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Summary record of the 2622nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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59. Mr. GOCO said that interest in the article would not always be confined to scholars of international law and that it might be useful to approach the question from the viewpoint of an eventual user, such as a lawyer representing an injured State in ICJ or some other forum. If he were that lawyer, he would prefer to be dealing with a simple article that, to begin with, clarified the meaning of an "injured State". His argument would be that his client State had been injured as a result of a breach of an obligation, and that that obligation was owed to his client. He would point out that there was a legal interest on the part of the wrongdoing State under an instrument to which that State was a party. Things would become more complicated when *erga omnes* obligations to the international community were involved, but his main concern would be to ensure that the case of a State party that had breached an obligation specially affecting his client would be properly aired before the court, and to demonstrate that the wrongdoing State had a legal interest in the performance of that international obligation.

60. His concern was that in, say, the case of a multilateral treaty, one would have to implead the other States whose rights might be affected. Nevertheless, while on an earlier occasion he had voiced doubts about the original article 40 expressed by some members of the Sixth Committee, he agreed that the new article, 40 bis, was an improvement.

61. Mr. PAMBOU-TCHIVOUNDA said that he shared Mr. Kamto's concerns about the attempt to make a distinction between the formal and the "customary" aspects of the "unity of rules" governing the undoubtedly complex category of human rights. He was not in favour of making a distinction between fundamental and non-fundamental human rights as it would be very difficult to apply such a distinction in practice. From a legal viewpoint, more was to be gained by maintaining a homogeneous approach than by defining a person as somehow central in some respects and peripheral in others. It was the whole package of people's problems, needs and claims that gave substance to the concept of human rights, and all attempts to integrate them into law contributed to the unity of the human rights regime. He could not therefore support any discrimination between fundamental human rights and other human rights.

62. With regard to article 40 bis, the question was whether the term "injured State" lent itself to a standard definition, and preferably one that offered a homogeneous concept. Various kinds of obligations had been discussed —bilateral, multilateral and *erga omnes* obligations, as well as those based on custom—but the form in which they were set forth was not in itself critical. The reason it was important to provide a homogeneous concept of an injured State, was that a measure of the injury had somehow to be established. It was the damage suffered as a result of the breach of an obligation that made an injury quantifiable. Was there a norm other than prejudice or damage that would make an accurate assessment possible of a claim or of a demand for cessation of the wrongful act? It was the breach of the obligation, irrespective of whether it was a bilateral or some other kind of obligation, that constituted the wrongful act. In seeking cessation of the wrongful act, or reparation, a minimum amount of concrete elements must be presented. However great the interests at stake might be, a claim lacking in those elements would not be received—either by a judge, an arbitrator or a group of States—in the same way as a claim that provided evidence of the consequences of the breach of a particular obligation.

63. He shared Mr. Kamto's view that there was a need to incorporate a minimum provision on the settlement of disputes. He had held that view for some time and believed that it was in keeping with the current trend towards the integration of the international legal system. A statement of the general principles and rules that would establish a general framework for the law on responsibility, which would not affect the functioning of the international legal order from the point of view of the jurisdictional mechanisms, appeared to have been pushed very much into the background. Rather than produce a law on responsibility of marginal relevance to the mechanisms that constituted the international legal system, the Commission should take a much more integrationist approach in order to make the best use of the results of the Special Rapporteur's work.

64. With regard to the question of the inclusion or non-inclusion of the concept of damage, Mr. Pellet had been guided by a need to propose an objective rule while being aware of the need to retain the concept of the internationally wrongful act. He strongly supported Mr. Pellet's proposal, on the understanding that it could be rewritten, since the claimants would include some who were directly affected and a range of others who were less directly affected. Including the concept of damage could make it possible to establish the whole range of claimants and could allow implementation to be structured in terms of the "distribution of rewards" or simply of giving satisfaction to all sides.

The meeting rose at 1 p.m.

2622nd MEETING

Wednesday, 17 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of article 40 bis proposed by the Special Rapporteur on State responsibility in his third report (A/CN.4/507 and Add.1–4).

2. Mr. KATEKA said that Mr. Lukashuk had indicated (2621st meeting) that it could take years to deal with the topic of dispute settlement and that the Special Rapporteur had doubts about the possibility of adopting a convention on the subject, given that a large number of States would not accept its provisions. It should be noted that many Governments in the Sixth Committee had not even raised the issue. He wondered whether their attitude indicated that they attached no importance to the topic or whether it presented them with special problems. The Commission should perhaps look into the matter, for example, in the Planning Group.

3. The Special Rapporteur had also stated that the form of the instrument adopted would determine whether there should be provision for compulsory dispute settlement. The mini-debate had left him somewhat puzzled. He had been under the impression that the questions of the form of the instrument and dispute settlement were still open. When the Commission had considered those points the previous year, it had concluded that dispute settlement required further clarification. But the omission of article 40, paragraph 2 (*b*), as adopted on first reading, from the text proposed by the Special Rapporteur seemed to confirm the tendency to exclude any reference to dispute settlement. If the Commission omitted all such provisions from the draft articles, it would find itself adopting a non-binding instrument. It could be argued that the current quinquennium had been characterized by the adoption of soft law, as evidenced by the draft articles on nationality of natural persons in relation to the succession of States, which were in the form of a declaration.[3] The same fate seemed to await the draft articles on unilateral acts of States and perhaps those on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Such a state of affairs would doubtless add grist to the mill of those who claimed that the Commission was running out of topics to codify. It would in any case be a pity if, after four decades of work, it ended up adopting a non-binding instrument on State responsibility. It could rightly be concluded that the mountain had brought forth a mouse. He was also reminded of Mr. Sreenivasa Rao's observation (ibid.), in connection with obligations *erga omnes* and human rights, that matters of concern to the majority of the human race were arbitrarily dismissed as inconsequential, while other issues of interest only to particular groups continued to dominate the international law agenda. Mr. Kamto had raised the issue (ibid.) of how basic human rights were to be determined and whether, for example, the right to development would be included among them. He hoped that the Commission would have another opportunity for an in-depth debate on the settlement of disputes, as envisaged by the Special Rapporteur in his proposed timetable of work for the current quinquennium.

4. Mr. LUKASHUK said that the ideas put forward by Mr. Kamto and Mr. Kateka deserved careful consideration by the Commission. One way of addressing the problem was to set aside the topic of the pacific settlement of disputes for future codification. The main thing, in his view, was to avoid establishing a rigid link between the means used for the pacific settlement of disputes and the question of responsibility, since that would impede the adoption of an instrument on State responsibility in the near future.

5. He drew attention to the ambiguity of the expression "pacific settlement of disputes", a phrase inherited from the distant past of international law, when there had been two categories of legitimate means of settling disputes—peaceful means and military means. The present situation was radically different, since only peaceful means were legitimate. It was therefore preferable to refer solely to the "settlement of disputes".

6. Mr. DUGARD congratulated the Special Rapporteur on his work. He agreed with his criticism of both the form and substance of article 40 as adopted on first reading. The article was far too long and confusing. As a key provision in the draft articles, it lacked clarity in its current form. However, the Special Rapporteur's proposed article 40 bis went a long way towards resolving the problems raised. He had a special interest in the article because it had a bearing on his own work in the area of diplomatic protection. He wondered whether a State could protect a non-national who had suffered a violation of a *jus cogens* norm where the State of nationality either declined or was unable to afford protection. It was important to differentiate in that context between the violation of a *jus cogens* norm and the violation of a human right. ICJ had delivered a clear ruling on that point in its judgment in the *Barcelona Traction* case: "With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" [see p. 47, para. 91]. The Court had thus drawn a distinction between violations of human rights that breached a *jus cogens* norm and those that did not.

7. Although he had prepared a draft article on the subject, he would refrain from including it in his report until the fate of article 40 bis had been decided. In his view, article 40 bis, paragraph 2, provided the answer to his question. However, he was not quite satisfied with its wording. For example, he saw no reason to include the words "to which it is a party". In any event, he assumed that the interest protected by that provision referred to

[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).

[3] See *Yearbook . . . 1999*, vol. II (Part Two), paras. 44 and 47.

customary international law obligations such as the prohibition on torture or discrimination. In other words, if State A tortured a national of State B and State B failed to respond, he took it that State C might intervene on behalf of the national of State B as a secondary victim, as suggested in paragraph 109 of the report. If State C had an interest, under the terms of article 40 bis, paragraph 2, he presumed that it might take action of the kind proposed in paragraphs 110 and 113, i.e. it might protest or demand cessation or restitution. On the other hand, while State C could not claim compensation on its own behalf, it could do so on behalf of the injured State or the injured individual.

8. The issue drew attention to the far-reaching changes which had taken place in the international legal order over the past 30 years and which affected the scope of the doctrine of diplomatic protection. Recognition of the possibility of State intervention to protect non-nationals had serious implications for the rules relating to diplomatic protection and the way in which they were applied. It raised very difficult questions, for instance, in respect of the exhaustion of the local remedies rule. Any guidance that the Special Rapporteur was able to provide in the matter would assist him in delimiting the scope of his own work on diplomatic protection.

9. Mr. ECONOMIDES, introducing his proposal on article 40 bis (ILC(LII)/WG/SR/CRD.3), said that it took account of the distinction between the injured State and the State having a legal interest both in the title and in the content of the article; the two concepts should, in his view, be defined before the question of the implementation of international responsibility was discussed. Moreover, the proposed list of cases in which a State suffered an injury was open-ended, since it could be difficult to envisage all cases in which a State could be injured by an internationally wrongful act attributable to another State. As international practice in the area varied considerably, it was advisable to keep the list open-ended by adding the words "in particular".

10. Paragraph 1 (*a*) referred essentially to bilateral obligations and was included in all the other proposals. Paragraph 1 (*b*), on the other hand, was the key component of the proposed text inasmuch as it specified that an internationally wrongful act by a State could injure "all States if the obligation breached is essential for the protection of fundamental interests of the international community". That was the definition contained in article 19 of the draft articles adopted on first reading. It was out of the question for him to approach fundamentally different things in the same way, i.e. a *jus cogens* rule prohibiting an international crime such as genocide or aggression and the mere breach of a multilateral customary or treaty-based obligation such as the inviolability of the diplomatic pouch. The former case involved a breach of a major or vital interest of the international community affecting international public order, while the latter merely involved a normative international rule, however important it might be. The formulation of an effective strategy for the deterrence of international crimes called for the adoption of provisions such as those contained in his proposal. Moreover, all the consequences of international responsibility, except perhaps that of compensation, should be applied to all States in cases of international crime, particularly the principle of restitution in the form of a return to the status quo; in cases of aggression, for example, the situation that had existed prior to the commission of the international crime must be restored. In that connection, the obligations provided for in article 53 as adopted on first reading would become far more comprehensible if the concept of "injured State" was applied to all States of the international community in cases of crime.

11. He would not comment on paragraph 1 (*c*) since its wording was similar to that used in all the other proposals. The provision covered multilateral obligations, including those of an *erga omnes* character.

12. Paragraph 2 endeavoured to spell out more clearly which States had a legal interest in requiring the cessation, in the broad sense of the term, of a breach of an *erga omnes* obligation or a multilateral obligation. They were States that were bound by the obligations in question, but had not been directly injured by the breach.

13. Mr. GOCO said that he found the proposal by Mr. Economides interesting, but also noted that some Governments took the view that there had to be a sufficient link between the violation and the State for the responsibility of that State to be invoked under customary international law.

14. When a State breached an obligation, that surely implied that the injured State was particularly affected by the breach, that the breach affected the exercise of that State's rights and that the obligation breached was bilateral or multilateral. To spell out those points did not seem necessary. It was obvious that the injured State had a special interest in the obligation in question being respected by the other State. In brief, he wondered whether the distinction was necessary once it had been established that an obligation had been breached and that the injured State was the State affected by the breach.

15. Mr. HAFNER said that the debate on State responsibility had reached the crucial point where it had a bearing both on international law and, at the same time, on international politics. The expression *erga omnes* was giving him a great deal of trouble because its meaning was not very clear. Authors' views on the subject were divided and the definitions of *erga omnes* obligations which they gave also varied very considerably. Thus, some authors spoke about norms to protect values common to the international community. Others spoke about norms the breach of which injured all States. Some identified those norms with norms of *jus cogens*; others, with those establishing international crimes, whether they were crimes of the State or crimes entailing individual responsibility; still others applied the qualification *erga omnes* to obligations whose violation was not allocable to any State in particular. In such a case, no State would be entitled to invoke responsibility, something which was most surprising in view of the judgment of ICJ in the *Barcelona Traction* case. In order to escape being qualified as *lex imperfecta*, that doctrine explained that any State was entitled to invoke responsibility. If an obligation *erga omnes* meant an obligation owed to the international community as a whole, he wondered whether the absence of allocability justified such a qualification.

16. Another question that had to be raised was the meaning of the term "international community as a whole". Did it include, say, individuals and non-governmental organizations in all cases and for all types of obligations? Article 53 of the 1969 Vienna Convention, which had been invoked in that connection, spoke only of the "community of States". In his view, there was a difference between the "community of States" and the "international community as a whole". Mr. Gaja's proposal (ILC(LII)/WG/SR/CRD.4) distinguished between the two and that distinction should certainly be kept. Even ICJ, when it referred to obligations *erga omnes*, placed several different kinds of obligations in the same category.

17. In the context of article 40 bis, the Commission should define to what kind of obligations *erga omnes* it was referring. Was it referring to all such obligations or only to some?

18. The Commission could, of course, say that it need not bother with those matters, since the question whether or not an obligation fell within the *erga omnes* category was defined by the primary rules. But that approach did not solve the problem; on the contrary, it raised more questions than it answered. Some clarification was needed; otherwise, States might ask the Commission to justify the different treatment given to those obligations. In that connection, he recalled that, on 1 November 1967, when the representative of Malta had proposed that the principle of the common heritage of mankind should be applied to the international seabed, no one at the time had known what was meant.[4] It had taken 15 years of negotiations to define the concept. The Commission should avoid similar situations.

19. Another way of defining the concept would be to adopt the procedural method used to define norms of *jus cogens* in article 53 of the 1969 Vienna Convention. Consequently, an obligation to define obligations *erga omnes* would be imposed on the community of States. Such an approach would perhaps simplify matters, but it would not provide the answer to the question. It was more important at the current time to define obligations *erga omnes* than *jus cogens* norms. Certain common legal characteristics would therefore have to be defined to distinguish those obligations from others. The question then would be simply whether those characteristics were constituent elements of obligations *erga omnes* or a consequence of the creation of that particular category of obligations.

20. In draft article 40 bis, the Special Rapporteur distinguished between obligations *erga omnes*, obligations *erga omnes partes* and obligations established for the protection of the collective interests of a group of States (paragraphs 2 (*a*), 1 (*b*) and 2 (*b*), respectively). While recognizing that the approach was dictated by a desire for clarity, he wondered whether the list really covered all possible cases or whether it left some loopholes.

21. For example, in a case of violation of the law of the sea, would all States—including landlocked States—have the right to invoke international responsibility, as envisaged in the draft, or would a distinction be drawn between landlocked States parties to the United Nations Convention on the Law of the Sea and those which were not parties and would therefore not be entitled to act? Would the obligation to protect and preserve the marine environment set forth in article 192 of the Convention be regarded as an obligation *erga omnes*? Those were among the issues that remained to be clarified.

22. Similarly, with regard to human rights, to which he referred rather often, the Special Rapporteur also failed to settle the issue. After stating in paragraph 88 of the report that human rights obligations were not owed to any particular State, which was tantamount to saying that they were obligations *erga omnes*, he explained in paragraph 106 (*b*) that obligations arising under a regional human rights treaty were matters of the collective interest of a group of States (which meant, according to the definition in paragraph 92, that they were obligations *erga omnes partes*). For his own part, he considered that human rights came within the category of obligations *erga omnes* only insofar as they were based on a general conviction. It would be interesting to see whether all rights under the International Covenant on Civil and Political Rights or the European Convention on Human Rights fell into that category.

23. In view of all those problems, he concluded that, despite the need for definition, the only practical solution for the Commission would be to refrain from any attempt to define such obligations and to confine itself to describing them. It could be said that for any obligation in article 40 bis which could be considered an obligation *erga omnes*, the community of States recognized the right of a State other than the directly injured State to invoke State responsibility in a restricted manner. That would not, of course, apply to obligations under a regional human rights treaty, which could fall under the "protection of the collective interests of a group of States" referred to in paragraph 2 (*b*) for which no right of the directly injured State was provided. He would be interested to hear the Special Rapporteur's views on that point.

24. Turning to some of the drafting proposals made by members of the Commission in connection with article 40 bis, he said that he found the wording proposed by Mr. Simma (ILC(LII)/WG/SR/CRD.1) less flexible than that proposed by the Special Rapporteur. In particular, the Special Rapporteur's reference to a State having "a legal interest in the performance of an international obligation to which it is a party" seemed to him to offer more possibilities than the formulation "a State has the right (is entitled) to invoke certain legal consequences of the responsibility of another State", which amounted to placing all States which were not directly injured, but only "interested", on the same level and to conferring the same rights on them. The expression "the obligation breached is owed to it individually" in paragraph 1 (*a*) ought to be clarified in that context.

25. With regard to the proposal by Mr. Economides, it would be useful to hear what meaning the author attached to the expression "protection of fundamental interests of the internationaly community" used in paragraph 1 (*b*). The underlying intention seemed to be to give to all States the right to react to an internationally wrongful act by invoking international responsibility. But was that really what the Commission wanted? The meaning of the words

[4] See *Official Records of the General Assembly, Twenty-second Session, First Committee*, 1515th meeting (A/C.1/PV.1515), and corrigendum, paras. 3 et seq.

"may, as the case may be, injure, in particular" used at the beginning of paragraph 1 also needed to be clarified. Did the use of the word "may" mean that certain "other conditions" had to be met in order for a State to be the injured State or that the State was not "injured" in all cases? He would be grateful for an elucidation of those points.

26. Mr. LUKASHUK said that Mr. Hafner had raised an essential problem of principle by referring to the proposal by Mr. Gaja establishing a distinction between responsibility towards all States and responsibility towards the international community as a whole. At the legal level, such a distinction had no raison d'être. Article 53 of the 1969 Vienna Convention referred, very rightly, to the "international community of *States** as a whole" and it went without saying that there could be no international [State] responsibility except within the framework of relations between States. The concept of the "international community as a whole" corresponded to a quite different idea, the point at issue being no longer the community of States, but world society as a whole, a concept which not only was yet to be defined, but which, in his view, was completely foreign to the topic under consideration.

27. Mr. BROWNLIE, repeating the warnings he had already expressed in that connection, said that the Commission ought not to embark on an impossible attempt to classify all rights and obligations of States. However great the efforts made, the subject could never be exhausted, because it had no end. To the extent that, as Mr. Economides had it in paragraph 1 (*b*) of his proposal, an internationally wrongful act could injure "all States" if the obligation breached was "essential for the protection of fundamental interests of the international community", that "essential obligation" would have to be defined. The Commission could, of course, decide that the problem would resolve itself automatically as customary international law developed, but by persisting in the attempt to codify a whole series of new concepts it would be embarking on a task which, interesting as it might be at the theoretical level, would slow down its work and reduce the chances of that work being approved by the Sixth Committee. In the field of State responsibility, the Commission already had enough to do to define the injured State, not to mention the problem of possible overlapping or duplication with the topic of diplomatic protection.

28. Mr. SIMMA said that his analysis of the problem was not the same as Mr. Brownlie's. What the Commission needed to do was not to define the injured State, but to define or specify who was entitled to invoke State responsibility.

29. Paragraph 1 (*b*) of the proposal by Mr. Economides in fact drew its inspiration from article 19, paragraph 2, on the question of international crimes, a subject of essential importance to which the Commission would have to revert at some stage.

30. As for the "international community as a whole" to which Mr. Gaja had referred, there was no need for a definition, since what was really meant was the international community of States as referred to in article 53 of the 1969 Vienna Convention.

31. Similarly, there was no need to exaggerate the difference that might exist between regional and universal protection of human rights, which in substance came to the same thing. Lastly, with regard to Mr. Hafner's examples drawn from the law of the sea, it should be noted that the problem in that context was not one of State responsibility, but only one of opposability.

32. Mr. PAMBOU-TCHIVOUNDA said that the wording proposed by Mr. Economides had the merit of providing an answer to a specific question, that of the cases in which the breach of an international obligation entitled States to act to ensure compliance with that obligation. The link between paragraph 1 (*b*) of the proposal and article 19, paragraph 2, referred to by Mr. Simma, was indeed very clear and he shared Mr. Simma's view of the importance of the concept of international crimes, which had to be taken into consideration at all stages of the draft until a final decision had been reached.

33. He wondered whether there was not a duplication of purpose between subparagraphs (*a*) and (*c*) (i) of paragraph 1 of the text proposed by Mr. Economides—which, incidentally, suffered from an overabundance of adverbs. Was there really a difference of meaning between the expression "the State to which the obligation breached is owed individually" and "any State, if the breach of the obligation specially affects that State"? In the second of those subparagraphs, was Mr. Economides' thinking, without expressly saying so, of breaches of customary obligations, while having in mind, in the earlier subparagraph, breaches of obligations set forth in a bilateral treaty? If so, it might be preferable to say so clearly.

34. Those minor criticisms apart, the proposal by Mr. Economides seemed to be well in line with the effort to achieve a synthesis and it deserved to be followed up.

35. Mr. ECONOMIDES, replying to questions and comments by previous speakers, explained to Mr. Hafner that, in paragraph 1 (*b*) of his proposal, he had merely reproduced the definition given in article 19 and had not thought it necessary to go into greater detail than article 19 did. He agreed, however, that it might be useful for the commentary to highlight the close link between the concept of *jus cogens* and that of international crime. The rules prohibiting international crimes were in reality rules of *jus cogens*, but they were even more stringent because there was no exception.

36. The structure of paragraph 1, in which the expression "may … injure" was followed by a list, was likewise modelled on article 19, which gave a non-exhaustive list of cases in which States were injured or could be injured by a serious breach of an international obligation. Nevertheless, the structure could certainly be improved.

37. He agreed with Mr. Brownlie that not everything could be defined in the context of the progressive development of international law and that some concepts were more the result of the development of customary international law.

38. Mr. Pambou-Tchivounda's comment was extremely interesting: there was indeed a similarity between the cases covered in paragraphs 1 (*a*) and 1 (*c*) (i), but, in paragraph 1 (*a*), a bilateral obligation was involved (an obligation stemming from a bilateral treaty was owed exclusively to the State concerned), whereas, in paragraph 1 (*c*) (i), the obligation breached was a multilateral

obligation which existed for all States parties, even if only one of them had been specially affected by that breach.

39. Mr. PAMBOU-TCHIVOUNDA said that, having heard the explanation just given, he was more than ever convinced of the value of Mr. Economides' proposal. It would merely be necessary to delete the adverb "individually" in paragraph 1 (*a*), to stipulate that the obligation breached was a bilateral obligation and to replace the words "specially affects" by the words "violates a customary rule" in paragraph 1 (*c*) (i).

40. Mr. GOCO thanked Mr. Economides for his explanations on the various categories of obligations, but agreed with Mr. Brownlie that the Commission should not try to make too much of them as it might then be moving away from the topic. Article 40 as adopted on first reading had clearly indicated that "injured State" meant "any State a right of which is infringed by the act of another State, if that act constitutes … an internationally wrongful act of that State". During the discussions, that initial definition had gradually been revised and supplemented, something that was somewhat unfortunate from a lawyer's point of view, since the classical link between the concepts of injury and reparation provided a satisfactory analytical basis. As international lawyers, however, the members of the Commission should perhaps, in an article of that kind, categorize the obligation that had been breached. If it was an obligation to the entire international community, it might be useful to say so, since, in such cases, States other than the directly injured State might be affected by the breach of the obligation. That was why he was not against the inclusion in the draft article of a reference to an obligation that affected the entire international community; nevertheless, the matter should not be complicated endlessly. Perhaps the Drafting Committee should be given the task of improving and simplifying the article, concentrating on the meaning of the words "injured State".

41. Mr. OPERTTI BADAN said he feared the Commission was only moving away from a solution rather than drawing closer to one. One member had requested a definition of the words "the obligation breached is essential" in paragraph 1 (*b*) of Mr. Economides' proposal. Another had asked what was meant by the "fundamental interests of the international community" in the same proposal. As Mr. Brownlie had quite rightly pointed out, that related more to the development of customary international law than to the development of international law in the strict sense. Mr. Economides had explained that the difference between paragraph 1 (*a*) and paragraph 1 (*c*) (i) lay in the source of the responsibility: a bilateral obligation in one case and a multilateral obligation in the other.

42. In his opinion, the Commission had by no means yet formed a sufficiently solid conceptual basis to understand the various elements properly. It had been concerned with theoretical issues for too long and, if it stayed on that course, it would certainly not be at the end of its troubles. It must be pragmatic and move away from doctrinal subtleties that merely obscured the true nature of things.

43. The responsibility of States to the international community was responsibility for the breach of obligations owed to the international community as a whole, as stated in the Special Rapporteur's proposed draft article 40 bis. The issue was not "fundamental interests", but obligations clearly stated in treaty law. He hoped that the Commission would hold to that meaning and refrain from including private entities such as non-governmental organizations, which definitely did not have the constituent elements to qualify as States, among the subjects of law legally entitled to invoke State responsibility. If it continued to adopt that approach, it might end up with a convention that dealt not with State responsibility, but with international responsibility in general, and that was not in keeping with the mandate entrusted to it.

44. Mr. ADDO said he agreed with the Special Rapporteur that the aspects of article 40 as adopted on first reading that related to multilateral obligations, including obligations *erga omnes*, had never been thoroughly considered, and that that was why article 40 had been defective in several respects. The reformulation proposed by the Special Rapporteur in draft article 40 bis was surely an improvement because it brought in the concept of an obligation *erga omnes*, even if the application of that concept remained problematic. For instance, when the internationally wrongful act was a breach of a multilateral treaty, all the other States parties to the treaty that qualified as injured States had the right to bring action in ICJ to protect the "public" or "collective" interest of the international community. Surely such a right could not be exercised unless the respondent State, i.e. the State that had committed the breach, had specifically agreed to the jurisdiction of the Court in a treaty or by making the statement provided for in Article 36, paragraph 2, of the Statute of the Court. The exercise of the right arising out of the breach of an obligation *erga omnes* thus had to have a jurisdictional basis. The *East Timor* case was an interesting one, since Portugal had invoked not only the violation of its own rights as the Administering Power of the territory recognized by the United Nations, but also the violation of the rights of the people of East Timor. As a non-State entity, East Timor could not have brought the claim itself, but Portugal had asserted the rights of the people of East Timor to self-determination and sovereignty over their natural resources in the maritime areas adjacent to the coast. In its judgment, the Court had held by a majority of 14 to 2 that it had no jurisdiction to adjudicate the dispute because, in order to rule on Portugal's claims, it would have to rule first on the lawfulness of Indonesia's conduct, and it could not do so, as Indonesia had not consented to its jurisdiction.

45. The question was whether the law would be more widely observed if every State could bring judicial action against a State for that State's infringement of collective interests. Such a solution involved the danger that every State could appoint itself as policeman of the international community and as responsible for ensuring respect for *erga omnes* obligations as determined by itself.

46. He endorsed the Special Rapporteur's reformulation in draft article 40 bis, although it was not without conceptual difficulties. With regard to paragraph 3, since the Commission was dealing with the responsibility of States, rights that accrued to any other subject of international law should not concern it. Paragraph 3 could be retained, however, out of an abundance of caution. Lastly, the Special Rapporteur was silent on article 40, paragraph 3, namely, the crime issue, which the Commission would need to discuss sooner or later.

47. Mr. TOMKA said that article 40, as article 5 provisionally adopted by the Commission at its thirty-seventh session, which contained the definition of an "injured State", had attracted a good deal of criticism from States. The Special Rapporteur had made a very convincing case in paragraph 96 of his report and elsewhere for considering that article as defective in a number of respects. When the Commission had adopted it, it had departed from its earlier position that the origin of the international obligation breached was irrelevant both to the qualification of an act as a wrongful act and to the international responsibility arising from the internationally wrongful act, an idea formerly expressed in article 17 and currently covered to some extent by article 16 as adopted by the Drafting Committee at the fifty-first session of the Commission.[5] The Special Rapporteur had been right to view the source of the obligation (treaty, custom, decision) as irrelevant and to devote himself to the analysis of different types of obligations for the purpose of identifying the injured State.

48. A striking feature both of the commentary to article 40 as adopted on first reading[6] and of the report by the Special Rapporteur was the fact that references to cases and precedents were rather scarce, whereas Part One and at least the introductory articles of Part Two were based on an abundance of international practice. There, the Special Rapporteur was using arguments of logic more than experience or State practice, as could be seen in the second sentence of paragraph 112.

49. One of the Special Rapporteur's criticisms of article 40 was that it made a premature conversion from the language of obligation to the language of right. He wondered, however, whether the Special Rapporteur was not opening himself up to the same criticism in entitling article 40 bis the "Right of a State to invoke the responsibility of another State". It could be asked when, in the opinion of the Special Rapporteur, the conversion from the terminology of obligations to that of rights should occur and whether it was really necessary. Could the content of responsibility be defined as new obligations of the State which had breached its primary obligation? The report and the discussion in the Commission had demonstrated that what was surprisingly lacking was a well-elaborated theory of international legal obligations. The Commission should therefore be grateful to the Special Rapporteur for his contribution in characterizing four types of obligations: bilateral; obligations to the international community as a whole (*erga omnes*); obligations to all the parties to a particular regime (*erga omnes partes*); and obligations to which some or many States were parties, but in respect of which particular States or groups of States were recognized as having a legal interest. A number of questions arose in that context. For example, did the existence of obligations to the international community as a whole mean that the international community was a subject of international law, since obligations were owed to it? If that was the case, who acted on behalf of the international community? The United Nations? He had serious doubts that the international community had become a subject of international law with the right to invoke the responsibility of a State which had breached its international obligations.

50. The examples of obligations *erga omnes partes* given by the Special Rapporteur, particularly obligations in the field of the environment in relation to biodiversity or global warming, were par excellence obligations for the benefit of all States, irrespective of whether they were parties to the relevant multilateral treaties. With regard to the last category of multilateral obligations mentioned above, who would recognize that particular States or groups of States had a legal interest? He concurred with the Special Rapporteur that the existence of a legal interest would be a question of the interpretation or application of the relevant primary rules. That might offer an overall approach to the issues currently of interest to the Commission. The interpretation of a primary obligation that had been breached by a State would help to identify the State or States to which the obligation was owed and for which a new obligation of responsibility as a consequence of a previous breach of a primary obligation would arise. He had some sympathy for the proposal by Mr. Gaja because it applied the same approach to responsibility in terms of obligations and it was brief.

51. Since the draft articles were to apply to inter-State relations, but, in practice, there were quite a few cases of the international responsibility of States vis-à-vis international organizations or other subjects of international law, there was full justification for including a saving clause in the text stating that nothing in the articles prejudiced the issue of the responsibility of a State which had committed an internationally wrongful act breaching an international obligation owed to an international organization or other subjects of international law. That idea was expressed in article 40 bis, paragraph 3, as proposed by the Special Rapporteur, although in a narrower sense, since it covered only Part Two of the draft. It should be included in the draft, on the understanding that the Drafting Committee would refine its language and find an appropriate place for it.

52. Mr. MOMTAZ, referring to the treatment of human rights obligations, said that it had been asked whether the obligation to respect human rights was an obligation *erga omnes* and whether it followed that all States without distinction could be considered "injured States". In order to be realistic, a distinction had to be drawn. Unfortunately, for the moment, there was no consensus in the international community on human rights rules. Nevertheless, States agreed on a minimum of rules, a "hard core" of rights which ICJ had described in the *Barcelona Traction* case as principles and rules concerning basic human rights. The Court had cited several examples, such as the protection from slavery and racial discrimination, to which the right to life, freedom of thought and conscience and the prohibition of torture might be added. The existence of such basic rights, to which there could be no exception or reservation, was recognized by treaty law and, in particular, by international human rights instruments, whether universal or regional, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights: "Pact of San José, Costa Rica". It must, however, be said that the distinction between those basic rights and other rights was

[5] See 2615th meeting, footnote 4.

[6] For the commentary to the article (former article 5), see *Yearbook ... 1985,* vol. II (Part Two), pp. 25 et seq.

awkward and prejudicial to the unity of human rights and he welcomed the fact that it was becoming blurred; the most recent international instruments, such as the African Charter of Human and Peoples' Rights, did not make the distinction. He also referred in that context to the attitude of certain States parties to the European Convention on Human Rights which had recently undertaken not to invoke its safeguard clause. It might be asked whether practice had not tended to replace that somewhat obsolete distinction between basic and other rights by a threshold based on the concept of systematic or gross breaches, to which the Special Rapporteur referred in paragraph 86 of his report. In cases of systematic or gross violations of human rights, all States could thus be regarded as injured. The advantage of that criterion, or threshold, was that it had been retained in article 7 of the Rome Statute of the International Criminal Court, which used the words "widespread or systematic". It was also interesting to note that, in the Rome Statute, crimes within the jurisdiction of the International Criminal Court, namely, genocide, aggression, war crimes and crimes against humanity, were of concern to the international community as a whole in that they were prejudicial to international peace and security. Accordingly, it was fair to say that all States parties to the Rome Statute could be considered injured when such crimes were committed. Such an approach would also have the advantage of responding to the concern which the Special Rapporteur expressed in paragraph 87, namely, that a distinction should be drawn between the rights of the individual victims and the responses of States and translating human rights into States' rights must be avoided. He wondered whether, in order to define the concept of injured State in respect of human rights, a quantitative criterion might not be added, as opposed to the qualitative criterion used to distinguish between basic and other rights, so as not to call the unity of human rights into question. Having consulted Mr. Gaja, he gathered that the "circumstances of the breach" referred to in his proposal on article 40 bis at the beginning of the meeting could refer to both the qualitative criterion and the quantitative criterion.

53. Mr. KAMTO commended the Special Rapporteur on his attempt to explain international obligations before dealing with breaches of those obligations that were likely to give rise to State responsibility. That question could not be considered without bearing in mind the theory of obligations.

54. The various proposals made for article 40 bis were not mutually exclusive and, apart from Mr. Gaja's, they all sought to define which States could be regarded as injured and which as having a legal interest. The two concepts having now been carefully set out, the Commission should first try to define them and only then draw the appropriate conclusions of those definitions for the purpose of implementation.

55. With regard to the words "the international community as a whole", the Commission could not ignore the current international context; that wording, taken from article 19 of the draft, was completely in line with the current trend in international law. The idea of State crime could not be left out, even if the term was not used. The problem was knowing in which circumstances it could be considered that an internationally wrongful act constituted a crime that was likely to give rise to the international responsibility of its perpetrator and to be invoked by all States.

56. Concerning human rights, Mr. Momtaz had given a good summary of the discussion. It was illusory to want to distinguish between basic and other human rights. In some cases, what was regarded as a secondary right was the condition for the implementation of a basic right. Human rights formed a whole and their unity must be respected. The concept of threshold introduced in the Rome Statute of the International Criminal Court could not apply to such individual rights as the right to life. That did not mean that the concept of essential rights for the international community as a whole must be discarded, but that the Commission must give some thought to ways of recasting it in the light of article 19 and practice.

57. Mr. ROSENSTOCK said that he agreed in large measure with Mr. Kamto, although he would not go so far as to associate the word "crimes" with a State.

58. He agreed that article 40 bis suggested by the Special Rapporteur was more in keeping with the approach which the Commission must follow than the other formulations, in particular Mr. Gaja's. It would be best to retain article 40 bis, improving it and perhaps dividing it into two articles, one focusing on the State injured by an internationally wrongful act of another State and the other on the State which had a legal interest in the performance of an international obligation.

59. Mr. ECONOMIDES said that, to avoid the confusion created by the words "have a legal interest in requiring the cessation of the internationally wrongful act" in paragraph 2 of his proposal, they should be replaced by the words "have a legal interest in requiring respect for the obligation breached". The consequences of the breach of the obligation in question must be set out and regulated in the following chapter of the draft articles.

60. Mr. HE, noting that article 40 bis was pivotal to the whole draft, said that he was grateful to the Special Rapporteur for posing and analysing in detail, in paragraphs 66 to 119 of his report, the problems raised by article 40 adopted on first reading; unless those problems were resolved, the Commission would be unable to discuss all the relevant articles. Those issues included the excessive attention given to bilateral obligations, on which there were four lengthy paragraphs which might be simplified, as the Special Rapporteur proposed in article 40 bis by means of the words: "For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if the obligation breached is owed to it individually".

61. Regarding whether the draft articles should retain a unitary concept of "injured State", he thought that, in view of the analysis in the report and the discussion, it seemed unnecessary to produce a unilateral concept of "injured State". It would be preferable to distinguish between an "injured State" and a "State with a legal interest" which was not specifically affected by the breach. That was the idea contained in the Special Rapporteur's article 40 bis, as well as in Mr. Economides' and Mr. Simma's proposals.

62. As to whether damage should be at the heart of the definition of "injured State", as proposed by Mr. Pellet

(ILC(LII)/WG/SR/CRD.2), he said that the fact that damage was not included as an element of the wrongful act did not mean that all States could invoke the responsibility of the wrongdoing State. On the contrary: only the State whose subjective right had been injured could do so. In other words, only the State in respect of which an obligation had been breached could demand reparation. Thus, there seemed to be no need to include damage in article 40 bis.

63. With regard to the combined reference to multilateral treaties and customary international law in article 40, paragraph 2 (*e*), he agreed that it would be preferable to deal with those two sources of international law separately. Lastly, if the Commission intended to specify the secondary obligations without referring to the concept of "injured State", it would be better to place article 40 bis in chapter I of Part Two.

64. Mr. Sreenivasa RAO said that, in his report, the Special Rapporteur had given a very good explanation of the limitations of article 40, which article 40 bis was meant to remedy. Under the circumstances, article 40 bis was better than its initial version, but it could still be improved, as could be seen in the proposals made by some of the members of the Commission. In his proposal (ILC(LII)/WG/SR/CRD.1/Rev.1), Mr. Simma was more interested in *locus standi* than in the definition of injury itself. On that point, it was very difficult to transpose concepts from domestic to international law. In domestic law, only direct injury gave rise to *locus standi*, whereas, in international law, it was necessary to go beyond injury to establish it, but that could not be done unless the injury was significant.

65. Indian constitutional law also had the concept of public interest litigation, which provided a solution to the problems of responsibility and reparation, but that concept was not applicable in the case of the "international community", which was a group of States. How could it be maintained that a legal interest was an interest of the international community as a whole? States did not all have the same interests. That was the difficulty in translating obligations *erga omnes* into *locus standi*. The idea that obligations *erga omnes* triggered the invocation of the responsibility of a State was not sufficiently developed to be able to assert that it would be a legal interest exercised on behalf of the international community as a whole and not a particular interest, which might be at variance with that of the international community.

66. The conditions needed so that the international community could duly act in the event of a breach of an obligation *erga omnes* of the kind listed in article 19 had not been met. Hence the need to consider discarding article 19. The only reason for doing so was that no State was really in a position to invoke its provisions on behalf of the international community.

67. He would support a proposal for dropping article 40 bis and leaving it for the future development of international law. The same approach might even be taken with article 19. He likewise suggested leaving article 40 for later development.

68. Mr. CRAWFORD (Special Rapporteur) said that the Commission had not invented the concept of "obligations owed to the international community as a whole": it had been introduced by ICJ. The Commission could only endorse it, the question being to what extent. It was in fact focusing on legal interest or legal standing; it certainly did not want to reduce international obligations to debates in political forums which had nothing to do with questions of international obligations.

69. Mr. GAJA said that his proposal did not contain anything very new, although its wording differed from the text proposed by the Special Rapporteur and from the other proposed texts.

70. The aim of his proposal was to avoid giving a definition of "injured State" or making the difficult distinction between "rights" and "legal interests", while seeking to define which States were owed the obligations set out in Part Two. Depending chiefly on the primary rule, that might be another State, several States, all other States or the international community as a whole. If a State breached an international obligation, it owed reparation, but reparation was not necessarily for the benefit of the above entities; it might be for the benefit of a specifically affected State, an individual or another entity.

71. Mr. CRAWFORD (Special Rapporteur) noted that the Commission had, in substance, the choice between making sense of article 40 or coming up with an extremely simple wording such as "an injured State is an injured State". In fact, that was what he proposed for violations of bilateral obligations and it was certainly appropriate. The problem was that the international legal order was not made up solely of bilateral obligations. The question thus arose whether the Commission should ignore the right to invoke State responsibility for a breach of an obligation that was not purely bilateral. In order to help move forward with the discussion on that point, the members of the Commission should focus on the crucial question, namely, whether to seek to elaborate and explain the content of the notion of "multilateral obligation" so far as the principle of legal standing and its consequences were concerned or whether it was sufficient simply to refer to general international law.

72. He agreed entirely with Mr. Pellet that the fact that a fundamental norm was breached did not mean that the breach was necessarily serious.

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

[Agenda item 2]

73. Mr. KAMTO (Chairman of the Planning Group) said that the Planning Group was composed of: Mr. Baena Soares, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda and, as a member ex officio, Mr. Rodríguez Cedeño. The Planning Group was open to all members of the Commission.

The meeting rose at 1 p.m.

* Resumed from the 2613th meeting.