and which suggested they were optional extras. Leaving to one side the question of interest, for which he proposed a separate article, he said that there was no doubt that compensation should cover any economically assessable damage sustained by the injured State and that that notion fitted into paragraph 1. The essential question in the debate on the draft article was whether the relatively simple statement of general principles in paragraph 1, with the addition of certain elements from paragraph 2, should be retained or whether a more detailed definition of compensation was required. In the view of some Governments and also some members of the Commission, that provision was too brief; the quantification of compensation did indeed pose many problems, but there was a wealth of practice in the matter and the Commission should further develop the concept. In comparison with articles 43 and 45, article 44 was too brief.

12. There was reason to be cautious before trying to elaborate more detailed principles of compensation. Efforts to do that had been made in recent years in the field of compensation in cases of expropriation and OECD had tried to do so as part of its more general work on the protection of investments. The difficulty in matters of expropriation had to do with the content of the primary rule requiring compensation. Generally speaking, States were entitled to expropriate property belonging to foreigners as long as they did so for a public purpose and in a non-discriminatory way. There was no question of a breach unless the State failed to pay compensation when it was required to do so by international law. Questions might then arise, but not at the stage when the level of compensation was being set. That important distinction had been formulated in the *Chorzów Factory* case and was still valid. The Commission should steer clear of spelling out the content of a particular primary rule or elaborating on the distinction between lawful expropriation and unlawful expropriation. If it wished to do that, it should do so in the context of the topic of diplomatic protection.

13. The second reason for caution was that compensation was an extremely dynamic concept. The human rights courts had actually started out with very modest aims in that field and the amounts of compensation awarded by, for example, the European Court of Human Rights had initially been very small. More recently, both the European Court of Human Rights and the Inter-American Court of Human Rights had become more ambitious in the field of compensation. In paragraph 157 of his report, he cited the key decision of each of those systems, which had both been influenced by the judgment in the *Chorzów Factory* case and the Commission's work

[4] See 2613th meeting, footnote 3.

on State responsibility. For those reasons, a rather general formulation seemed to be justified and any further guidance considered necessary could be included in the commentary in a form that did not tie down the law on the subject.

14. With regard to the limits of compensation, the arguments put forward in favour of paragraph 3 of article 42 as adopted on first reading, concerning means of subsistence, were more persuasive in respect of compensation as it was possible for a State to cause catastrophic damage in another State that could not have been foreseen at the time when the wrongful act had been committed. National legal systems dealt with the problem in a variety of ways, first of all by invoking the notion of proximate cause, which the Commission had agreed should be embodied in the draft articles on reparation and compensation in particular. Certain acts were just too distant from the damage to give rise to compensation. Secondly, national legal systems took into account the kinds of damage covered by the primary rule and, thirdly, they set up limitation-of-liability regimes for certain activities. Whether or not the Commission decided to take the robust approach formulated in paragraph 163 of his report, it seemed that the matter should be settled on a case-by-case basis either by the court dealing with the case or by States themselves through their legislation.

15. The mention of loss of profits in the main text of the article without further clarification would be like "waving a red rag". He therefore proposed a simplified version of article 44 in paragraph 165, on the understanding that it could be explained in the commentary that the loss of profits in certain circumstances could be compensable, depending on the content of the primary rule in question and the circumstances of the particular case. Should the Commission wish to have a more detailed provision on compensation, he would be happy to produce one, provided that he received very specific instructions.

16. Mr. BROWNLIE said that the Commission still had a great deal to do before it exhausted a subject which was of enormous importance, but was not very suitable for regulation. He was generally sceptical about rule-making activities, but thought that, in most cases, the best way to assess and take advantage of past experience was to compile indicia rather than fall back on supposedly general rules. That was why he was not very happy with methods that produced series of apparently general propositions. However, the Commission had a mandate to fulfil. In the case in point, it therefore had to devise some useful rules with appropriate provisos attached in order to avoid the generalities that appeared to characterize the part of the report under consideration.

17. He noted with satisfaction that the Special Rapporteur had acknowledged the importance of primary rules, but he regretted that he had not taken that acknowledgement to its logical conclusion. It was not enough simply to accept the principle that primary rules played an important role in determining whether compensation was justified and what form it should take or whether interest was justified. The cases in which they applied also had to be classified.

18. With regard to the connected question of sources, he said that the report should have relied less on legal writings and more on jurisprudence, particularly arbitration decisions. In particular, he regretted that there was no mention of the award in the *Aminoil-Kuwait Arbitration* concerning a series of connected agreements, from which it emerged that the applicable law was the agreements themselves. It was true that reparation depended on the relevant area of law. The same also applied to restitution.

19. He was not convinced that restitution was the primary form of reparation. There was a great deal of uncertainty on the subject. In fact, if primary rules were accorded the practical importance they deserved, there would be no need to determine whether or not restitution was the generally applicable, primary form of reparation. The problem could be solved in another way. It was quite possible to avoid generalities by including some provisos along the lines of "unless the relevant primary rules indicate a different solution". With regard to sources, it would also be better to rely more on the decisions of tribunals, although caution was necessary because the applicable law was not always clearly stated, as shown in the case of the claims brought before the Iran-United States Claims Tribunal. He also thought it did not matter much if the applicable law was general international law or not. It should perhaps be pointed out in the commentary that some cases could be settled by means of a declaration of rights or declaratory judgement by a court without giving rise to restitution as such, as in the case, for example, of a withdrawal from a territory in a territorial dispute.

20. Lastly, he did not agree that punitive damages and moral damage should be discussed under the heading "Satisfaction".

21. Mr. GAJA said that he found the Special Rapporteur's proposals generally persuasive and, in any case, they were an improvement over the corresponding text adopted on first reading. In his opinion, the Commission had no option but to state the rules that stemmed from judicial decisions and arbitral awards. The problem was that those rules were applied only occasionally.

22. He would like to know to whom the expression "those injured" referred in subparagraph (*c*) of the proposed new article 43. Did it refer to the State, as intended in the earlier version of the provision? Did it also cover individuals, for instance, when the breach of the obligation concerned the treatment of foreigners or fundamental rights? If so, was restitution owed to another State or to the injured individual or to the State for the benefit of the latter? The wording of subparagraph (*c*) should be changed so as not to include any reference to the injured entity. However, was it possible to limit State responsibility to inter-State relations and ignore individuals?

23. On the question of material impossibility, he was not persuaded by the explanations given by the Special Rapporteur in paragraph 141, especially with regard to the death penalty cases. Nor was he persuaded by the argument in paragraph 142 that restitution could be excluded in cases where the respondent State could have lawfully achieved the same or a similar result in practice without breaching the obligation; that referred essentially to procedural obligations. It could be argued that, if there was a

lawful way to achieve a given result, the fact that the respondent State had not taken advantage of that way did not in itself exonerate it from the obligation of restitution. The State must put that procedure in motion; restitution was possible and the question of disproportion did not arise. The question was not what constituted restitution—which depended on the content of the relevant primary rules—but, rather, whether the breach of an obligation warranted restitution.

24. Mr. HAFNER said that the two draft articles proposed, especially article 43 on restitution, gave rise to several problems. It appeared that restitution was an obligation and therefore all the provisions of the draft articles being prepared, even those dealing with circumstances precluding wrongfulness, were applicable to it. The question that arose was what the consequences of that were. If a circumstance precluding wrongfulness arose, the State was then relieved of the duty of restitution, but not of the obligation to pay compensation, for example, because the original obligation clearly remained. What then was the relation between the provisions on circumstances precluding wrongfulness and the provisions on restitution in relation to compensation? What was the relationship between the material impossibility referred to in article 43 and force majeure, for example? Did the exceptions to restitution replace circumstances precluding wrongfulness as a *lex specialis* or were the provisions on circumstances precluding wrongfulness in addition to those exceptions?

25. Mr. CRAWFORD (Special Rapporteur), replying to the last point, said that, if one of the conditions set forth in article 43 was met, there was no obligation to provide restitution; the problem of compensation arose only in relation to the circumstances precluding wrongfulness listed in Part One of the draft articles, assuming that they were applicable in all cases. One of the effects of those circumstances was to suspend compliance with the obligation under consideration for a period of time. Distress and state of necessity would therefore have such an effect. However, it was also possible that the temporary effect could last long enough for the obligation to be superseded. The courts had always made a distinction between the continued existence of the underlying obligation and the exemption from performance of the obligation at a given time.

26. In his view, circumstances precluding wrongfulness were generally speaking supplementary to the exceptions given in article 43. It followed that the impossibility of proceeding with restitution referred to a permanent impossibility rather than a temporary one.

27. Mr. LUKASHUK thanked the Special Rapporteur for submitting a detailed report. He agreed with its general approach and thought that the proposed articles 43 and 44 would be easier to apply than those adopted on first reading, as they corresponded more closely to reality.

28. He reserved the right to make more detailed comments on the Special Rapporteur's proposals at a later stage.

29. Mr. ECONOMIDES said that the question of reparation could be settled only in a general way and with a great deal of caution, leaving it to practice, particularly international and internal jurisprudence, to work out the details. He had not been convinced by the inadequate arguments the Special Rapporteur had put forward in favour of the deletion of the words "in kind" after the word "restitution". The new provisions that the Special Rapporteur was proposing were less precise than those already adopted on first reading. Article 43, for example, did not say to whom restitution must be made. Implicitly, of course, it was to the injured State, but, in such an important text, precision was necessary. Article 44 had the same flaw, since the bilateral relationship between the responsible State and the injured States, which had been clear-cut in the old provisions, had been abandoned. He doubted whether circumstances precluding the wrongfulness of an act also applied in the part of the draft articles under consideration and was of the opinion that that question should be looked at carefully. The concept of "responsible State" was also not used in that part. It was, of course, known that a State was responsible because it had committed an internationally wrongful act, but the concepts of international responsibility and responsible State should be given pride of place in that context. He reserved his position on the fact that two exceptions had been eliminated in article 43. It was not that he was in favour of those exceptions, but he had still not been able to form a definitive opinion and reserved the right to come back to that issue later.

30. The CHAIRMAN noted that the articles were drafted to guarantee the right of the injured State to choose a mode of reparation. It might be considered that the wrongdoer also had a choice to make. He asked the Special Rapporteur whether it could be concluded from paragraph 123 of his report that he intended to include a specific article along those lines in Part Two bis.

31. Mr. CRAWFORD (Special Rapporteur) said that the answer to the Chairman's question was "yes". The reason the articles were formulated in terms of the obligation of the responsible State was that the question was thus left open of who was entitled to invoke responsibility, as was the question of the choices which could be made at the time it was invoked. It must not be forgotten that the Commission was dealing with obligations towards different entities and even non-entities. For example, the international community as a whole was not a legal person, but there were obligations towards it. In some situations, several States were injured. Referring to an obligation "to the injured State" implied a purely bilateral form of responsibility, and that was not what was involved. There had been no attempt to find a solution to that problem on first reading. The Commission was coming back to it now in Part Two bis, which drew a distinction between the obligation of the responsible State to make reparation in one of the forms referred to and the invocation of that responsibility by other States which could choose the form of reparation. Obviously, an injured State might prefer compensation to restitution, except in extraordinary circumstances. Those provisions would be part of a framework in which it would be indicated what the responsibilities of the State that had committed the breach were and then what States could do to invoke those responsibilities. The reason why the earlier articles had been regarded as involving a choice between, for example, compensation and restitution, was quite simply that they had referred to a right and that right had been thought to imply the right to choose. It was clear that, in a bilateral context, an injured State was entitled to make a choice and it would be better to say so explicitly rather than implying it.

32. Mr. SIMMA said it was not to be ruled out a priori that a State not belonging to the category of injured State might ask for restitution, but the distinction between cessation and restitution gave rise to a difficult problem, for example, with regard to human rights violations. Accordingly, the text of the commentary as it stood should be regarded as provisional.

33. Mr. CRAWFORD (Special Rapporteur) said it was clear that the injured State, which was the one that had suffered the damage, would have the right to choose the mode of reparation. In some circumstances, other States would be able to invoke responsibility. Mr. Gaja had rightly referred to the possibility that those States might substitute for the injured State. They would obviously not be compensated themselves, but they would be entitled to insist not just on cessation, but on restitution as well. It was because of that possibility that he had drafted the relevant provision of article 43 in the way he had. The disadvantages for the State which became involved must be balanced against the damage suffered by the victims, the persons actually affected by the wrongful act. The way in which the draft articles were formulated left open the possibility that the injured State would claim its rights for itself and the possibility that other States would be claiming those rights, as it were, on a broader basis.

34. Mr. PAMBOU-TCHIVOUNDA, referring to the question by Mr. Hafner, who had asked where circumstances precluding wrongfulness belonged in the various forms of reparation, said that there were two possible answers. The first was that chapter II was based on the assumption that wrongfulness was not precluded. The various examples of compensation for wrongful acts would be dealt with accordingly. The second was to approach the question from the viewpoint of the mitigation of responsibility—and it was perhaps in that context that an echo could be given to that concern, which was one that he shared.

35. With regard to articles 43 and 44, he preferred the wording suggested by Roberto Ago. The articles proposed by the Special Rapporteur were, of course, more concise, but it could be asked whether he was not sacrificing some questions that were not secondary, but essential. For example, the exception in subparagraph (*d*) of article 43 adopted on first reading was being sacrificed. Accordingly, the question whether there might be more than one State "concerned" by the commission of an internationally wrongful act found practically no reply in the new version, even though that question was a substantive one.

36. Similarly, in the overall treatment of reparation, the Special Rapporteur opted for inversion. In the Ago draft, it had been the State which had committed the internationally wrongful act which had been in the hot seat in Part One, with the spotlight on the injured State in Part Two. Now, the approach was the reverse: the draft articles began with the words "A State which has committed an internationally wrongful act".

37. In Part One, the point had been to establish principles. It appeared that, in stating the rules dealt with in Part Two, the Commission would have to go beyond principles. For that purpose, it would have been better to keep the injured State in a more active role in order to show that it was the driving force behind reparation.

38. There was one point on which he fully agreed with the Special Rapporteur, and that was the deletion of the words "in kind". Either reference was made to restitution or it was made to reparation in kind. Restitution could be made only for the totality of what had been wrongfully expropriated. That was not only a question of semantics, but also one of substance. To the extent that the construction of the system was based on the breach of an international obligation, the whole question was how to restore what would in a way be a right, the reverse of an obligation. There was a material aspect of the thing to be restored that did not come across in the edifice which the Commission had agreed on and which consisted in basing the entire system of the law of responsibility on the breach of an international obligation, i.e. the commission of an internationally wrongful act.

39. The question of compensation did not lend itself to treatment that was as compact as that given it by the Special Rapporteur in his third report. It might be asked why he was reintroducing restitution in the provision he proposed in paragraph 165. Compensation was a mode of reparation which derived from restitution, but the impression was that the general principle was restitution, and nothing less, and that, in technical terms, compensation came into play if there had not been any restitution. The same would be true of satisfaction. As sober as they were, those draft articles gave rise to questions which had to be dealt with by the Drafting Committee.

40. Mr. CRAWFORD (Special Rapporteur) reminded Mr. Pambou-Tchivounda that Part Two of the draft articles had been prepared not by Mr. Ago, but by Mr. Riphagen and by Mr. Arangio-Ruiz, and it could therefore not be known whether Mr. Ago would have assigned the "active role" to the injured State or to the responsible State in the articles on restitution and compensation. As Special Rapporteur, he had tried mainly to disentangle the issues without claiming to have settled them satisfactorily. His objective was to give effect, in a chapter dealing with the implementation of responsibility, to what he took to be the set of values implicit in articles 1 and 3, thereby going back to an approach which he thought had been wrongly abandoned by the preceding Special Rapporteurs.

41. Mr. ROSENSTOCK said that it was very difficult to take a position on the articles proposed by the Special Rapporteur without situating them in the general context of the draft. It was essential, for example, to have a clear idea of the links between article 40 and the rest of the regime. The content of article 44 could be assessed only on the basis of what would be stated in the commentary. His comments on articles 43 and 44 could therefore be only preliminary in nature.

42. He nonetheless endorsed the Special Rapporteur's proposal that the title of chapter II, "Rights of the injured State and obligations of the State which has committed an internationally wrongful act", should be replaced by the shorter title, "The forms of reparation". That title was not only shorter and simpler, but it would, as the Special Rapporteur had stressed in paragraph 120, avoid the

implication that the rights of "injured States" were in all cases the strict correlative of the obligations of the responsible State.

43. The wording of article 43 proposed by the Special Rapporteur would be acceptable, provided that the proposed new version of article 45 was also accepted.

44. The new wording of article 44 caused him more problems because he was not sure that the deletion of the reference to loss of profits might not be misunderstood. Of course, as the Special Rapporteur had noted in paragraph 149 of his report, that reference had perhaps been too "lukewarm" in the old version, but that was not a reason for deleting it. Loss of profits absolutely had to be mentioned, either in the form of an explicit reference in article 44, the solution he preferred, or at least in a separate article or in the commentary.

45. Mr. CRAWFORD (Special Rapporteur) said that there appeared to be a misunderstanding about loss of profits. The adoption of Part Two bis on the implementation of responsibility would, of course, affect the content of article 44. Mr. Arangio-Ruiz had already proposed two versions of that article (former article 8), a short one and a long one in his second report.[5] There had been some problems with the long one because it had not actually said much more than the short one and it had contained some contentious issues. The Commission and the Drafting Committee had thus opted for the short version,[6] but it had ultimately been deemed inadequate by Governments and by some members.

46. The Commission now had a choice between two solutions: it could either draft article 44 concisely, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive. An intermediate solution would hardly be possible in that case. If the Commission opted for the long version—a change of strategy compared to the solution adopted on first reading—that version would have to include a reference to loss of profits. That was, however, a matter for the Commission to decide and he was counting on the members for guidance in that regard.

47. Mr. GALICKI said that, like the speakers who had preceded him, he would simply make preliminary comments because chapter I, section B, of the third report which had just been distributed warranted closer study.

48. With regard to the wording of article 44, the Special Rapporteur seemed to reject a priori any intermediate solution between the current shorter version, which did not mention loss of profits, and a longer and analytical version based on the one adopted on first reading. In the light of the comments by Governments and the position taken by some members, however, unanimity could perhaps be reached on such a compromise solution. He had no specific proposal to make at the current stage, but he did not think that it was impossible to refer to loss of profits even in a concise version of article 44. There were sometimes very simple solutions for very complicated problems, as shown by the new title of article 43, in which the deletion of the words "in kind" had solved the problem of whether reference should be made to restitution in kind or restitution *in integrum*.

49. Mr. ROSENSTOCK said that he fully shared Mr. Galicki's view. Reference could perfectly well be made to loss of profits in an article 44 to be drafted concisely, provided that additional explanations were given in the commentary.

50. Mr. CRAWFORD (Special Rapporteur) said that he did not object to that solution, but wished to provide a clarification. In his opinion, the Commission would not, as Mr. Galicki had said, have to choose between article 44 adopted on first reading and the proposed new version, but between that new version and the detailed article submitted by Mr. Arangio-Ruiz in his second report. He did not think that he had changed the substance of the article 44 adopted on first reading. He had, of course, removed the idea of "interest", which had been dealt with and expanded on separately, but he had deleted the reference to loss of profits only because some Governments had been of the opinion that it had been formulated in such a weak way that it had the effect of "decodifying" international law. He had therefore preferred to deal with that question in the commentary.

51. The article proposed by Mr. Arangio-Ruiz in his second report had been much more analytical and had explained the various methods of compensation in five paragraphs.

52. Mr. GALICKI said that he did not object to the Special Rapporteur's decision to delete the reference to "interest", which did not have to be mentioned in article 44, but he continued to believe that the problem of loss of profits had still not been solved.

53. Mr. ELARABY said that he shared the view of the preceding speakers and, in particular, that of Mr. Rosenstock. Article 44 should contain a reference to loss of profits, even if it was desirable that that article should be drafted concisely.

54. Mr. CRAWFORD (Special Rapporteur), referring to the comments by Mr. Brownlie, said it was obvious that the problem of the relationship between primary rules and secondary rules arose in the field of reparation. Contrary to what people sometimes tended to think, secondary rules did not "operate" autonomously and independently of primary rules. That was not sufficiently taken into account by *lex specialis*.

55. However important primary rules might be, it was difficult to draw the appropriate conclusions in the drafting of the articles themselves. That was why he had preferred to deal with that question in the commentary. He pointed out, moreover, that reference was usually not made to the content of primary obligations in the text of articles themselves. An attempt along those lines had been made in articles 19 and 40 adopted on first reading, but it had proved to be disastrous.

56. As to whether moral and punitive damages belonged in article 44, he recalled that Mr. Arangio-Ruiz

[5] See *Yearbook . . . 1989,* vol. II (Part One), p. 56, document A/CN.4/425 and Add.1, para. 191.

[6] See article 8 and the commentary thereto (*Yearbook ... 1993*, vol. II (Part Two), pp. 67–75).

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

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

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

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

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

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

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

63. Mr. ROSENSTOCK said that he fully endorsed the solution which the Special Rapporteur had just suggested, namely, that article 44 should be drafted concisely, while nevertheless including a reference to loss of profits and giving detailed explanations in the commentary.

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

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

The meeting rose at 1 p.m.

[7] See 2613th meeting, footnote 3.

2635th MEETING

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

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Pellet, Mr. Sreenivasa Rao, Mr. 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 Special Rapporteur to continue his introduction of chapter I, section B, of his third report (A/CN.4/507 and Add.1–4).

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

[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).