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Summary record of the 2103rd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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58. The Special Rapporteur was therefore right to propose that cessation of an internationally wrongful act should form the subject of a provision separate from those on other forms of reparation, and particularly restitution in kind. The new draft article 6 was entitled "Cessation of an internationally wrongful act of a continuing character", but since international delicts and international crimes were to be treated separately, a better title would be "Cessation of an international delict of a continuing character".

59. The new draft article 6 was framed from the standpoint of the obligations of the author State, and independently of the rights of the injured State. The obligation to cease the wrongful act thus found its source in the primary rule which had been violated and which existed prior to the claim by the injured State. He endorsed the formulation "A State . . . remains . . . under the obligation to cease . . . " and would point out that the French expression *est tenu* did not fully render the nuances of the term "remains". On the other hand, he had doubts about the words "action or omission", a formula which the Commission had so far adopted only in the case of an act consisting of a "series of actions or omissions" or a "complex act" consisting of a succession of "actions or omissions", i.e. the situations dealt with in article 18, paragraphs 4 and 5 respectively, and in article 25, paragraphs 2 and 3 respectively, of part 1 of the draft.

60. If the aim was to indicate that cessation applied both to the breach of an obligation to perform an act (omission) and to the breach of an obligation to refrain from an act (action), it was not enough to speak of an internationally wrongful act of a "continuing character". Reference should also be made to the "composite act" and the "complex act" mentioned in article 25, paragraphs 2 and 3 respectively, of part 1. The effect would be to lengthen considerably the text of draft article 6 and the best course might therefore be to employ the formula used in the title of article 25 and to speak of a State whose action or omission constituted an internationally wrongful act "extending in time".

61. Moreover, since the obligation of cessation was outside the scope of reparation and the resulting legal relationships, to which the Special Rapporteur—unlike his predecessor—intended to give separate treatment, it was useful to indicate that it did not affect the legal consequences of the responsibility already incurred as a result of the wrongful conduct. However, the wording used for that purpose in article 6, namely "without prejudice to the responsibility it has already incurred", was not altogether satisfactory. It could be replaced by "independently of the responsibility already incurred".

62. It was, however, on the question of reparation in its various forms that the Special Rapporteur was proposing the most significant modifications in comparison with the provisions of draft articles 6 and 7 submitted by his predecessor. He had adduced abundant material, both legal writings and State practice, in support of his conclusions, which pointed to the primacy of restitution in kind. His explanations of the definition of *restitutio in integrum* were acceptable, as was the approach he employed of merging the element of reparation with that of compensation. That approach was consistent with the general principle of law which imposed upon the author of a wrongful act the obligation to make reparation for all the consequences of its wrongful conduct by restoring the situation that would have existed if the breach had not occurred; that justified restitution in kind *stricto sensu* and, where appropriate, an additional financial compensation.

The meeting rose at 1.05 p.m.

2103rd MEETING

Wednesday, 17 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. RAZAFINDRALAMBO, continuing the statement he had begun at the previous meeting, noted that the Spe-

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting, para. 40.

cial Rapporteur was rejecting the proposal made in draft article 7 of part 2 as submitted by his predecessor to establish a special régime for a breach of the rules on the treatment of aliens. For the Special Rapporteur, any measures taken to bring about the cessation of a wrongful act suffered by a foreign national fell within the realm of reparation of an injury to the State of allegiance itself and of restitution in kind. There were, of course, different degrees in the extent of injury, and the breach of a rule on the treatment of aliens might, for example, at the same time be an act committed with the intention of harming the State: it was in such a case that reference might be made to "direct injury". That was what often happened in the case of violation of the civil, economic, social and cultural rights of immigrant workers from third world countries. In all cases, however, there could and should, in principle, be only one mode of reparation to be provided as a result of a wrongful act or conduct. The Special Rapporteur was therefore right to propose that restitution in kind should be a general rule.

2. With regard to the exceptions to that rule, the Special Rapporteur's preliminary report (A/CN.4/416 and Add.1) contained some interesting arguments on cases of impossibility of restitution in kind with which he was bound to agree. Like the Special Rapporteur, he took the view that no legal obstacle could derive from internal law. He also thought that the Special Rapporteur was right to disagree with his predecessor's opinion that the author State would not be bound by an obligation of restitution in kind which was contrary to its domestic jurisdiction. The argument on that point (*ibid.*, para. 89) was wholly convincing. The Special Rapporteur was, however, proposing in the new draft article 7 that the excessive onerousness of the burden on the author State should be allowed as an obstacle to restitution, for it would endanger the equitable balance between the conflicting interests present in each case. That proposal would give effect to the principle of proportionality between the seriousness of the violation and the injury caused, on the one hand, and the quality and quantity of the reparation, on the other—for example, where restitution would seriously jeopardize the political, economic or social system of the State. The proposal aimed to safeguard international stability and peace and would promote the progressive development of international law; it therefore deserved support.

3. The Special Rapporteur was proposing a further significant innovation by giving the injured State a right of choice between restitution in kind and pecuniary compensation—a choice to which the author State would be bound to consent and which the Special Rapporteur justified on the basis that it was the author State which was responsible for the injury. He himself wondered whether that proposal did not conflict with the idea that restitution in kind should be based on the need to re-establish the situation which would have existed if the wrongful act had not occurred. The *Chorzów Factory* case, cited by the Special Rapporteur in support of his proposal (*ibid.*, para. 110), was not wholly conclusive, since, in that case, the condition of the factory at the time when compensation had been claimed had no longer corresponded to its condition at the time when it had been taken over: the case was thus one in which restitution had been materially impossible, rather than one in which the claimant State had genuinely been willing to forgo restitution.

4. In any event, freedom of choice on the part of the injured State was likely to lead to abuses and the attendant condition proposed by the Special Rapporteur, namely that the author State should not be placed at an unfair disadvantage, would be difficult to fulfil. It would surely be preferable to provide that the injured State and the author State could agree on pecuniary compensation as a substitute for restitution in kind. For that purpose, it would suffice to amend the beginning of paragraph 4 of draft article 7 by replacing the word "claim" by the words "agree to" and the words "in a timely manner" by "where appropriate" or "in all cases".

5. Finally, he thought that the new draft articles 6 and 7 could be referred to the Drafting Committee.

6. Mr. CALERO RODRIGUES said that, on the whole, he agreed with the changes suggested by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1) to the outline of parts 2 and 3 of the draft articles. In particular, the Special Rapporteur was right to propose separate treatment for the consequences of international delicts and of international crimes. Instead of looking for the lowest common denominator between the two categories, it would be better first to adopt the provisions on delicts and then decide to what extent they also applied to crimes.

7. He also thought that, for the time being at least, the Commission should follow the Special Rapporteur's proposal and view part 3 of the draft in terms of the peaceful settlement of disputes arising in the field of State responsibility, rather than in terms of "implementation" (*mise en oeuvre*) (*ibid.*, para. 19). As a result, some of the articles proposed by the previous Special Rapporteur, especially articles 1, 2 and 3, would be removed from part 3 and placed in part 2.

8. With regard to the outline proposed by the Special Rapporteur (*ibid.*, para. 20), two new articles had so far been submitted for section 1 (Substantive rights of the injured State and corresponding obligations of the "author" State) of chapter II (Legal consequences deriving from an international delict) of part 2 of the draft.

9. The text proposed by the Special Rapporteur for article 6, on cessation, was more concise and more satisfactory than paragraph 1 (*a*) of draft article 6 as submitted by the previous Special Rapporteur, although there was no substantive difference between the two texts. He was wholly persuaded by the arguments in the report (*ibid.*, paras. 39-62) that cessation had inherent properties of its own which distinguished it from reparation. On that point, he did not share Mr. Barboza's opinion (2102nd meeting). The basic consideration, as the Special Rapporteur said, was that the primary obligation—the breach of which constituted the wrongful act—continued to exist and that cessation of the wrongful act was a consequence of that primary obligation. However, he did not think that draft article 6 belonged in chapter II of part 2, on the legal consequences of international delicts; it should, rather, be included in chapter I, on general principles. In his report (A/CN.4/416 and Add.1, especially paras. 31 and 40), the Special Rapporteur himself advanced theoretical arguments in favour of that suggestion. The decisive argument was nevertheless a practical one. The Special Rapporteur stated that, where reparation was concerned, "it is by a decision of the injured State that a 'secondary' legal machinery is set into motion. Were the

injured State not to put forward any claim for reparation, the 'secondary' legal relationship might not emerge" (*ibid.*, para. 55). It could be inferred that the provisions of chapter II would not be applied in such a case, whereas the obligation of cessation, according to the Special Rapporteur, had to be considered "not only existent, but in actual operation on the mere strength of the 'primary' rule, quite independently of any representation or claim on the part of the injured State" (*ibid.*). The provision on cessation should therefore be included in chapter I.

10. Turning to the new draft article 7, on restitution, he said that, as the Special Rapporteur noted (*ibid.*, para. 114), restitution in kind came foremost before any other form of reparation, since it enabled the injury suffered to be remedied in a "natural", "direct" and "integral" manner. The concept of restitution in kind was, however, not uniformly defined. For some, it meant the re-establishment of the situation as it had existed when the wrongful act had been committed; for others, it meant the re-establishment of the situation that would have existed had the wrongful act not been committed. He preferred the latter interpretation, as the Special Rapporteur and certain members of the Commission who had written on the subject—including Mr. Reuter and Mr. Graefrath—also seemed to do. There was, however, one lacuna, for the Special Rapporteur did not specify in draft article 7 which of those two interpretations should be adopted. In any event, it would be better to avoid the expression "restitution in kind", since it was not sufficiently explicit. The wording used in paragraph 1 (*c*) of draft article 6 as submitted by the previous Special Rapporteur, which referred to an obligation to "re-establish the situation as it existed before the act", though preferable, had two disadvantages: it was appropriate in cases where the wrongful act was an action, but not in cases where the act was an omission; and it implied acceptance of the first interpretation of the term "restitution". It would be better to say, for example, "to re-establish the situation that would exist if the wrongful act had not been committed".

11. Like the Special Rapporteur, he considered that restitution was a mode of reparation that should be applied as widely and as universally as possible and that there was no need to provide a special régime for breaches of the rules on the treatment of aliens, as the previous Special Rapporteur had done in the draft article 7 he had submitted. Very cogent arguments in that connection were adduced in the report (*ibid.*, paras. 104-108 and 121). Although restitution applied to all wrongful acts, it could not apply in all circumstances. It could be said, simplifying matters to the extreme, that restitution should not apply when it was impossible to carry it out: those were the terms used by the Special Rapporteur (*ibid.*, para. 85). That was self-evident in cases in which the nature of the act and of its injurious effects had rendered *restitutio* physically impossible: material impossibility then resulted in legal impossibility. The question which arose, however, was whether there could be legal impossibility if restitution was physically possible. In the new draft article 7 (para. 1 (*b*)), the Special Rapporteur recognized such impossibility where restitution would be contrary to a peremptory norm of general international law, for example the Charter of the United Nations. He could not but subscribe to that view, although such a situation was very unlikely. It was difficult to see how restitution could be contrary to a peremptory norm unless the primary obligation from which it derived was also contrary to that norm, in which event it would be devoid of legal consequences and the question would not arise.

12. On the other hand, the Special Rapporteur did not regard cases in which restitution would be contrary to an obligation of the author State towards a third State, and contrary to the domestic law of the author State, as cases of legal impossibility. He himself agreed entirely. He disagreed, however, with the exception laid down in paragraph 1 (*c*) and paragraph 2 of draft article 7, whereby restitution would not be required if it were "excessively onerous" for the author State, if it represented "a burden out of proportion with the injury caused by the wrongful act" or if it seriously jeopardized "the political, economic or social system" of the author State. Since restitution in kind was, in a way, the belated performance of an obligation, the doctrinal arguments put forward in that connection by the Special Rapporteur (*ibid.*, paras. 99-100) lacked conviction. As to the principle of proportionality between the seriousness of the injury and the quantity of reparation (*ibid.*, para. 103), it could apply only in the secondary relationship between the injured State and the author State; restitution conceived as the belated performance of the primary obligation could not be made dependent on it. Moreover, if restitution seemed to be excessively onerous, that simply meant that the performance of the primary obligation would also have been excessively onerous and that pecuniary compensation would be too.

13. Furthermore, it must not be forgotten that the Commission had provisionally adopted article 33 of part 1 of the draft, whereby the author State could invoke a state of necessity when the wrongful act was "the only means of safeguarding an essential interest . . . against a grave and imminent peril" (para. 1 (*a*)). A State which found itself in the situation referred to in paragraph 2 (*b*) of draft article 7 might conceivably be justified in invoking the terms of article 33, which would have the effect of precluding the wrongfulness of the act, without prejudice to any question regarding compensation for damage (art. 35 of part 1). He was therefore not in favour of treating the excessively onerous character of restitution as a ground for excluding restitution.

14. Lastly, with regard to the question whether the injured State should have a right of choice between restitution in kind and pecuniary compensation (*ibid.*, paras. 109-113), he was in favour of adopting the position taken by the Special Rapporteur for the time being and of reverting to the question when a draft article on pecuniary compensation had been submitted. He did not, however, think that the injured State should have the right to claim only part of the restitution in the form of pecuniary compensation when full restitution in kind was possible.

15. Mr. MAHIOU said that members had surely profited from the time that had elapsed between the submission and the consideration of the Special Rapporteur's excellent preliminary report (A/CN.4/416 and Add.1).

16. Commenting in general before turning to the draft articles, he noted that the approach adopted by the Special Rapporteur for parts 2 and 3 of the draft followed the same

lines—with a few exceptions—as that of his predecessor and the general plan for the topic adopted by the Commission at its twenty-seventh session, in 1975.[4] The Special Rapporteur had, however, proposed methodological adjustments which meant that part 2 would have to be recast. The first of those adjustments related to the distinction to be drawn between the consequences of international crimes and the consequences of international delicts. He welcomed that approach, particularly since the Special Rapporteur had indicated that it could always be abandoned if it proved to be of little use. The report (*ibid.*, para. 18) was quite clear on that point, stressing that the methodological aspect of the Commission's work should not have any implications for its substantive options. The other adjustment related to the settlement of disputes. On that point, the Special Rapporteur had departed somewhat from the position of his predecessor, who had dealt with two, perhaps different, things at the same time: the conditions to be fulfilled before an injured State could take legal action against the author State; and the actual procedures for the settlement of disputes. It would indeed be better to deal with those questions separately, since the conditions to be fulfilled came under part 2 of the draft, while the procedures for the settlement of disputes came under part 3.

17. Turning to the draft articles, he noted that the Special Rapporteur believed, not without good reason, that the difficulties the Commission and the Drafting Committee had had with draft article 6 of part 2 as submitted by the previous Special Rapporteur stemmed from the problem of the distinction between cessation and the other forms of reparation. After an examination of legal writings and practice, the Special Rapporteur had arrived at the following conclusions: first, cessation had to be expressly provided for in the draft; secondly, its scope had to be explicitly defined; and, thirdly, it had to be dealt with in a draft article that was separate from those relating to the other forms of reparation. He himself had no objection to the first and the third of those conclusions. The problem of the scope of cessation was, however, a more delicate matter. In that connection, the Special Rapporteur gave a demonstration in which he indicated the similarities and, in some cases, the confusion between cessation and restitution, referring, for example, to "the noted difficulties of perceptibility of cessation *per se*" (*ibid.*, para. 31) and pointing out that cessation had to be ascribed not to the operation of a secondary rule, but to the operation of a primary rule. If that was the case, cessation should not be dealt with in part 2. The Special Rapporteur also admitted, however, that "While thus falling outside the realm of reparation and of the legal consequences of a wrongful act in a narrow sense, cessation nevertheless falls among the legal consequences of a wrongful act in a broad sense" (*ibid.*, para. 32). From that standpoint, cessation would have a place in part 2. Mr. Barboza (2102nd meeting) had raised interesting doctrinal issues in that connection, which he himself would nevertheless avoid for fear of leading the Commission away from its immediate concern, which was to formulate a provision on cessation, leaving the question of where it should be placed to be decided later.

18. There was, however, one point in the Special Rapporteur's analysis that should be given particular attention, namely his introduction of the idea (A/CN.4/416 and Add.1, para. 38 *in fine*) of an act or omission involving an initial phase which was likely to lead to a wrongful act and which would authorize the State that was likely to be injured to take certain steps, and in particular, to warn the potential author State not to embark on that initial phase so that its responsibility would not be engaged. While he understood the Special Rapporteur's concern, he found it difficult to see how it could be taken into account in the draft, since the problem was, rather, one of prevention. To the extent that the problem touched on that of international liability, it would belong more to the topic entrusted to Mr. Barboza. All in all, the concept of an initial phase was likely to give rise to more problems than it would solve and he was all the more reluctant to agree to it because it was very difficult to identify the potentially injured State: identifying the State that had actually been injured was already difficult enough in some cases.

19. With regard to *restitutio in integrum*, the work done by the Special Rapporteur helped to shed light on the basic elements which should guide the Commission in its work and he agreed on the whole with his arguments, including those which corrected some of his predecessor's analyses and even some of the comments made by the Commission itself. It was, for example, logical to consider that restitution in kind took precedence over all other forms of reparation (*ibid.*, para. 116). It was also quite normal to specify the cases in which restitution in kind was not possible, as the Special Rapporteur had done in paragraph 1 of the new draft article 7. There were, however, still some points on which his own doubts had not been entirely dispelled.

20. Thus, according to the Special Rapporteur, the obligation of restitution could not be affected either by a legal obstacle deriving from the internal law of the author State or by the existence of another international obligation, except one arising from a peremptory norm. To illustrate the second case, the Special Rapporteur gave the example of State A, which had an obligation to make restitution to State B, but refrained from doing so in order to comply with an obligation towards State C, noting that the case would be one of "a factual rather than a legal obstacle" (*ibid.*, para. 87). Why should the first situation be described as legal and the second as factual? On what basis should State A, which was confronted with two obligations, give precedence to one of them? Actually, the two obligations appeared to be equivalent and there was no valid reason for saying that State A did not have a right of choice. Perhaps the problem was that, in that example, the Special Rapporteur had not taken account of the nature and purpose of the obligations, whereas they should have been taken into consideration in order to determine which of the two equivalent international obligations should prevail. If, for example, the action of State A which had injured State B was simply affected by a defect of form and if restitution was likely to affect an equally important obligation of State A towards State C, would that mere defect of form lead to *restitutio in integrum*? There were thus situations in which the rule of *restitutio in integrum*, if rigidly invoked, could have paradoxical consequences.

[4] *Yearbook . . . 1975*, vol. II, pp. 55-56, document A/10010/Rev.1, paras. 38-44.

21. As for the so-called rule of domestic jurisdiction, which raised the problem of nationalizations in particular, the Special Rapporteur had not taken the same stand as his predecessor and did not regard the concept of domestic jurisdiction as a possible exception to the obligation of restitution. He thus rejected the exception proposed by his predecessor in respect of the treatment of aliens by refuting the distinction between direct and indirect injury. He himself shared that view: the distinction between direct and indirect injury did not have a sound enough basis to warrant deriving from it an exception to the obligation of restitution. Moreover, the previous Special Rapporteur had not seemed to be fully convinced on that point. However, the next problem raised by the previous Special Rapporteur, namely whether restitution should be admitted in the event of a nationalization effected in breach of a rule of international law, was a very real one and one which could not be evaded. The present Special Rapporteur was aware of that problem and, in order to avoid having his hands tied by the rigid rule of *restitutio in integrum*, suggested a solution based on the excessive onerousness of the burden imposed: that criterion would, in his view, make it possible to safeguard the freedom of States to carry out any economic and social reforms they considered necessary. In fact, however, it must be noted that it was not so much excessive onerousness that was at stake as respect for the political, economic and social options of States. It was therefore somewhat artificial to try to establish a link between the exception to restitution and excessive onerousness and it would be better to base that exception on respect for the political, economic and social systems of States. That was, in fact, what the Special Rapporteur had done in the new draft article 7 itself, which contained the two formulas. In the final analysis, he himself agreed with that text, although the reasons on which it was based did not seem to have been explained clearly enough by the Special Rapporteur. Moreover, in paragraph 2 (*b*) of the article, the word "jeopardize" was not appropriate; it would be more normal to refer to "incompatibility" between restitution and the political, economic or social system of the author State.

22. In his view, the new draft articles 6 and 7 could be referred to the Drafting Committee.

23. Mr. ROUCOUNAS congratulated the Special Rapporteur on the remarkable work of synthesis in his preliminary report (A/CN.4/416 and Add.1). He approved of the Special Rapporteur's methodological approach, which was based on the distinction made by the Commission in article 19 of part 1 of the draft between "international crimes" and "international delicts" and which consisted in examining separately the legal consequences of the two categories of wrongful acts so as to make clear, on the one hand, the rights and duties of the parties with regard to the various modes of reparation for, and cessation of, the wrongful act and, on the other, the rights and *facultés* of the injured State to secure reparation and/or impose sanctions. That intellectual and practical approach, which was in keeping with trends in international law, was justified, despite the misgivings expressed in certain circles, in an attempt to clarify the matter.

24. Turning to the question of the cessation of an internationally wrongful act, he said that the Special Rapporteur had submitted a highly relevant account of doctrine and international practice, from which—despite the sometimes fundamental differences of opinion that could be noted—he had derived the rule set out in the new draft article 6. He supported that proposal *a priori* and agreed that cessation as such fulfilled a corrective function deriving from a legal régime different from that of reparation and therefore deserved to be the subject of a separate provision. In that connection, he drew attention to the key importance of the analysis of "primary" and "secondary" obligations made by Mr. Barboza (2102nd meeting). He also noted that, in his report (A/CN.4/416 and Add.1, para. 61), the Special Rapporteur indicated that cessation was not necessarily linked either to a primary obligation or to a secondary obligation. According to Combacau and Alland, the obligation of cessation was a "substitute primary obligation":[5] it would thus be neither a primary nor a secondary obligation. He himself therefore concluded that it would be preferable to place draft article 6 in the part of the draft devoted to general principles, rather than in the part concerned with the legal consequences proper of an internationally wrongful act.

25. Noting that the Special Rapporteur drew a distinction between a continuing act and an act whose effects were continuing and pointed out that the claim for cessation was admissible from the moment at which the threshold of wrongfulness had been crossed, he said that, like Mr. Mahiou, he feared that difficulties would arise that were inherent in the action expected of the wrongdoing State when that State was called upon to acknowledge the fact that its conduct would develop into an internationally wrongful act. It would be rather dangerous to assume that internal legislation, as it existed at a given moment, was capable of creating conditions conducive to the commission of a wrongful act. That approach, which could be described as "advanced" monism, might be followed in the EEC, but that organization was a case apart, since its legal order was itself a case apart. Personally, he questioned whether, as things stood, the international community was prepared to go quite so far.

26. It was interesting to note that the Special Rapporteur also drew a fundamental distinction between the right to claim cessation of the internationally wrongful act—a right which existed as long as the violation continued, but which was extinguished with cessation—and the right to reparation, which subsisted even if the violation had ceased and as long as there had been no response to it.

27. With regard to the Special Rapporteur's comments on the different functions of interim measures and cessation of the internationally wrongful act, he said that, although such measures were intended to ensure the cessation of the wrongful act in order to protect the rights of parties when there was a risk of irreparable harm, they depended on the jurisdiction of the body before which the case was brought—the ICJ or the Security Council, for example. Thus, while the injured State could always claim cessation of the internationally wrongful act through an application for interim measures, the body concerned might not agree to that approach. The fact remained that the right

[5] J. Combacau and D. Alland, "'Primary' and 'secondary' rules in the law of State responsibility: Categorizing international obligations", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, p. 97.

of the injured State to claim cessation and the obligation of the author State to discontinue the internationally wrongful act subsisted even in the absence of interim measures.

28. A further reason why he considered that the inclusion of a separate rule on cessation of an internationally wrongful act was justified was the legitimate interest at stake. On the basis of the case-law in the making of the ICJ, the Commission had established, in paragraph 3 of article 5 of part 2 as provisionally adopted, as a counterpart to a State's obligations *erga omnes*, a corresponding right of all "injured States" if the internationally wrongful act constituted an international crime. Thus the determination of capacity to take action in the case of an internationally wrongful act depended on the characterization of the wrongful act itself, either as an international delict or as an international crime. If the act was a crime, all States were entitled to claim its cessation, but they did not all enjoy the right to reparation.

29. Noting in conclusion that the Special Rapporteur had placed the provision on cessation in the part of the draft dealing with the legal consequences of international delicts (chap. II of part 2) (*ibid.*, para. 20), he pointed out that, if that provision were not moved to the part devoted to general principles (chap. I), it would have to be reproduced in the same form in the part relating to the legal consequences of international crimes (chap. III).

The meeting rose at 11.30 a.m.

2104th MEETING

Thursday, 18 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/416 and Add.1,[1] A/CN.4/L.431, sect. G)

[Agenda item 2]

Parts 2 and 3 of the draft articles[2]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 6 (Cessation of an internationally wrongful act of a continuing character) *and*

ARTICLE 7 (Restitution in kind)[3] (*continued*)

1. Mr. TOMUSCHAT said that the main innovation introduced by the Special Rapporteur was perhaps greater clarification and concretization. The rules proposed by the previous Special Rapporteur in the previous draft article 6 of part 2 had dealt much too briefly with the consequences of internationally wrongful acts and the article could thus have become a mere shopping list that failed to provide the guidance the community of nations expected from the Commission's draft. The present Special Rapporteur rightly saw the need for much greater detail.

2. As for the suggested structure of the draft, there appeared to be a slight discrepancy. In the outline submitted in his preliminary report (A/CN.4/416 and Add.1, para. 20), the Special Rapporteur set out the subdivisions tentatively proposed for part 2 of the draft, but those headings did not appear in the part of the report containing the new draft articles 6 and 7 (*ibid.*, para. 132). Those headings were useful, however, and should be retained.

3. The intention was to separate the legal régime of international delicts from that applicable to international crimes, yet the wisdom of that approach was questionable. In the first place, article 6—drafted for delicts—would not be any different if drafted for international crimes. It was obvious that a duty of cessation existed for crimes, in fact even more than for delicts. The same considerations largely applied to draft article 7 as well. In that connection, he disagreed with the somewhat polemical character of the Special Rapporteur's arguments (*ibid.*, paras. 10 *et seq.*), which presented the concept of a lowest common denominator as something rather negative. A common denominator was not necessarily a low denominator. He was convinced that a broad régime applicable to all internationally wrongful acts did exist and that international crimes entailed some additional consequences—consequences which the Commission would have to determine as a matter of legal policy.

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[3] For the texts, see 2102nd meeting para. 40