

Document:-
A/CN.4/SR.2637

Summary record of the 2637th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

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

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

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

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

The meeting rose at 4.40 p.m.

2637th MEETING

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

Chairman: Mr. Peter TOMKA

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

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of chapter I, section B, of the third report (A/CN.4/507 and Add.1-4), and specifically, articles 43 and 44, with a view to referring them to the Drafting Committee.

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

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

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

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

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).

secondary rules, not the duty of compensation required under the primary rules on the taking of foreign property.

6. Both restitution and compensation were subject to limitations: those for restitution were mentioned in article 43, subparagraphs (a) and (c), and those on compensation were outlined in the commentary. In view of those limitations, it was difficult to establish priorities. The tension between the civil law approach and the common law approach was perhaps creeping into the discussion. The common law tradition could be more easily accommodated if compensation was placed on the same level as restitution, whereas civil law practitioners tended to seek restitution first and to fall back on compensation only if restitution was not possible.

7. The *Chorzów Factory* case loomed large in the literature and in the earlier work of the Commission, yet the formula for reparation used in that case was different from the one adopted by the Commission. The judgment of PCIJ in the *Chorzów Factory* case stated that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. The question thus was what would be the situation if the breach had never occurred. The Commission's approach to restitution, reflected in article 43 adopted on first reading, limited itself to the re-establishment of the situation that had existed before the wrongful act had been committed, the implicit objective being to turn the clock back, as it were. However, if the *Chorzów* formula on integral reparation was followed faithfully, *lucrum cessans* would then have to be compensated, whereas according to the Special Rapporteur's proposal the fate of *lucrum cessans* remained unresolved, although it might be decided on a case-by-case basis.

8. The first exception to restitution, outlined in subparagraph (a) of new article 43 proposed by the Special Rapporteur, related to material impossibility. Mr. Hafner had asked (ibid.) whether legal impossibility should not be included, e.g. when State A, the victim of a breach, asked State B for restitution but State B replied that it could not give it because internal law did not allow for it. That was not a case of legal impossibility, however, because there was nothing in international law to preclude internal laws from being changed. Former article 50, currently article 41, of the European Convention on Human Rights said that, if full restitution could not be obtained, compensation must be paid. But that provision and others like it constituted a voluntary agreement by States not to go as far as general international law would allow them to, a recognition that it would in many instances be extremely difficult to ask a State to repeal legislation. The difficulty involved was nonetheless very different from impossibility, and the two must not be confused.

9. He concurred with others that the words "those injured" in new article 43, subparagraph (c), was infelicitous, for it might be construed as covering entities other than States. Article 40 bis, paragraph 3, should be applied in that context. However: its scope should be interpreted broadly throughout the entire draft, so that the Commission would not have to include ambiguous clauses on remedies available to non-State entities.

10. As to the Special Rapporteur's discussion of restitution in the context of the *Great Belt* and death penalty cases (*Paraguay v. United States* and *LaGrand*), he agreed with Mr. Yamada that a distinction should be drawn between restitution in the context of injunctive relief and restitution in the context of the subsequent proceedings on the merits.

11. With reference to article 44, on compensation, many members and the Special Rapporteur had recognized the difficulty involved in constructing a meaningful formula, as in many instances States reached agreement on compensation for an internationally wrongful act but the responsible State insisted that payment be *ex gratia*. A second difficulty was that, particularly in world trade and environmental issues, States created special, custom-tailored regimes for compensation which for practical purposes excluded the application of general principles. The report mentioned treaties on liability in environmental law, but those regimes all related to limitations on operator liability. As far as he knew, there was no State responsibility regime that set out such limitations. He agreed with the Special Rapporteur that all the Commission could do for the time being was to devise a flexible formula, perhaps incorporating some of the amendments proposed by Mr. Economides (ibid.). Any attempt at developing rules on the quantification of compensation should be left for the Commission's work in future years.

12. Mr. Hafner had pointed to problems with the phrase "economically assessable damage" in article 44 and asked whether "material damage" would not be a better formulation. In paragraph 148, the Special Rapporteur described "economically assessable damage" as including both material and moral damage. He would be interested to learn how moral damage could be economically assessed. Perhaps satisfaction or the payment of nominal damages would be a more appropriate approach. Finally, as he had mentioned earlier, if the *Chorzów* dictum on full reparation was applied faithfully, compensation would have to be given for *lucrum cessans*, whereas if the formula now in article 44 was followed, *lucrum cessans* could be decided on a case-by-case basis.

13. Mr. HAFNER said the problem of legal impossibility was a genuine one. Under the primary rules of international law, States had to adopt certain types of legislation. But what happened if the parliament did not do so? Perhaps only compensation to the victim was then possible. Limitations on changes to legal regimes certainly existed: a supreme court decision could not be overturned, for example, and restitution in such cases was truly impossible.

14. Mr. SIMMA, illustrating the difficulties involved in the idea of legal impossibility, gave the example of a parliament that enacted legislation found to be in breach of international law, which the Government tried in vain to have repealed. In other words, an international legal prescription shifted to an executive branch which was unable to induce parliament to do what was necessary to effect a return to legality. That, however, was not the way a State should be viewed for the purposes of State responsibility. It should rather be seen as a "black box", and no governmental organ should be able to escape the duty to rectify any violation of international law that might occur.

15. On the subject of supreme court decisions that could not be overturned, according to a decision by the Supreme Court of Greece, the Federal Republic of Germany, as the successor State to the Third Reich, did not enjoy immunity for crimes against humanity committed in Greece during the Second World War.³ More than 50 million German marks were to be paid to the claimants if forcible execution involving State property in Greece was to be avoided. The Federal Republic of Germany considered that the decision was not in conformity with international law on sovereign immunity. But what could a country do when it considered that a final judgement, not subject to appeal, was illegal? Pay first and then claim compensation for damages? Surely that bordered on the absurd.

16. Mr. GAJA said that, although there might be no legal remedy within the domestic system for a final judgement not subject to appeal, that did not mean the domestic legal situation could not be changed. Reversal of the results of judgements had occurred on issues concerning international law in various countries. A series of bilateral agreements on judicial or arbitral settlement concluded between the two world wars had contained clauses designed to avoid a reversal of final judgements. This confirms that an obligation to reverse judgements could otherwise result from the application of international law. There was no such thing as legal, as opposed to material, impossibility: the only possible exception might be the very marginal case that an obligation under international law needed to be breached in order to achieve restitution. From the practical point of view, material impossibility was the only thing with which the Commission should be concerned. Difficulties under internal law could only be one of the various elements to be taken into account in deciding whether restitution or compensation was appropriate.

17. He took issue with another point made by Mr. Simma. Even if, as had been agreed, the Commission was dealing only with relations between States, it could not ignore the reality that lay behind any infringement of the State's rights that affected an individual. It could not solve the problem with an escape clause like the one described by Mr. Simma. It had to consider in depth the matter of who could invoke responsibility and who could make the choice between compensation and restitution. It must bring in the individual, even though it was only considering the individual's role in the context of inter-State relations.

18. Mr. PAMBOU-TCHIVOUNDA said the difficulties involved in drafting article 44 were understandable in view of its objective: to cover any and all economically assessable damage. Mr. Simma seemed to take a minimalist approach to such assessment, construing it as relating solely to material, as opposed to moral, damage. He did not agree with that approach and preferred the position taken by the Commission in adopting the draft articles on first reading, namely, that any damage could lend itself to compensation and financial assessment. That position was borne out by case law as well; judges or arbitrators had ruled that financial compensation or indemnification was payable for moral damage.

19. Mr. GOCO said the phrase "economically assessable damage" had to refer to damage that could be assessed from the pecuniary standpoint. Some damages were incapable of pecuniary estimation, however. Punitive damages, for example, fell into an entirely different category.

20. Mr. KABATSI asked for clarification as to what happened if, under the separation of State powers, a piece of legislation sailed through parliament and subsequently constituted the basis for a wrongful act. Compensation could be paid, but the wrongful act might be perpetuated if the executive branch was unable to do away with the legislation involved. In such circumstances, compensation would not provide a meaningful remedy.

21. Mr. ECONOMIDES said that the Commission would have to decide whether it supported the principle cited by Mr. Simma that loss of profits must be compensated in all cases or whether it would adopt the approach suggested by the Special Rapporteur, whereby loss of profits should be evaluated on a case-by-case basis. He was inclined to the latter approach. If adopted, however, the principle—and any exceptions thereto—should be spelled out in the draft articles themselves. The commentary should be used to explain the reasoning behind both the principle and the exceptions. With regard to the possibility of execution, and any material or legal impediments thereto, in his view "material impossibility" should be given an extensive interpretation; it should include any legal obstacles arising out of internal law. As for the question of separation of powers, it was a concept that applied only to internal, not to international, law. The State was responsible for the actions of its executive, legislative and judicial arms. The case referred to by Mr. Simma came into that category.

22. Mr. CRAWFORD (Special Rapporteur) said the discussion had confirmed his suspicion that the Drafting Committee should reconsider article 42, paragraph 4, as adopted on first reading, namely the affirmation of the underlying principle that a State should not rely on its internal law as an excuse for not fulfilling its international obligations. It could not claim that its legislation could not be changed if international law required a change. In principle, international law should prevail. In practice, it was indeed easier to change legislation in some countries than in others, but the Commission could not legislate with that consideration in mind. He was therefore wary of the phrase "legal impossibility", which could be a way of reintroducing a revision of the basic principle he had mentioned earlier. Sometimes, however, the relevant legal position had changed, resulting in actual impossibility. For example, property seized from one person could not be restored if it had already been validly sold to another. The situation was more complicated where the rights of an individual were involved and international law acted as a sort of secondary standard, as it did in the human rights field. For instance a legal system existing in accordance with the requirements of international law might yet fail in an individual case. There might be international legal constraints on reconstructing the system; but in any case the individual problem remained. Article 41 of the European Convention on Human Rights addressed the problem by giving preference to compensation over restitution, although whether that constituted *lex specialis* was

³ See I. Bantekas, "Prefecture of Voiotia v. Federal Republic of Germany", AJIL, vol. 92, No. 4 (October 1998), p. 765.

an open question. He broadly concurred with the interpretation of “material impossibility” put forward by Mr. Economides: he was unhappy with the potential for a false dichotomy between material and legal impossibility.

23. Mr. PAMBOU-TCHIVOUNDA expressed concern at the Special Rapporteur’s approach to the respective roles of the author of the internationally wrongful act and the injured State in relation to forms of reparation. He still preferred the wording of article 43 as adopted on first reading, which had placed the emphasis on the right of the injured State to determine the question of international obligations, in the sense of identifying the State responsible. The draft articles relating to forms of reparation, in the version proposed by the Special Rapporteur, endorsed the cardinal principle embodied in the *Chorzów Factory* case, but that approach was excessively academic. A more practical line would have been more effective.

24. It was right that, in its new form, article 43 was not restricted to restitution in kind. The problem was that restitution implied a transfer in time and space; yet, within those parameters, there was no certainty that territory, for example, retained its original qualities. The issue was particularly germane on a day when the Middle East peace process was due to continue with a discussion of the future of the Golan Heights. Restitution in kind should therefore be seen in relative terms. It was also important to establish the scope of restitution. For example, the question arose as to whether “material damage” included moral damage. Article 43, as adopted on first reading, was not particularly illuminating on that point. Indeed, the very word “restitution” was not necessarily appropriate. In some instances, “restoration” or even “reparation” would be more precise. The terminology in the draft article was too vague. It failed to cover all possible ramifications and thus undermined the point of the article.

25. Article 44 proposed by the Special Rapporteur raised fewer concerns. He queried only the use of the phrase “economically assessable damage”, given that many of the activities that had given rise to the arbitration of the 1970s and 1980s—with the exception of those relating to hydrocarbons or nationalization—did not fall into that category. Removing the reference to the “injured State” was a logical progression from the text adopted on first reading. Equally, any reference to restitution in kind would have considerably reduced the specificity of compensation as a form of reparation. It was better not to specify the form of compensation involved; otherwise, it would need to be similarly specified in every other relevant article. Lastly, with regard to the suggestion by Mr. Economides, he thought that article 44 should include a reference, in general terms, to loss of profits and to interest.

26. Mr. ADDO said that the purpose of restitution in kind was to re-establish the situation which had existed before the internationally wrongful act or omission had taken place. Tribunals invariably took into consideration the practical difficulties involved, however, and, where appropriate, opted for monetary compensation. ICJ was vested with the same discretion under Article 36, paragraph 2, of its Statute. Restitution in kind had not commonly been awarded in recent times, although in the *Temple of Preah Vihear* case the Court had ordered Thailand to return all of the sculptures and other items that had

been removed from the Temple. In his view, restitution should be retained in the draft articles as the basic form of reparation. He endorsed the reformulation of article 43 by the Special Rapporteur, including the deletion of subparagraph (b)—which was unnecessary—and subparagraph (d), the provisions of which were adequately covered by subparagraph (c). He also endorsed, so cogent was the Special Rapporteur’s reasoning, the single paragraph proposal for article 44.

27. He was concerned, however, about the proper measure of compensation, which article 44 did not address. The issue had been a fertile source of conflict between developing nations and the industrialized countries of the West. The classic Western position was the Hull formula of “prompt, adequate and effective compensation”.⁴ In other words, there should be payment for the full value of the property, usually the “fair market value”, where that could be determined, taking into account the “going concern value”, if any. Compensation was to be based on value at the time of taking and it should be made in convertible currency, without restrictions on repatriation.

28. The foreign exchange implications of that formula, however, would virtually impose an embargo on any significant restructuring of the economy by a developing country that faced balance-of-payments difficulties. In the case of his own country, the Hull formula would have prevented Ghana from participating in the extractive industry in 1973 until it could mobilize enough foreign exchange resources to ensure immediate repatriation of the entire compensation payable to the mining and timber companies. Obviously, however, if Ghana had had such surplus foreign exchange, most probably it would not have been anxious to participate in the industry.

29. In his opinion, a newly independent African Government should not be required to pay the fair market value for a mine acquired by a metropolitan company at little or no cost under the protection of the imperial Power. He questioned the very meaning of “fair market price” in those circumstances, taking into account the inordinately high returns over as much as 50 or 100 years from a resource that had been exploited for a nominal consideration. He also questioned whether the liberal concessions granted to a company in colonial days should be ignored when the current market value was computed or, indeed, whether a market value existed at all. A good example was whether the Government of Ghana, in 1972, should have paid Lonrho (London and Rhodesia Mining and Land Company) compensation fully reflecting the soaring gold prices, in respect of the Ashanti goldfields which had been exploited by British concerns since 1892 under highly liberal concession terms.

30. Those were not merely rhetorical questions. Current international practice revealed that considerable inroads had been made into the traditional formulation. Moreover, in paragraph 4 of General Assembly resolution 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources, the Assembly had prescribed the

⁴ See G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1942), vol. III, p. 659.

payment of “appropriate compensation” in the event of nationalization, expropriation or requisitioning. The term “appropriate” was a significant departure from the phrase “prompt, adequate and effective”, although the Assembly had failed to define it. The Charter of Economic Rights and Duties of States⁵ had also stipulated “appropriate compensation” (chap. II, art. 2 (c)) but had dropped all references to international law in that regard.

31. In raising the issue he was not proposing a more detailed formulation of the principle of compensation in the text of article 44. He trusted, however, that the Special Rapporteur would consider the issue when he came to the more discursive treatment in the commentary. All concerns should be taken into account in developing the law. Doubts that the Hull formula reflected customary international law were to be found even among Western jurists, including Schachter⁶ and the late Sir Hersch Lauterpacht, one-time member of the Commission, who had written of the matter in 1948. The relevant passage was to be found in Oppenheim.⁷

32. Mr. PELLET said that Mr. Addo was correct in every way, except that the concerns that he had raised did not relate to the contents of article 44. Nationalization was a lawful act, whereas article 44 dealt with internationally wrongful acts. Compensation for nationalization was therefore irrelevant. The Special Rapporteur had added to the confusion with his long footnote, concerning nationalization, to paragraph 158 of his report.

33. Mr. BROWNLIE said that even those who did not agree with Mr. Addo’s account of the law would admit that Governments such as that of Ghana faced serious problems in dealing with the standard formula. He reiterated his view that much depended on the context of an act. Thus, nationalization in connection with economic restructuring was quite different from expropriation or confiscation that formed part of a policy of racial discrimination or ethnic cleansing. The Commission must guard against perpetrating excessive generalizations. He would add that Lauterpacht had expressed his opinion as early as 1936.

34. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pellet. Indeed, paragraph 158 of his report specifically stated that it was not the Commission’s function to develop the substantive distinction between lawful and unlawful takings or to specify the content of any primary obligation. His reason for including the footnote was to take account of the substantial literature on the issue. Secondly, he would point out that expropriated property did sometimes have to be valued in the context of State responsibility, as demonstrated by the *Chorzów Factory* case.

35. Mr. LUKASHUK commended the third report, which like its predecessor was solidly based on the provisions of international law, mostly “hard” law. Its realistic

approach was admirable, providing a proper reflection of existing law. The Special Rapporteur had been right to avoid excessive detail, especially where the relevant provisions were not fully reflected in domestic legislation. The Commission could take considerable credit for formulating the law of State responsibility; indeed, he understood that the latest edition of Mr. Brownlie’s course on international law included a chapter on the topic. The Commission must, however, press on with its work and fulfil its mandate by completing its second reading at its next session. State responsibility was a crucial issue, yet different States had different interests, as could be seen even with the Commission. If the Commission accepted the approach proposed by the Special Rapporteur, the draft articles would be accepted all the more readily by Governments.

36. Turning to specifics, he said that the new title of chapter II, “The forms of reparation”, clearly and concisely reflected the substance. On the other hand, it seemed that in many cases the concept of responsibility was implied rather than clearly spelled out in the draft articles. Such was the case in articles 43 and 44. Article 43, for example, would be improved if it was redrafted to read: “A State which is responsible” (or “A State which bears responsibility”) “for the commission of an internationally wrongful act is obliged to make restitution in kind.” It could be objected that such a reformulation added little to the actual content of the article. However, it must be borne in mind that law was a strict logical system. Thus, in certain circumstances the absence of any reference to responsibility might have adverse legal consequences. Furthermore, the obligation to provide compensation arose directly not from the wrongful act but from the legal relationship of responsibility. Such was the legal construction and it should not be overlooked.

37. He favoured the deletion of article 43, subparagraph (b), concerning peremptory norms. As the comments by Governments confirmed, such questions were resolved by the general rules of international law. Article 43, subparagraph (d), also, was better omitted, as it was of too general a character and could be interpreted extremely broadly so as to avoid triggering responsibility.

38. As for the correlation between the concepts of cessation and restitution, to describe cessation as “restitution of performance” was not quite correct. Cessation of the wrongful act was the first and often the most important obligation, sometimes more important than compensation. Thus, cessation must be given its due place in the draft, as Mr. Kabatsi had already pointed out.

39. He was in favour of a general and flexible formulation of article 44, as proposed by the Special Rapporteur. At the same time, he had some doubts about the comments on article 43, which appeared to separate the topics of diplomatic protection and responsibility. In paragraph 158 of the report, the Special Rapporteur rightly pointed out that diplomatic protection was a topic within the general field of responsibility. That should be explicitly spelled out in the draft, thereby emphasizing the link between the two topics. He also wished to emphasize that point because, as others had observed, the problem of State responsibility in connection with violations of the rights of natural and legal persons was not reflected

⁵ General Assembly resolution 3281 (XXIX) of 12 December 1974.

⁶ See O. Schachter, “Compensation for Expropriation”, *AJIL*, vol. 78, No. 1 (January 1984), p. 121.

⁷ See L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I, *Peace*, p. 352.

clearly enough in the draft articles. It was a matter of fundamental importance to which the Special Rapporteur should devote more attention. That being said, articles 43 and 44 could, in his view, now be referred to the Drafting Committee.

40. Mr. PELLET said that, by and large, Part One of the draft, and also chapter I of Part Two, had required only minor adjustments. Matters were very different when it came to chapter II of Part Two. As adopted on first reading, that chapter was barely more than an outline, and an unconvincing one at that. He had mixed feelings, not only about the changes proposed by the Special Rapporteur, but also, more generally, about the whole approach adopted. The superficial, albeit necessary, tidying up of Part One had been legitimate, but was altogether more debatable when it came to the substance of the topic, addressed in Part Two. That was particularly true in the case of article 44, on compensation, which was largely devoid of content, though admittedly currently complemented by article 45 bis, on interest.

41. He was well aware that the Special Rapporteur was working under pressure to meet the rigid deadlines the Commission had set itself. Nonetheless, he seriously wondered whether the Commission was right to agree to the “homeopathic” approach proposed by the Special Rapporteur. He was not calling the Special Rapporteur’s work into question: it was the basis on which that work was conducted that he was criticizing. In his view, it was not possible to improve a bad set of draft articles without subjecting them to thoroughgoing reconsideration. While it was not for him to put himself in the place of the Special Rapporteur, he would attempt to outline the main features of such a reconsideration, which it was still not too late to carry out.

42. The starting point for any in-depth consideration of the forms of reparation—a title that might, incidentally, be better formulated as “Forms and modalities of reparation”—should be article 42 as adopted on first reading, or article 37 bis as proposed in the report. Reparation must be full, and must wipe out all the consequences of the internationally wrongful act. Where a State had committed an internationally wrongful act, it was responsible and it must make reparation for the harmful consequences of the breach of international law. Yet many of the provisions adopted on first reading, and of those now proposed by the Special Rapporteur—which, he conceded, represented some slight improvement on the previous draft—appeared to be designed to protect the interests, not of the injured State, but of the responsible State. Why, for example, was it necessary to specify in article 45, paragraph 4, that satisfaction “should not take a form humiliating to the responsible State”? Quite apart from the fact that a conditional tense was never entirely convincing in a legal text, he saw no need to avoid humiliating a responsible State that had itself humiliated the injured State. The requirement of proportionality was alone sufficient, and there was no need for the additional stipulation, which fell wide of the mark.

43. It was very disappointing that the Special Rapporteur confined himself to referring only cursorily, in paragraph 125 of his report, to the fundamental question whether restitution in kind should re-establish the situation

that had existed before the commission of the wrongful act, or the situation that would have existed if the wrongful act had not been committed. As Mr. Simma had stressed, that question was linked to another fundamental issue not addressed in the report, namely, whether compensation should be made for *lucrum cessans*. While that problem had not truly been resolved by article 44, paragraph 2, adopted on first reading, at least that provision had had the merit of drawing attention to the problem, whereas the new formulation of article 44 proposed by the Special Rapporteur made absolutely no reference to it. His own first impression was that, pursuant to the principle of full reparation already adopted by the Commission, what should be re-established was the situation that would have existed if the internationally wrongful act had not been committed, and that compensation should be made for *lucrum cessans*. Those, however, were not the solutions currently reflected in the draft articles.

44. The second discussion missing was, obviously, the discussion of crimes. Regrettably, the Special Rapporteur had in that regard learned nothing from the unfortunate example of his predecessor, Mr. Arangio-Ruiz, who had postponed a debate on that question until the eleventh hour. The result had been a muddle, which had led the Commission to include in the part referring to delicts consequences that it would have been wiser to reserve for crimes, thereby depriving articles 51 to 53, on the consequences of crimes, of much of what might otherwise have been their substance. The Special Rapporteur was now following the same road, which would surely lead to the same impasse. Yet the concept of crimes still lurked in paragraph 126 of the report, in which the Special Rapporteur was compelled to draw a distinction between acts contrary to a simple rule of international law and a breach of a peremptory norm of general international law—a distinction which constituted perhaps an acceptable definition of “crime”. A State could waive restitution in the first case, but not in the second. That was just one of a number of consequences of the distinction between crimes and delicts, as the Special Rapporteur appeared to acknowledge. But, because that fundamental question had not been settled, the draft articles made not the slightest allusion thereto, and indeed, the deletion of former article 43, subparagraph (b) was actually a step backwards. That provision should be retained, but relocated in article 44, so as to stress that in no case could compensation be used as a means to buy off the consequences of a crime.

45. The concept of crimes was also detectable in article 45, paragraph 3 (b), as proposed by the Special Rapporteur. In paragraph 174 of the report the Special Rapporteur cited at length the convincing views of the Czech Republic on the problem. Subsequently, in paragraph 190, he imperturbably stated, without discussion, that there was no authority and very little justification for the award of punitive damages. Yet article 45, paragraph 3 (b), still provided for “damages reflecting the gravity of the injury”, while eliminating the proviso referring to “gross infringement of the rights of the injured State”.

46. In response to a point of order raised by Mr. CRAWFORD (Special Rapporteur), the CHAIRMAN requested Mr. Pellet, in the interests of concluding consideration of articles 43 and 44 for referral to the Drafting

Committee that same day, to confine his remarks at the current meeting to those two articles.

47. Mr. PELLET said the point he had wished to make was that, by stubbornly refusing to enter into a debate on crimes, the Special Rapporteur was preventing the Commission from engaging in a global consideration of the question of reparation. Provision should have been made for a general debate on articles 43, 44, 45, 45 bis and 46 bis as a cluster.

48. Like Mr. Hafner, he was surprised that, apart from the plural “those” to be found in article 43, subparagraph (c), there was no reflection whatsoever in the draft articles of the Special Rapporteur’s important views on the question of the injured State. That omission constituted a third missed opportunity. In his view, the Special Rapporteur had accorded too much deference to the existing draft articles, thereby failing to propose the sort of radical recasting that was called for. In any case, the Drafting Committee must examine articles 43, 44 and 45 in the light of its decisions on article 40 and the new definition of the injured State and of the injury.

49. In general, then, the Special Rapporteur’s proposed new articles differed little from the articles adopted on first reading, and when they did so it was not always in the right direction. Thus, in article 43, which he wished to address in detail, he was not sure that the new title “Restitution” was an improvement on “Restitution in kind”. A better option, acceptable both in French and in English, might be “*Restitutio in integrum*”, a perfect reflection of the intended meaning. Moreover, in the French the expression *est obligé de* should be replaced by *a l’obligation de*, and the bizarre expression “make restitution, that is, to” omitted in both languages. More importantly, as Mr. Lukashuk had pointed out, it would be sufficient to begin articles 43, 44 and 45 with the expression “the State responsible”, for the State obliged to make reparation was not necessarily the State that had committed the internationally wrongful act.

50. Furthermore, he wished to reiterate that he was not ready to accept without more convincing explanations, that the purpose of the restitution was to re-establish the situation that had existed prior to the commission of the wrongful act. If restitution was to be *in integrum*, it seemed, at least a priori, much more logical to reconstitute what would have happened in the interim if the wrongful act had not been committed. In that regard, the commentary to the draft article adopted on first reading⁸ cited in paragraph 125 of the third report was astoundingly confusing because it lumped together two fundamentally distinct approaches.

51. On article 43, subparagraph (a), he agreed with Mr. Simma and took issue with Mr. Economides and the Special Rapporteur. Contrary to what was sometimes asserted, internal law was never and should not be a pretext for refusing restitution and thus did not constitute a case of material impossibility.

52. He had no other problem with article 43, subparagraph (a), nor with the proposed deletion of subparagraph (b), provided it was spelled out somewhere in the draft, and not just in the commentary, that if a crime had been committed, or in other terms, a norm of *jus cogens* had been violated, restitution could not be waived in favour of compensation. There was an excellent reason for the preference accorded by international law to restitution, namely, that it must not be possible to buy off a breach of international law; nor should the injured State be entitled to waive reparation in favour of compensation when the vital interests of the international community as a whole were at stake. Lastly, he had no problem with subparagraph (c) and the deletion of subparagraph (d).

53. Article 44 was, in effect, a “non-article”, which, as amended, had even less substance than the corresponding provision adopted on first reading. Now that its paragraph 2 had been deleted, little substance remained, other than the priority accorded to restitution in the last phrase, i.e. “to the extent that such damage is not made good by restitution”. Like Mr. Economides and Mr. He, however, he felt that the point should be made much more clearly. He also had doubts about the use of the word “economically”: “financially” would be a better term, as the damage needed to be evaluated in financial and monetary terms. Mr. Hafner appeared to believe that “economically assessable damage” amounted to material damage—which was true of direct immediate damage to the State. However, Aristotle’s maxim that “money is the common measure of valuable things” was also applicable to moral damage suffered by individuals, as was clearly established in constant jurisprudence since the “*Lusitania*” case of 1923. Those points should be spelled out in article 44. As it stood, the article was little more than a *chapeau* for a much more detailed article that remained to be drafted, and which would come to grips with the problems posed.

54. He had carefully read the Special Rapporteur’s arguments in support of his “minimalist” or “homeopathic” approach, but remained convinced that it was the task of the Commission to provide States and the courts with guidelines with regard to compensation, as had been clearly requested by a number of States—a point conceded in paragraph 150 of the report. In paragraphs 154 to 160, the Special Rapporteur invoked two main arguments in favour of a minimalist approach: first, that little settled practice existed, and secondly, the fact that Governments often settled matters amicably. He noted, however, that in the *Gab Ž kovo-Nagymaros Project* case, ICJ had taken no position on the question of compensation, merely encouraging the parties to settle matters amicably. Such settlements did not always result in full reparation, contrary to the basic principles of international law, for the simple reason that non-legal considerations intervened. Regardless of the draft’s future form, the rules it set forth would always be residual in nature and could always be set aside by States in cases where they thought fit. That, however, did not relieve the Commission of its duty of codifying and progressively developing existing rules, especially where there was a need for such work and where the rules were not clear. He was in any case not sure that those rules were as unclear as the Special Rapporteur claimed, despite his reference to a work by

⁸ See the commentary to article 7 (*Yearbook ... 1993*, vol. II (Part Two), pp. 62–67).

Brownlie in a footnote to paragraph 159.⁹ Important work had been done on those rules, by Lillich, and in France by Personnaz between the wars, and more recently by Brigitte Stern. While it would not be possible to enter into much detail at the current late juncture, a middle way could nonetheless surely be found.

55. After the current text, which was merely the *chapeau* of what was necessary, at the very least five points should be made. First, it should state that compensation should constitute the effective equivalent of the damage sustained. That was the approach adopted in article 37 bis, and there was no reason not to proceed in the same way in article 43, as was already done in article 44. Secondly, it should be stated that compensation should compensate both material damage and moral damage when the moral damage was suffered by an individual. Thirdly, it should be stated that compensation must compensate *damnum emergens* and *lucrum cessans* at least when both were certain. The idea of certainty regarding damage should appear somewhere in article 43. Fourthly, it should be stated that only “transitive” damage—that which resulted from a necessary and certain link of causality with the internationally wrongful act—should be liable for compensation. Fifthly, it should be stated that the damage should be assessed on the date of commission of the internationally wrongful act subject to article 45 bis—which should perhaps come immediately after article 44. Those five points were the barest minimum without which the Commission would not be doing its job of progressive development and codification of international law.

56. Mr. GALICKI said he supported those who had spoken in favour of the term “*restitutio in integrum*”, rather than “restitution in kind”, because it was more applicable to the text of article 43. The formula covering exceptions to restitution was expressed in article 43, subparagraph (a), in the form of a double negative (“not materially impossible”), and in his view consideration should be given to reformulating it in an affirmative manner. Both points should be taken up by the Drafting Committee.

57. Mr. LUKASHUK said that, while sharing Mr. Pellet’s views regarding aggression and the incorporation of corresponding provisions, his own experience and experience of discussions in the Sixth Committee had shown that it was far from easy to reach agreement on questions of wrongful acts and that their consequences should be dealt with first, before reverting to the question of aggression. Mr. Pellet’s advice should not be followed, for as both he and the Special Rapporteur surely realized, it would be impossible to draft detailed provisions at the current stage.

58. Mr. ILLUECA said that in paragraph 146 of the report the Special Rapporteur proposed that article 43 should be couched in such a way that sections of the previous text were deleted. Basically, the Special Rapporteur equated restitution with re-establishment of the situation which existed before the wrongful act was committed, but the exceptions listed in article 43 detracted from the concept of *restitutio in integrum* referred to by Mr. Pellet.

In paragraph 128, the Special Rapporteur referred to the commentary justifying the four exceptions to restitution provided for in article 43 as adopted on first reading, and in that respect major concerns arose. The use of the phrase “not materially impossible” could give rise to a situation where the State responsible for the internationally wrongful act was presented with a situation in which restitution was materially impossible. It was essential to ensure that sound international legislation left no margin for the more powerful States to advance unilateral interpretations, such as arguing that, unfortunately, international obligations they wished to fulfil were not compatible with domestic criteria.

59. As to paragraph 128 (a) of the report, a situation could arise in which, for example, a State sustained damage of a very serious nature in parts of its territory as a result of an internationally wrongful act by a neighbouring State which had dumped toxic waste that had filtered down to the watertable; in such a case it was impossible to re-establish the situation which had existed previously.

60. In that connection, the Special Rapporteur and the Drafting Committee should bear in mind that material impossibility must not be allowed to mean that a state of affairs was to be perpetuated in which a part of a population was deprived of its fundamental human rights. It was essential to make clear in the commentaries that the phrase “not materially impossible” did not detract from the obligation of responsible States to eliminate all the consequences of the internationally wrongful act in question. It was a requirement for the protection of the fundamental human rights involved.

61. With reference to the question of proportionality between the onus to be sustained by the responsible State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation, mentioned in paragraph 128 (c), he said that when dealing with restitution disproportionately onerous (para. 144 (c)) the Special Rapporteur had rightly stated that one useful clarification might be to stress that the notion of proportionality not only concerned cost and expense but also required that the significance of the gravity or otherwise of the breach be taken into account, for instance, if it involved the violation of fundamental human rights. In his opinion, articles 43 and 44 could be referred to the Drafting Committee.

62. Mr. HERDOCIA SACASA said that article 43 should certainly refer to *restitutio in integrum*, since no consequence of an internationally wrongful act could be more logical than restoration of the *status quo ante*. The form of reparation should be considered as an obligation upon the responsible State rather than as a right on the part of the injured State. As to the question of material impossibility, and the distinction sometimes drawn between material and juridical restitution, mentioned in paragraph 127 of the report, it ought to be possible for a commentary to address the question of legal impossibility, which was an entirely different matter. The general phrase employed in the *Chorzów Factory* case was that restitution should so far as possible wipe out all the consequences of the wrongful act, and he would point out that it was more general in application than if it had been

⁹ I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford, Clarendon Press, 1983), pp. 223–227.

confined to “material” or “legal” restitution. It was right to omit the exception regarding a breach of an obligation arising from a peremptory norm of general international law. It would be remembered that the draft formed an indissoluble whole, and it was unnecessary to reiterate principles already enunciated, in the current case in article 29 bis.

63. Commenting on the ruling of the Central American Court of Justice in the *El Salvador v. Nicaragua* case¹⁰ mentioned in paragraph 128 (b) of the report—and noting the error in the English text, which spoke of the “Inter-American” Court of Justice—he said the Court had avoided addressing the nullity of a treaty between Nicaragua and a third State (the United States) but had not considered that restitution was necessarily impossible. On the contrary, it had held that Nicaragua was obliged to use all means available under international law to restore and maintain the rule of law which had existed before the conclusion of the treaty. It should also be emphasized that it had not been a bilateral matter between Nicaragua and El Salvador; it had involved the 1907 General Treaty of Peace and Amity, a regional friendship treaty. Consideration might be given to a number of other very interesting cases upon which the Court had ruled, more particularly the *Nicaragua v. Honduras* case on 17 January 2000.

64. Finally, the third exception, concerning disproportionality, was absolutely necessary and encompassed subparagraph (d) of article 43 as adopted on first reading, regarding the jeopardizing of the political independence and economic stability of the author State. Subparagraph (d) could therefore be deleted, provided the commentary made clear that its provisions were covered by the principle of proportionality.

65. A proper balance had to be struck regarding article 44. It was necessary to ensure that as a minimum a general text addressing financially assessable economic injury and at least the commentary, if not the article, should be more comprehensive and explicit, extending to matters like loss of profits, interest, specific circumstances, moral and material damage and the concept of compensation.

66. Mr. CRAWFORD (Special Rapporteur) said he would perforce be brief, as it should be borne in mind that the aim was still to produce a complete text of the draft articles at the current session. If Mr. Pellet had expressed his views about article 44 and if they had been endorsed by the Commission at the end of the previous session, when there had been an opportunity, he himself might have spent more time formulating new articles rather than drafting a 20-page commentary.

67. The question of expropriation was predominantly a matter of the content of the primary obligation in the case of lawful expropriations, but there could be cases of unlawful expropriations where questions of valuation arose.

68. He agreed with those members who preferred the “responsible State” formula or some equivalent. The title of chapter II could include a reference to modalities,

although it had been his view that they were more a matter for Part Two bis. What was involved was the basic forms of reparation, in other words the content, so far as the responsible State was concerned, of the basic obligation set out in chapter I.

69. With regard to article 43, Mr. Brownlie had made the very serious point that the extent of the obligation of restitution depended on the primary rules at stake. Those primary rules were not merely passengers on the vehicle of the secondary rules of responsibility. The debate had demonstrated the differences of approach between those in the common law tradition and those in the civil law tradition. Primary rules did matter, and that point had been raised by the exception which Mr. Momtaz had proposed to replace subparagraph (b). It involved the question of the role of the rules of law as a basis for non-restitution, and there had been general agreement that, provided it was made clear that article 29 bis applied to Part Two, subparagraph (b) was unnecessary. There were also situations where restitution was obviously inappropriate, without the need to go so far as to say that the relevant rules were rules of *jus cogens*. The real question was whether it was possible to formulate such matters in language which did not create more problems than it resolved. Mr. Momtaz’s formula seemed to do just that, and in particular raised the spectre of States arguing that restitution was impossible for them for legal reasons of their own, and hence they would not undertake it. Those legal reasons did not constitute justifications as a matter of international law, but it was clear that the primary rules of international law could come into play at that stage. It was for the Drafting Committee to consider whether a formula existed to resolve such problems.

70. As to the question of the narrow as opposed to the broad conception of restitution, he was unabashedly in favour of the narrow conception in the context of article 43. The *Chorzów Factory* dictum was about reparation in the general sense, and was therefore about *restitutio in integrum* in the general sense; it was not about restitution in the article 43 sense, which had already been excluded by the time PCIJ had issued its dictum because it had been disavowed by Germany, as the Court had recorded at an earlier phase of the case. The issue had simply not arisen: general reparation must be full, as was already stated in chapter I. If restitution was not addressed in its narrow conception a completely intolerable overlap would occur between article 43 and other forms of reparation. Despite some ambiguity in the second report of the previous Special Rapporteur,¹¹ the Commission had been very clear on first reading in adopting the narrow conception, and it had not been criticized for that by Governments. The broad conception of reparation was that contained in chapter I, and it must be full. He agreed with everything Mr. Pellet had said about full reparation as long as it was understood in that way.

71. Mr. Economides and Mr. Pambou-Tchivounda had raised the question as to whom restitution should be made. The problem was that an attempt was being made to cover a whole range of situations, and to some extent it was necessary to be proleptic in looking at the articles

¹⁰ See AJIL, vol. 11 (1917), p. 674.

¹¹ See 2634th meeting, footnote 5.

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

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

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

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

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

questionable terms like “moral” should be left to the commentaries.

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

It was so agreed.

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

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

The meeting rose at 1.15 p.m.

2638th MEETING

Wednesday, 12 July 2000, at 10 a.m.

Chairman: Mr. Peter TOMKA

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

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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