Document:-
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Summary record of the 2105th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1989, **vol. I**

referring to the Drafting Committee articles which might be wholly altered.

Programme, procedures and working methods of the Commission, and its documentation (*concluded*)*

[Agenda item 9]

75. The CHAIRMAN announced that the members of the Working Group to consider the Commission's long-term programme of work (see 2095th meeting, para. 24) would be Mr. Al-Khasawneh, Mr. Díaz González, Mr. Mahiou, Mr. Pawlak and Mr. Tomuschat. The Working Group would elect its own chairman and would submit a report in due course to the Planning Group.

76. Mr. KOROMA said that he would prefer to have been consulted before the membership of the Working Group was decided.

Organization of work of the session (*continued*)*

[Agenda item 1]

77. The CHAIRMAN said that the Commission would be able to revert the following week to the question of the list of war crimes to be included in the draft Code of Crimes against the Peace and Security of Mankind (see 2102nd meeting, para. 39).

The meeting rose at 1.05 p.m.

* Resumed from the 2095th meeting.

2105th MEETING

Friday, 19 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, 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]

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

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. THIAM said that he would confine his remarks to three aspects of the topic: injury, the distinction between international crimes and international delicts, and the cessation of the internationally wrongful act.

2. With regard to injury, it might be asked what place the Special Rapporteur was assigning to it in the draft. The articles first proposed on the subject had sparked off considerable controversy, which had since abated but had not wholly died down. The Special Rapporteur was, so to speak, on a moving train and found himself at a stage in the work where it was appropriate to raise the problem once again. He was suggesting an outline for part 2 of the draft (A/CN.4/416 and Add.1, para. 20), but that part should begin with some provisions on the concept of injury, so as to link up with part 1. The transition from part 1 to part 2 was based on the concept of the injured State, and that presupposed that injury had occurred, although no provision dealt with the nature, characteristics or limits of such injury. It would be advisable for the Special Rapporteur to clarify his position on that point.

3. In part 1, the distinction between an international crime and an international delict had been made for the purposes of analysis and classification. There was, however, no clear-cut dividing line between the two concepts, especially from the point of view of the consequences. Some consequences were common both to crimes and to delicts, but there were others that were peculiar to crimes. It was the common consequences that should therefore be dealt with first: the obligation to discontinue the wrongful act, in the case of a continuing breach or an act of a repetitive or complex nature; and the obligation to provide reparation, in its various forms, namely *restitutio in integrum*, compensation or satisfaction. In the case of the consequences peculiar to crimes, there were, above all, effects *erga omnes*: the obligation to withhold legal recognition from the situation brought into being by the crime (occupation, annexation, etc.); the obligation not to lend assistance to the author

[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.

State; and the obligation to assist the injured State. In the case of aggression, there would also be all the rights and obligations provided for in the Charter of the United Nations. If the Special Rapporteur pursued an approach based on a dividing line between the two categories, the result would inevitably be overlapping or repetition.

4. He therefore proposed the following outline for part 2: (1) consequences common to crimes and delicts: cessation, *restitutio*, reciprocal measures, reprisals, etc.; (2) consequences peculiar to international crimes: effects *erga omnes*. That was, moreover, what the previous Special Rapporteur had proposed in article 2 of part 2 as provisionally adopted by the Commission, which stated:

> . . . the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Consequently, draft articles 14 and 15 of part 2 dealt specifically with international crimes. He therefore reserved his position on the method proposed by the present Special Rapporteur until the remaining articles had been drafted.

5. Turning to the new draft article 6 on cessation of an internationally wrongful act of a continuing character, he recalled that the Commission had held some very intricate discussions on the nature of that concept: was it a primary obligation, a secondary obligation or a legal formula *sui generis*? In any event, there was still the problem of where to place the article in question within the overall structure of the draft. In his own view, it should remain in part 2: first, because cessation occurred after, and was thus consecutive to, the commission of the wrongful act; and, secondly, because it might be difficult to establish a dividing line between cessation and certain other concepts, such as *restitutio in integrum*. If, for example, the crime in question was the occupation or annexation of a territory, the end of such occupation or annexation was a form of *restitutio*. It therefore appeared that cessation fell more properly within the part dealing with the legal consequences of responsibility.

6. As for the new draft article 7, which defined the basic principles of restitution and listed a number of exceptions, it was a direct application of existing law. It could be accepted in the form proposed, subject to possible drafting changes.

7. Mr. SEPÚLVEDA GUTIÉRREZ welcomed the precision of the Special Rapporteur's preliminary report (A/CN.4/416 and Add.1) and the wealth of detail it contained, for, in view of the difficulty of the topic, those qualities were essential to the drafting of provisions that would be acceptable to the international community. The Commission was now in a position to define a set of basic principles relating to the modern forms of State responsibility.

8. In general terms, he agreed with the outline tentatively proposed by the Special Rapporteur for parts 2 and 3 of the draft (*ibid.*, para. 20), despite the distinction between the legal consequences of delicts and the legal consequences of crimes. The outline would at least enable the Commission to make progress in its work, without prejudice to the possibility of removing that distinction at a later stage.

9. In his report (*ibid.*, para. 3), the Special Rapporteur referred to the possibility of improving draft articles 6 and 7 of part 2 as submitted by his predecessor, particularly in view of the undue significance which the previous Special Rapporteur had attached to the treatment of aliens (art. 7). In that connection, he recalled that the question of the treatment of aliens had given rise to a great deal of controversy and that some bitter memories were still associated with the functioning of the mixed claims commissions.

10. He did not think that a distinction should be made between a "primary" obligation and a "secondary" obligation because that only confused matters, as Mr. Barboza (2102nd meeting) and other members had already said.

11. The new draft articles 6 and 7 were acceptable, subject to a few reservations. In article 6, the idea of "a continuing character" was not convincing: in any event, it was much less clear than the Special Rapporteur thought, as Mr. Graefrath had rightly pointed out (2104th meeting). There was also the problem of where article 6 should be placed in the draft. Mr. Calero Rodrigues (2103rd meeting) had suggested that it could be included under "General principles" in chapter I of part 2; that would be an excellent solution because its inclusion in the provisions on reparation would only complicate matters.

12. In draft article 7, the Special Rapporteur had made commendable efforts to maintain an equitable balance between the interests of the author State and those of the injured State. The article was thus acceptable in terms of principles, but it could deal more specifically with the problem of the nationalization of foreign property, which was a very frequent occurrence at the present time.

13. Paragraph 2 (*b*) of article 7, according to which restitution in kind would be deemed to be excessively onerous if it seriously jeopardized the political, economic or social system of the State bound to make restitution, was not explicit enough. If a State was compelled to nationalize foreign property to secure the well-being, or even the survival, of its population, that circumstance should be counted as one that mitigated or precluded its responsibility, as Mr. Mahiou (*ibid.*) had so rightly said.

14. Paragraph 3 went quite far in providing that no obstacle in internal law could preclude the injured State's right to restitution in kind. There were, however, certain inviolable principles of internal law which, by the very nature of things, had to be respected. Moreover, any peremptory rule of that kind would make it difficult for some States to accept the draft articles. No doubt specific exceptions would be provided for, but he reserved the right to return to the question.

15. Quite properly, the Special Rapporteur intended to devote part 3 of the draft to the peaceful settlement of disputes. That area of the law was often bedevilled by political considerations; it called for an innovative approach to bring about speedy and acceptable solutions which would not merely promote a quicker end to disputes, but also protect the interests of weaker parties and foster peaceful and constructive international relations.

16. He was not wholly persuaded by the distinction the Special Rapporteur drew between "direct" and "indirect" responsibility or by his comments on the exact point at which one State became responsible and another State

became entitled to claim reparation. He would revert to those questions, too, at a later stage.

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

18. Mr. HAYES said that the new draft articles 6 and 7 submitted by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1) were a welcome improvement on the previous articles as they were more detailed and elaborate, but they raised a question of methodology. Although the consequences of an international delict and the consequences of an international crime should be considered separately, a final decision should not be taken yet on how they should be dealt with structurally within the draft—whether in separate provisions or by the "in addition" approach favoured by the previous Special Rapporteur.

19. The subject of cessation, dealt with in draft article 6, had given rise to a very learned exchange of views on the question whether, as the Special Rapporteur maintained, cessation differed from reparation, the former being regarded as related to the "primary" rule and the latter to the "secondary" rule (*ibid.*, para. 31). Several considerations had emerged from the debate. In the first place, it was difficult to fit concepts such as those into watertight compartments, as might be desirable in the interest of the tidiness of the text. Secondly, efforts in that direction were not facilitated by the fact that, in State practice, the injured State was more concerned to invoke a combination of remedies than a separately distinguished individual remedy. Thirdly, even the courts were more concerned with determining remedies than with distinguishing the bases for them. Lastly, as the Special Rapporteur himself noted (*ibid.*, para. 48), the same action could in some cases have the character both of cessation and of restitution in kind, as had been seen in the case concerning *United States Diplomatic and Consular Staff in Tehran*.[4]

20. The question must, however, be at least partially resolved. The Special Rapporteur's arguments were the more persuasive, particularly his conclusion that a rule on cessation could be conceived as a provision situated "in between" the primary and the secondary rules (*ibid.*, para. 61). From either standpoint, a specific rule on cessation was an essential element in the draft articles and should be separated from the provisions on reparation. That did not mean that it should be placed in part 1 of the draft, as some had suggested, for then it would be too far removed from the section on reparation. It would be better, as the Special Rapporteur had suggested, to include that rule under a different heading in part 2.

21. Restitution in kind (*restitutio in integrum*) was, as stated in the report, a "secondary" obligation. Moreover, restitution must have primacy over the other forms of reparation (*ibid.*, paras. 114 *et seq.*). That primacy, which arose out of the very nature of *restitutio*, was not so easily proved from practice and the authorities offered different views on whether it meant the restoration of the *status quo ante* or the establishment of the situation as it would have been had there been no wrongful act. In his view, the Commission should adopt a definition of restitution which conformed to the latter meaning, even if it involved progressive development. There would then be, as the Special Rapporteur said (*ibid.*, para. 67), an "integrated" concept of restitution in kind within which the restitutive and compensatory elements were fused.

22. The Special Rapporteur considered three grounds of legal impossibility to make restitution on the part of the author State and dismissed two of them. It could be accepted, of course, that a rule of *jus cogens* would constitute an impossibility. An obligation to a third State or a provision of domestic law could not in principle justify a State evading the obligation to make restitution, but those cases should be examined more closely. In the first of those two cases, a State must ensure that it did not incur conflicting obligations to two other States. Neither of those two States would agree to forgo restitution on the grounds that it was in competition with the other. Assuming, however, that State A found that it could not provide *restitutio in integrum* to State B without violating an obligation to State C giving rise in turn to a second and conflicting right of State C to *restitutio in integrum*, that was a situation of impossibility in a practical sense. If such a situation could arise in practice, it must be considered.

23. The Special Rapporteur adverted to another obstacle to *restitutio* in noting (*ibid.*, para. 90) that, despite the principle that domestic jurisdiction could not affect the international obligations of a State, a Government might find itself bound by a legal rule, perhaps in the form of a constitutional provision or supreme court decision, which it could not change, at least retroactively. Again, it could be said that it was up to the State not to place itself in that position: none the less, the possibility had to be considered.

24. Both of those problems related to the principle, perfectly defensible in itself, that the choice between remedies lay with the injured State, subject only to impossibility or excessive onerousness. He wondered, however, whether excessive onerousness would make for a solution. If the dominant factor in assessing excessive onerousness was the gravity of the violation or the injury, that might very often preclude it as a solution to those problems. If, on the other hand, the obstacles to which he had referred were to override the concept of gravity, they would in effect achieve the status of impossibility. Those were problems which complicated the task, but which must be resolved.

25. He agreed that particular categories of wrongful act should not be singled out and consequently considered that draft article 7 as submitted by the previous Special Rapporteur, on the case of aliens, should be deleted.

26. With regard to the new outline for parts 2 and 3 of the draft proposed by the Special Rapporteur (*ibid.*, para. 20), he said he felt that, as a general rule, members should bow to the wishes of a special rapporteur with respect to the methodology he favoured for his research and presentation to the Commission. In any event, the outline afforded a very sensible basis for the continuation of the work, without prejudice to the final organization of the draft articles. However, he maintained the reservation he had made with regard to separate treatment of the consequences of international delicts and those of international crimes. He made the same reservation with regard to the location of the provisions on implementation, which was not just a matter of methodology. He enquired whether those provisions were intended to be covered by chapter IV (Final provisions) of the outline for part 2.

[4] See 2104th meeting, footnote 7.

27. He hoped to speak more generally on the topic at another time.

28. Mr. YANKOV thanked the Special Rapporteur for drawing attention in his preliminary report (A/CN.4/416 and Add.1, para. 20) to the outline he contemplated for parts 2 and 3 of the draft. In a matter of such complexity, it was important to have an idea in advance of what the draft as a whole would be. Also, the Sixth Committee of the General Assembly had asked the Commission to adopt that procedure for all the topics it considered.

29. In the case of a topic which the Commission had been considering for more than 30 years, however, a more detailed outline might have been expected. The outline also lacked balance, for, while the presentation of some of the elements was fairly specific, that of others was very sketchy. There were also differences in some of the headings in part 2: for example, chapter II, section 1, referred to "substantive rights", whereas chapter III, section 1, referred simply to "rights". Were those differences intentional? Lastly, while it seemed that the distinction between international crimes and international delicts could be justified to some extent, the question arose whether the legal consequences arising out of both were so significant as to warrant their presentation in two separate chapters. Even if it were decided to retain that distinction, they could perhaps simply be dealt with in separate articles in the same chapter. The proposed outline was not open to criticism in itself, but it was important not to create undue expectations with regard to the content of chapter III.

30. Two questions arose with regard to the new draft article 6 of part 2. Did the cessation of a wrongful act have a function which distinguished it from all the other forms of reparation so that it deserved to be formulated in a separate article? And, if so, where in the draft should the article be placed? He agreed with the Special Rapporteur that, despite the fact that in common with other forms of reparation cessation had a remedial function, it also had specific features peculiar to it. Nevertheless, it was important not to go too far by establishing distinctions between cessation and other forms of reparation which were, as Mr. Hayes had pointed out, often disregarded in State practice and jurisprudence. The report did state (*ibid.*, para. 49) that cessation was in practice sometimes combined with other forms of reparation, but perhaps that point should be emphasized further. Another point that should be emphasized was that, in the continuing character of a wrongful act, duration *per se* was not the decisive factor, and that the obligation of cessation could arise immediately after the act had been committed, for example when the Security Council decided that, as a preliminary measure, an armed conflict should be discontinued.

31. With regard to the actual wording of article 6, several members had suggested that it should be further developed on the basis of paragraph 1 (*a*) of draft article 6 as submitted by the previous Special Rapporteur. He himself considered that the earlier text had made it clearer that the injured State had certain rights and that those rights were matched by certain obligations on the part of the State which had committed the wrongful act. The new text, which included the words "remains . . . under the obligation", tended to underline the continuing character of the obligation. Otherwise, he approved of the new article 6 and, while he saw some merit in the arguments adduced for placing it in chapter I of part 2, on general principles, he was of the view that it should be left in chapter II, on the legal consequences of international delicts.

32. Turning to the new draft article 7, he said he agreed that restitution in kind was one of the forms of reparation and that the obligation of restitution derived from a secondary rule. The Special Rapporteur had provided a commendable analysis of doctrine and jurisprudence on the question, although many of the extracts he had quoted were definitions and therefore of greater theoretical than practical interest. In fact, whether restitution in kind was defined as the re-establishment of the situation which had existed prior to the wrongful act or as the re-establishment of the situation which would have existed if the wrongful act had not been committed, it could be considered that, from the point of view of reparation, the final result would be the same. While the importance of legal theory should not be underestimated, it should not be forgotten that the Commission's task was to establish rules of public international law whose purpose was to govern relations between States.

33. In addition, the draft articles related not only to international delicts, but also to international crimes, as defined in paragraph 3 of article 19 of part 1 of the draft, in other words to serious violations of international obligations of essential importance for the maintenance of international peace and security, for safeguarding the right of peoples to self-determination, for the protection of the individual and for the protection of the human environment. In all such cases, restitution would be very broad in scope and content and it was not enough merely to take account of its material aspects. Admittedly, the Special Rapporteur had pointed out that subsequent articles would make provision for other modes of reparation, but, even in the context of restitution in kind, the analysis should be carried further. The Special Rapporteur was also right to state that, despite certain specific legal characteristics, restitution in kind was one way of fulfilling the secondary obligation of reparation in the broad sense and that, while it must be distinguished from the other modes of reparation, and particularly cessation, the links between all those elements must not be overlooked.

34. Draft article 7 constituted a sound basis for the Commission's work, but it could not be determined whether its provisions were comprehensive enough until it was known what the content of the draft articles relating to the other forms of reparation would be. Nevertheless, he could certainly state that he attached great importance to the provisions of paragraph 2 and, in particular, to subparagraph (*b*), which might, in his opinion, be in the nature of a public policy provision that would make restitution in kind legally impossible if it seriously jeopardized the political, economic or social system of the author State.

35. Mr. Sreenivasa RAO said that, as a relatively new member of the Commission speaking on a topic as complex as State responsibility, he thought it appropriate, before considering some specific aspects of the question, to refer to the major problems to be dealt with.

36. The first was to determine how to establish State responsibility under international law: that was the first phase in a total process which culminated in the determination of appropriate remedies to redress the injury suffered as a result of the wrongful act. Determination of State responsibility was the most difficult aspect of

international law, since the rights and obligations of States were subject to a wide array of interpretations and, in different contexts, required different considerations and factors to be weighed. It was true, however, that the draft articles under consideration did not have to deal with that aspect as they would come into play after responsibility had been established.

37. Acts which constituted direct and serious attacks on international peace and security or friendly relations between States should naturally be distinguished from other acts and the Commission had drawn that distinction when it had defined international crimes and international delicts in article 19 of part 1 of the draft. The two categories of internationally wrongful acts should in fact be treated differently, if only because it was more difficult to establish the existence of a crime than that of a delict. In both cases, however, it might be years before it could be determined whether a wrongful act had occurred. Given that context, the draft articles under preparation would do well to deal with the legal consequences of a wrongful act and the remedies involved with a certain flexibility. Thus, in order to promote the draft articles and provide a solid foundation for the legal consequences of a wrongful act, account had to be taken of the practical difficulties involved in determining whether a wrongful act had occurred, as well as of the wide range of options available to States in finding common ground and defining responsibilities.

38. Secondly, he was somewhat disconcerted by the Special Rapporteur's categorization of the rules of international law. He found it difficult to understand both the need to categorize principles of international law into primary rules, secondary rules and general principles, and the relationship between those categories. A less theoretical and formalistic approach to the topic was desirable in order better to appreciate the basic principles involved.

39. With regard to the arguments put forward by the Special Rapporteur in support of a separate article on cessation and, in particular, the need to ensure that the international order was not jeopardized, he said that he shared the Special Rapporteur's concern, but felt that he had unduly emphasized that aspect of the issue. Cessation sometimes gave rise to other problems: for example, an act which was regarded as internationally wrongful at one particular time might not be so regarded at another time.

40. In order to speed up its work on the topic and complete the task entrusted to it, the Commission must build upon the work already done. The Special Rapporteur was definitely moving in that direction. It was, however, essential to avoid drafting the articles in such a way that they would give rise to problems of interpretation. He thought, for example, that the Special Rapporteur was placing too much emphasis on the "lasting or continuing character" of the internationally wrongful act.

41. As he had already stated, the Special Rapporteur was right to treat cessation separately from the other obligations arising out of a wrongful act. However, he could also have agreed with the method followed by the previous Special Rapporteur. He was nevertheless not sure whether the concept of cessation was a complete and appropriate one in every case: while cessation did take care of the negative consequences of a wrongful act, it might be less successful in meeting the need for positive action to be taken as a result of such an act. He also questioned whether it was appropriate to make cessation a pre-condition for any other remedy and even whether a distinction could always be made between cessation and the other remedies. Could that rule be made applicable in all cases? He would welcome clarification on all those points.

42. With regard to restitution in kind, of which there appeared to be two possible definitions, namely restitution as such and the re-establishment of the *status quo ante* combined with compensation, he found that, although such subtleties were interesting, they were not of overriding importance. Obviously, the situation that had existed prior to the wrongful act had to be re-established to the extent possible. In fact, however, it might be difficult to re-establish that situation fully and, since restitution *stricto sensu* could not be made, compensation always proved to be necessary. Having established the principle of restitution and the principle of its primacy, the Special Rapporteur made its application subject to certain conditions, and that had caused some confusion. Could some way not be found to formulate the new draft article 7 without stating an absolute principle to which exceptions would then be provided?

43. Referring to the limits which the Special Rapporteur proposed to set on restitution in kind, he said that he could accept material impossibility. Without clarifications and arguments supported by examples, however, it was difficult to accept other exceptions, such as "legal" impossibilities and, in particular, impossibility deriving from the requirement to refrain from violating an obligation arising out of a rule of general international law—unless it was really a rule of *jus cogens*, which was, in his view, the only "higher" rule—and impossibility deriving from the excessive onerousness of restitution for the author State. Similarly, other exceptions dealing with mitigating circumstances required careful and cautious treatment before they could be accepted: he had in mind those relating to domestic jurisdiction or internal law, or—in the name of the principle of the equality of States before the law—those relating to the political, economic or social system of the author State, although it might be possible to take account of its level of economic development. The fact was that a State which had committed an internationally wrongful act had an obligation of reparation, of which restitution in kind was one form, and it was pointless to affirm the primacy of the obligation of restitution in kind if exceptions to that principle were immediately provided for. What was necessary was to determine the conditions and forms under which restitution in kind was to be made.

44. Mr. KOROMA thanked the Special Rapporteur for the quality of his preliminary report (A/CN.4/416 and Add.1), from which the Sixth Committee of the General Assembly would certainly benefit.

45. Provisionally and for practical reasons, he was in favour of the Special Rapporteur's idea of dealing in two separate chapters of part 2 of the draft with the legal consequences of an internationally wrongful act, according to whether the act was a delict or a crime. The issue should, however, be given further consideration and, at a later stage, it would have to be determined whether the legal consequences of international delicts differed so much from those of international crimes that they should be dealt with separately. Such an approach would make it possible to determine the rights and obligations of the parties with regard

to the various forms of reparation and, if possible, with regard to the cessation of the internationally wrongful act, as well as the means by which the original violation was to be remedied.

46. There were, however, situations such as territorial or border disputes which entailed international responsibility but did not result either from an international delict or from an international crime. The Special Rapporteur should therefore expand his analysis to include situations in that grey area with a view to identifying the legal consequences that might derive from them.

47. The Special Rapporteur's proposal (*ibid.*, para. 4) to draw a distinction between the rights and obligations of the parties with regard to cessation and reparation and the various measures to be taken to secure cessation or reparation was logical at the current stage, because it would help to shed light on the sensitive problem of identifying the substantive and procedural legal consequences of internationally wrongful acts. That was an important point, because there were cases in which procedural issues could have a bearing on substantive issues: an example was that of the rule on the exhaustion of local remedies. The Commission would thus have a clear idea of the direction it was taking.

48. He had no settled views on the question whether part 3 of the draft should deal only with the peaceful settlement of disputes or include implementation (*mise en oeuvre*) as well: there was something to be said for both solutions.

49. By way of a general conclusion, he approved of the tentative outline proposed by the Special Rapporteur for parts 2 and 3 (*ibid.*, para. 20) and had no doubt that he would be sensitive to the urgency of his task and to the expectations of the international community.

50. Turning to the question of cessation of an internationally wrongful act and restitution in kind as forms of reparation for the violation of an international rule or obligation, he agreed with the Special Rapporteur that cessation was the obligation to discontinue the wrongful conduct in progress and to re-establish the normative action of the primary rule violated. He also agreed that cessation was not, strictly speaking, a form of reparation: it derived from the primary obligation incumbent upon every State to desist from an act by virtue of the very same rule which imposed upon it the original obligation that had been violated. It was because the obligation of the author State in the case of cessation was conceived as a primary rule that cessation must be included among the general principles in chapter I of part 2. The idea that the obligation of cessation referred only to a continuing breach was also valid. In other words, there were good reasons for regarding cessation as a separate form of reparation in the event of the breach of a primary obligation, but that did not mean that cessation could not be combined with other forms of reparation. In fact, there had been many cases of such combination, as the Special Rapporteur and other members of the Commission had indicated.

51. The new draft article 6 of part 2 would have to be reformulated either by the Special Rapporteur or by the Drafting Committee if it was to become a "peremptory rule"—that expression not being taken in its formal sense. The article could, for example, say that a State whose action or omission constituted a breach of international law or of an international obligation was, without prejudice to the responsibility it had already incurred, under an obligation to cease such action or omission forthwith. The Special Rapporteur had, in fact, already considered the possibility of such wording, but had abandoned it for the reasons explained in his report. In his own view, emphasis had to be placed on the fact that the obligation consisted of the immediate discontinuance of the violation or wrongful conduct and the restoration of the primary rule, rather than on the continuing nature of the wrongful act. In other words, the purpose of cessation was to put an immediate end to the wrongful act, whether or not it was of a continuing nature. The text proposed by the Special Rapporteur did not, however, bring out that idea of urgency clearly enough, whereas the formulation he himself had suggested had the advantage of providing for the immediate cessation of the wrongful conduct and hence the restoration of the primary rule, while leaving the door open to the possibility of implementing the secondary obligation arising out of the violation.

52. With regard to the new draft article 7, he said that there was a marked difference between restitution in internal law and restitution in international law. In internal law, for example under the common law, a claim for restitution was not, strictly speaking, a claim for damages: its purpose was not to compensate for a loss, but to deprive the party that was in breach of a benefit, in other words to place both parties in the position in which they would have been if the contract had not been made. In international law, the prime consideration of *restitutio in integrum* was the restoration of the *status quo ante*. It could also be said that, in internal law, under the common law at least, the effect of restitution was the non-existence of the contractual relationship, whereas international law, as shown by the judgment of the PCIJ in the *Chorzów Factory* case,[5] attempted to wipe out all the consequences of the wrongful act and to re-establish the situation which would have existed if the breach had not been committed. In that connection, he said that he did not agree with the comment by F. A. Mann quoted by the Special Rapporteur (*ibid.*, footnote 70): restitution in kind was not "largely unknown to the common law"; it merely served a different purpose.

53. He noted that the Special Rapporteur had opted for the international law approach to the function of restitution, but had qualified it: the State which was in breach could not be asked to make restitution which was materially impossible or which related to an irreversible situation; it could not be asked to make restitution when such restitution would involve a breach of a rule of *jus cogens*; and restitution must not constitute an excessively onerous burden for the wrongdoing State or go against its will. All those conditions would appear to apply more particularly to cases in which the act in question related to a concession or a nationalization and in which the injured party was not entitled—saving exceptions—to claim restitution: the sole remedy then lay in damages. The Special Rapporteur was right to adopt that position, because restitution as a form of reparation tended to be invoked chiefly in cases in which it was physically or politically possible: according to State practice, and even considering the judgment in the *Chorzów Factory* case, restitution, notwithstanding the other examples cited by the Special Rapporteur (*ibid.*, footnote 120), was

[5] Judgment No. 13 of 13 September 1928 (Merits), *P.C.I.J., Series A*, No. 17.

normally considered as merely a preliminary to the assessment of monetary compensation. Hence, in his view, the Special Rapporteur had, on the whole, struck the right balance in draft article 7.

54. Finally, in a document such as the report under consideration, in which the notes were sometimes richer in information than the text itself, they should be placed at the bottom of the pages to which they related rather than at the end of the document.

55. Mr. ARANGIO-RUIZ (Special Rapporteur) thanked members for their comments. It would be preferable if he summed up the discussion and replied to the questions that had been raised within the framework of his forthcoming second report, which would deal, in particular, with the other forms of reparation, their modalities and their relationship with cessation and *restitutio in integrum*. It was a fact that judges did not always draw a distinction between cessation and restitution, restitution and compensation, compensation and satisfaction, and satisfaction and guarantees of non-repetition. Obviously, all those remedies telescoped at some point or another and, in his second report, he would analyse the judicial decisions which illustrated that state of affairs.

56. In reply to a question by Mr. AL-KHASAWNEH and Mr. DÍAZ GONZÁLEZ, the CHAIRMAN said that, time permitting, the members of the Commission who had not yet done so would be able to speak on the topic before the end of the present session.

The meeting rose at 1.15 p.m.

2106th MEETING

Tuesday, 23 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, 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.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/411,[2] (A/CN.4/419 and Add.1,[3] A/CN.4/L.431, sect. D, ILC(XLI)/Conf. Room Doc.3)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 13 (War crimes)[4] (*continued*)

1. The CHAIRMAN said that the Special Rapporteur had now prepared an indicative list of war crimes for inclusion in draft article 13. Most of the members of the Commission who had spoken on the topic had expressed a preference for the second alternative of the article, and it had been suggested that the addition of a list of crimes would provide useful guidance for the Drafting Committee.

2. He invited the Special Rapporteur to introduce paragraph (*c*) of the second alternative of article 13 (A/CN.4/419/Add.1), which read:

> **(*c*) The following acts, in particular, constitute war crimes:**
>
> **(i) serious attacks on persons and property, including intentional homicide, torture, the taking of hostages, the deportation or transfer of civilian populations from an occupied territory, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;**
>
> **(ii) the unlawful use of weapons and methods of combat, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction.**

3. Mr. THIAM (Special Rapporteur) said that, in preparing the list of war crimes in paragraph (*c*), he had been faced with several options. He could have reproduced in its entirety article 85 of Additional Protocol I[5] to the 1949 Geneva Conventions; that article contained a list of all "grave breaches" and could have provided the substance for a first subparagraph, listing acts against protected persons and property. A second subparagraph would then have dealt with the unlawful use of weapons. However, he had been reluctant to use article 85 as a whole, because of the reservations expressed by certain States. Moreover, some States had not accepted Additional Protocols I and II. The proposed list was therefore based on a number of sources, including Additional Protocol I, Law No. 10 of the Allied Control Council,[6] the Charter of the Nürnberg Tribunal,[7] the 1954 draft code and suggestions made by members of the Commission. The list was purely indicative, and was intended as a working document. Crimes could, of course, be added or deleted.

4. Paragraph (*c*) (i) listed attacks on persons and property afforded protection under the laws of war, even if they were not mentioned in article 85 of Additional Protocol I. The qualifier "protected" might be added before the words "persons and property", and a reference could well be made to the improper use of protective emblems.

5. Paragraph (*c*) (ii) dealt with the unlawful use of weapons and methods of combat, a time-honoured notion

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* Resumed from the 2102nd meeting.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the text, see 2096th meeting, para. 2.

[5] See 2096th meeting, footnote 11.

[6] *Ibid.*, footnote 9.

[7] *Ibid.*, footnote 7.