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A/CN.4/SR.2616

Summary record of the 2616th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2000, vol. I

implemented, would surely still constitute an internationally wrongful act.

67. As to the precise question posed by Mr. Hafner, he was still not convinced that the issue fell within the sphere of guarantees of non-repetition. Admittedly, a repeal of the law in question would constitute such a guarantee. He wondered, however, whether there was any need to make assurances and guarantees of non-repetition an autonomous concept. All the examples cited could be in fact linked either to satisfaction, to performance or to cessation. No one had come up with a concrete example of a different context in which a guarantee was actually owed by virtue of international law, as was stated in the Special Rapporteur's proposed draft article 36 bis, paragraph 2 (*b*).

68. Mr. Sreenivasa RAO said he shared Mr. Pellet's understanding of the concepts under consideration. Clearly, no State could invoke its internal law as an excuse for evading its international obligations. Once a State assumed an obligation, it must implement it effectively through its internal legislation. There was no disagreement between himself and Mr. Hafner on that score. Matters, however, were not so straightforward. The enactment of new legislation about evolving and not so well defined standards would be meaningless, particularly if the State lacked the capacity to implement it. The situation was more complex still where customary international law, and international standards not universally accepted, were involved.

69. Mr. HAFNER said that Mr. Pellet had been right to accuse him of rushing to conclusions. He had intentionally compressed his argument with a view to simplifying matters. Of course some primary norms obliged States to enact certain legislation. On the other hand, other primary norms obliged States to pursue a certain attitude. In such cases a delict was committed only if the internal law was applied and therefore the law itself was not up to that point a breach of an international obligation. He could accept that an article on satisfaction included the right to request assurances or guarantees of non-repetition, provided the fact was made explicit in the text, or at least in the commentary. He could not, however, accept that there was no obligation for a State to change its laws, for in that case internal law would rank higher than international law for that State.

70. Mr. ROSENSTOCK said the fact that it was hard to quantify reparations in a given case did not mean that the rules were invalid. The draft articles called for "full reparation" while recognizing that reparation would never be truly full in an imperfect world.

71. Mr. Sreenivasa RAO said that he and Mr. Rosenstock were in agreement, though looking at the issue from different standpoints. The glass was half full, but it was also half empty.

72. Mr. CRAWFORD (Special Rapporteur) pointed out that the words "full reparation" were to be found in draft article 42 as adopted on first reading, and had not been criticized by Governments.

The meeting rose at 1 p.m.

2616th MEETING

Friday, 5 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

later: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, 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 articles 36, 36 bis, 37 bis and 38, contained in paragraph 119 of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. TOMKA said that the third report was a highly interesting and useful introduction to the second reading of Part Two of the draft articles.

3. In particular, he agreed with the new structure proposed by the Special Rapporteur, especially the new Part Two bis entitled "The implementation of State responsibility". That approach was faithful in every way to the original intention of the Commission and of the then Special Rapporteur, Roberto Ago, namely, to consider including, after a Part One devoted to the origin of international responsibility and a Part Two devoted to the content, forms and degrees of international responsibility, a Part Three on the settlement of disputes and the implementation of international responsibility.[3]

4. The Special Rapporteur was to be commended on his intention to move the provisions on countermeasures, which were currently located in Part Two, although they bore no relation to the content or forms of international responsibility. Countermeasures were an instrument designed to induce the State that had breached an international obligation to comply with its new obligation

[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] *Yearbook . . . 1975*, vol. II, pp. 55–59, document A/10010/Rev.1, paras. 38–51.

of reparation, which was at the core of responsibility. The provisions on countermeasures thus belonged in the part on the implementation of responsibility.

5. With regard to the Special Rapporteur's proposal for the addition of a Part Four entitled "General provisions" and incorporating the substance of the current articles 37 and 39 adopted on first reading, more detailed analysis was still needed.

6. He was convinced by the Special Rapporteur's argument that the provisions of Part One applied to all international obligations of States, thus including new obligations that had arisen as a consequence of a previous wrongful act. Accordingly, article 42, paragraph 4, should avoid repeating the substance of article 4. In that connection, he recalled that, in its commentary to the title of chapter I, "General principles", of Part One, the Commission had expressly stated that "Chapter I of the draft, which comprises four articles (articles 1–4) is devoted to certain principles of law which apply to the draft as a whole".[4] He was therefore not in favour of the proposal made by Mr. Pellet (2613th meeting) that Part Two should include a provision stating that chapter V of Part One was also applicable to Part Two. Such an addition would create unnecessary problems of interpretation using arguments *a contrario*.

7. As to the title proposed by the Special Rapporteur for Part Two, namely, "Legal consequences of an internationally wrongful act of a State", responsibility was in fact a legal consequence of an internationally wrongful act. Consequently, the slightly different title suggested by a member of the Commission, namely, "Legal consequences of international responsibility", would not be appropriate.

8. He considered that the title of article 36, "Content of international responsibility", proposed by the Special Rapporteur, did not reflect the content of the provision itself, perhaps because the Special Rapporteur had proposed a different wording for the title of Part Two. It would be for the Drafting Committee to consider that point. As for article 36 bis, he agreed with the Special Rapporteur's intention to establish a closer link between the continuing validity of the obligation breached, cessation of the internationally wrongful act and assurances and guarantees of non-repetition. He noted, however, that those three concepts, although similar in some respects, were distinct and he would therefore prefer them to be dealt with in separate articles. In any event, the title of article 36 bis, "Cessation", did not cover all three concepts. Paragraph 1 must reaffirm that the primary international obligation, although breached, continued to be in force and must be performed by the State in question. The proposed wording of paragraph 2 (*b*) implied that assurances and guarantees of non-repetition should be provided in all circumstances, but the debate had shown that they were relevant only in certain circumstances. The Drafting Committee should take due account of that point.

9. On article 37 bis, entitled "Reparation", he noted that the corresponding previous provision (art. 42, also entitled "Reparation") provided for full reparation and that it had met with no opposition from Governments. It would thus not be wise to abandon that concept. In that regard, the Commission should focus less on the situation of the wrongdoing State than on the injury suffered by a State as a result of the wrongful act of another State. Lastly, with regard to the new text of article 38, entitled "Other consequences of an internationally wrongful act", proposed by the Special Rapporteur, he was inclined to agree with him that there was no need for a specific article to that effect. Usually, provisions relating to the application of the rules of customary international law not enumerated in an instrument appeared in the preamble thereto. That, then, was the approach that should be adopted if the draft articles were ultimately to take the form of a convention.

10. Mr. ADDO said that he endorsed most of the proposals made by the Special Rapporteur in his third report, such as the proposal on the insertion of a Part Two bis on the implementation of State responsibility and a Part Four on general provisions, as well as the setting aside of Part Three for the time being.

11. He saw no problems with articles 36 bis and 37 bis. There were different types of reparation and the choice would depend on the facts of the case. In that context, it should be stressed that the responsibility of a State could be invoked from the moment the injured State demonstrated that there had been commission or omission of a wrongful act; it did not have to prove actual damage. It could not be gainsaid that a State discharged the responsibility incumbent on it for the breach of an international obligation by making reparation for the injury caused. "Reparation" was the generic term that described the various methods available to a State for discharging or releasing itself from such responsibility. It encompassed the right to cessation of the breach, the right to restitution in kind, the right to compensation when restitution in kind was not possible and the right to receive satisfaction. Articles 36 bis and 37 bis, reformulated by the Special Rapporteur, embodied all those forms of reparation. Together with article 36, they should be referred to the Drafting Committee. With regard to article 38, he preferred the new text proposed by the Special Rapporteur, but was not a particularly enthusiastic advocate of its retention. As Mr. Lukashuk had already pointed out (2615th meeting), the article added nothing substantial and might safely be left out. If it had to be retained, he would support it only *ex abundanti cautela* and on condition that it was placed in Part Four. He reserved the right to speak on article 40 bis at a later stage.

12. Mr. ILLUECA said that the third report was to be commended and that it enriched not only the work of the Commission, but also international law in general. He considered that articles 36, 36 bis, 37 bis and 38 had a place in the draft articles and that they could be refined by the Special Rapporteur and the Drafting Committee on the basis of the comments made in the debate.

13. The ambitious programme of work submitted by the Special Rapporteur on the schedule for the consideration of the draft articles on second reading took as its starting point the principle that, at its fifty-first session, the Commission had completed its second reading of the draft articles of Part One, whose underlying conception had basically not been called into question, although the Commission had set aside for further reflection a number of questions relating to Part One, such as State responsibility for breaches of obligations *erga omnes* and the

[4] For the commentary, see *Yearbook ... 1973*, vol. II, pp. 173 et seq., document A/9010/Rev.1, para. 58.

relationship between the provision in question and article 19 as adopted on first reading.

14. Article 19, entitled "International crimes and international delicts", was, in his view, the keystone of the draft articles, securing their cohesion. The concept of "international crime", which had emerged from the Second World War, referred to State responsibility for the most serious internationally wrongful acts. And there was a single regime of responsibility for the most serious internationally wrongful acts and a single regime for other wrongful acts. Unless it took account of that fact, the Commission would not be able to bring to a successful conclusion the commendable exercise it had undertaken by embarking on the subject.

15. Mr. CRAWFORD (Special Rapporteur), summing up the debate on articles 36, 36 bis, 37 bis and 38, noted that the Commission and the working group had made good progress on many issues, including the one to which Mr. Illueca had just referred, although there were still a number of outstanding questions on which a final decision would be taken during the consideration of other aspects of the report.

16. He noted with satisfaction that there was general agreement on the strategy of formulating Part Two, or at least the consequences set forth therein, in terms of the obligations of the responsible State and on the need to deal with those obligations and their invocation by other States, if not in different parts, at least in different chapters, of the same part. It had also become apparent that the existing provisions, even if rearranged, would in substance be retained, together with some additional elements, such as, perhaps, an article on interest, which had been proposed by the previous Special Rapporteur, Mr. Arangio-Ruiz, in his second report.[5]

17. With regard to the possibility of entities other than States invoking the responsibility of a State, a matter raised by Mr. Gaja, he stressed that the open conception of responsibility formulated in Part One allowed for that possibility. It was clear that the responsibility of the State to entities other than States was part of the field of State responsibility. It did not follow that the Commission must become involved in those questions: there were a number of reasons, not related to the field of State responsibility, why it should not do so, though it needed to spell out the fact that it was not doing so in order to make clear the discrepancy between the content of Part One and that of the remaining parts. That was the purpose of the saving clause in paragraph 3 of proposed article 40 bis. It was not desirable to go beyond the current proposed scope.

18. As for the difficulty of establishing a distinction between primary and secondary rules, a problem several members had raised, he considered that the Commission had no choice but to adhere to its original decision and maintain that distinction.

19. Turning to the various articles he had proposed, he noted that there had been a helpful debate on the language of the title of Part Two and also on the titles of the various articles. It was now for the Drafting Committee to consider all the proposals that had been made as to the form. There seemed to be general agreement that the four articles should be referred to the Drafting Committee and that they should be retained somewhere in the draft. In that connection, he had been persuaded of the need to retain article 38, either in Part Four or in the preamble, in the light of the proposals to be made by the Drafting Committee.

20. Similarly, there was general agreement that articles 36 bis and 37 bis should contain general statements of principle on cessation and reparation, respectively, so as to establish a balance in chapter I. Interesting comments had been made as to the form, particularly by Mr. Brownlie, who had stressed, with regard to article 36 bis, that the question of cessation and particularly that of assurances and guarantees of non-repetition arose not only in the context of continued wrongful acts, but also in the context of a series of acts apprehended as likely to continue, even though each of them could be viewed individually. It would be for the Drafting Committee to decide whether the reference to continuing wrongful acts in paragraph 2 (*a*) was necessary. As paragraph 2 (*b*) concerned assurances and guarantees of non-repetition, the current title of the article should perhaps be amended. Different views had been expressed on the retention of that subparagraph; however, it was clear from the debate that most members of the Commission favoured its retention. It should be borne in mind that no Government had proposed the deletion of article 46, as adopted on first reading, although there had been proposals that it should be relocated. Replying to Mr. Pellet's comments that there appeared to be no examples of guarantees of non-repetition ordered by the courts, he said it was true that there were very few such examples. He noted, however, that the award made by the Secretary-General in the "*Rainbow Warrior"* case included certain elements that might be conceived of as falling within the category of assurances and guarantees of non-repetition. He had already made the point that the draft articles operated primarily in the area of relations between States, although it was the courts that had to apply them. It was certainly true that assurances and guarantees of non-repetition were frequently given by Governments in response to breaches of an obligation, and not only continuing breaches. The Drafting Committee might wish to reformulate the subparagraph, incorporating the proposal by the Czech Republic on chapter III[6] referred to in paragraph 56 of the third report, perhaps mentioning the gravity of the wrongful conduct and the likelihood of its repetition and drawing on the corresponding article adopted on first reading.

21. Article 37 bis had raised several difficulties, particularly with regard to the expression "full reparation". Mr. Sreenivasa Rao had queried (2614th meeting) whether the phrase should be retained. As it had appeared in the original text of the article and had not been criticized to any significant extent by Governments, it would be preferable to retain it. It must, however, be borne in mind that there was a problem of balance. Mr. Sreenivasa Rao had devoted his remarks almost entirely to the concerns of the responsible State, but, as Mr. Tomka had pointed out, the

[5] *Yearbook . . . 1989,* vol. II (Part One), pp. 23–30 and 56, document A/CN.4/425 and Add.1.

[6] See 2613th meeting, footnote 3.

Commission must also consider the concerns of the State that was the victim of the internationally wrongful act. It was true that there were extreme cases in which the responsible State could be beggared by the requirement of full reparation. Safeguard measures might thus be needed to cope with that situation, without prejudice to the principle of full reparation. As to the words "eliminate the consequences", which appeared in article 37 bis, paragraph 2, Mr. Kamto had rightly pointed out (ibid.) that it was impossible completely to eliminate the consequences of an internationally wrongful act. Furthermore, in its judgment in the *Chorzów Factory* case, PCIJ had indicated that reparation should eliminate the consequences of the wrongful act "so far as possible". It might be a question for the Drafting Committee to consider whether that phrase should be included so as to qualify the term "full reparation" or whether the question should be dealt with in the commentary.

22. There had been general agreement that a notion of causality was implied in the concept of reparation and ought consequently to be expressed. There again, it would be for the Drafting Committee to decide whether the notion was correctly formulated in paragraph 1 of article 37 bis.

23. There was a fairly strong consensus in favour of the retention of article 38, but some difference of opinion as to its precise location in the text. The Drafting Committee might consider whether it should be incorporated in the proposed Part Four.

24. With regard to article 40 bis, he stressed that the underlying purpose had been to give effect to the distinction between the responsible State's obligations in the fields of cessation and reparation, on the one hand, and the right of other States to invoke that responsibility, on the other. He was pleased that the Commission had at least gone a considerable way towards accepting that distinction.

Mr. Kamto took the Chair.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 36 to 38 to the Drafting Committee.

It was so agreed.

26. He invited the members of the Commission to consider article 40 bis.

27. Mr. SIMMA said that the current title of article 40 bis, "Right of a State to invoke the responsibility of another State", did not keep its promises because it did not give clear answers to the question whether such a right existed. Instead, it introduced two different concepts: that of "injured State" in paragraph 1 and that of a State having a "legal interest" in paragraph 2. The two were of course related in a sense, but did not really correspond to each other in the way they should in article 40 bis. Moreover, different interpretations of the judgment of ICJ in the *Barcelona Traction* case suggested a minefield of theoretical problems; his reading of it differed from the Special Rapporteur's. He therefore suggested avoiding the notion of "injury" as triggering the invoking of State responsibility because it was virtually impossible to "calibrate" it according to the proximity of a State to a breach and, in that context, he cited the example of human rights treaties. Either all States were regarded as injured, as Mr. Arangio-Ruiz had done, or none was so considered, thus leaving such treaties toothless. He thought it wiser to steer clear of the idea of "legal interest" and favoured instead a direct reference, in line with the title, to the "right to invoke" certain legal consequences. The Special Rapporteur had proposed a new wording of the article that was very close to his. He was not opposed to drafting changes, such as the ones proposed by Mr. Economides, namely replacing the words "legal consequences of the responsibility" by the words "legal consequences of an internationally wrongful act of another State". His primary concern was to arrive at an acceptable operational structure for article 40 bis.

28. Mr. BROWNLIE said that he was more or less in agreement with Mr. Simma on the substance of article 40 bis. He was chiefly concerned about collateral problems, notably matters of legislative policy which the Commission must take into consideration.

29. First, any draft articles which the Commission produced, however well crafted, would generate opposition and confusion because the subject matter was extremely technical and complex and could not simply be based on customary law. That article 40 bis or some similar version would generate opposition was testified to by the content of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth Session (A/CN.4/504 and Add.1). The paragraphs of that document on the original version of article 40 raised a number of issues concerning obligations *erga omnes*. The reaction of the Sixth Committee was symptomatic, not eccentric.

30. Secondly, the Commission should also take notice of the consumers of documents that it produced, even at the provisional level. Such documents would not be used exclusively by courts, but also by legal advisers with very little time to spare and who were not always experts in international law, as well as by non-lawyers. Hence the need to avoid being too elaborate so as not to create confusion.

31. Lastly, although it was possible to produce a reasonable definition of "injured State", drafting a comprehensive definition of the concept raised major technical difficulties. The Special Rapporteur had at one point drawn a distinction between bilateral and multilateral obligations and observed that, in general international law, obligations were always owed bilaterally. That comment was well founded and must be accepted. But then the Special Rapporteur had gone on to suggest that the situation was different with multilateral obligations. He did not agree. He thought that the difference would lie in the difficulty of identifying the principles of general international law, but he was somewhat tempted by the sort of solution found in the 1969 Vienna Convention in relation to obligations *erga omnes*, namely, that there might be a cross-reference to developments in customary law.

32. A related consideration was the economy of completing the current task. He took the footnote to article 40 bis, in paragraph 119 of the report, very seriously

and shared the Special Rapporteur's concern, but the Commission could certainly elaborate on the principles in article 40 bis in a new chapter, although that would hold it up for a long time.

33. Mr. GAJA said that article 40 bis was based on an essential distinction between bilateral and multilateral obligations which, in a specific context, could give rise to bilateral relations, on the one hand, and obligations *erga omnes* on the other. That distinction was formulated in a much clearer and more coherent way than in the version of article 40 adopted on first reading. The distinction was necessary and should appear somewhere in the text. Further clarifications and developments were possible and might be considered for inclusion in the general provisions.

34. A number of interesting proposals had already been made. He personally suggested that article 40 bis should be divided according to the type of obligation. The first part of the provision could then deal with breaches of bilateral or multilateral obligations which, in a specific context, gave rise to bilateral relations. A typical example could be the breach of an obligation relating to freedom of navigation on the high seas: that would be a multilateral obligation, whether it was set out in a treaty or in general international law. But, in the specific circumstance where a foreign ship was stopped by a warship of another State, infringement affected only one State. The other States might be concerned by the problem, but there was only one injured State.

35. A second part of the provision would relate to obligations *erga omnes*. Their infringement would affect all States. However, in certain situations, a violation of such obligations specially affected one or more States.

36. The first part of article 40 bis, namely, the current paragraph 1 (*a*), could deal with the first situation, whereas the second part of the article, which would combine paragraph 1 (*b*) and paragraph 2, would address obligations *erga omnes* and could start by saying that, in the event of the infringement of those obligations, all States were entitled to request cessation and seek assurances and guarantees of non-repetition.

37. In his opinion, the Commission might consider whether all States might also request reparation, with the proviso that compensation was to be given to the ultimate beneficiary, which might be another State, an individual or even the international community as a whole. The Commission did not have to determine who the beneficiary was; as Mr. Sreenivasa Rao had pointed out (2614th meeting), that was a matter of primary rules. In the case of obligations *erga omnes*, there might be a special beneficiary, and that beneficiary was the only one entitled to compensation. If it followed the Special Rapporteur's line of reasoning, the Commission should not consider in detail the situation of beneficiaries other than States. If a State was the target of an aggression, that was of concern to the international community as a whole. All States could demand cessation and assurances and guarantees of non-repetition and they could also ask for reparation, but only the State that was the target of the aggression could demand compensation. It could be said that that State had further rights and it would also have a role with regard to implementation. It was up to the State which was specially affected to choose between restitution and compensation. That matter should be dealt with in Part Two bis relating to implementation. In chapters I and II of Part Two, the Commission could refer to obligations only from the point of view of the responsible State.

38. According to the theory of the three concentric circles, as it was called by Abi-Saab, the widest circle was that of norms imposing obligations *erga omnes*. The circle in the middle comprised *jus cogens*, i.e. rules which were designed to invalidate or terminate a treaty if it contained provisions infringing obligations *erga omnes*. The last circle, the smallest one, included norms imposing obligations whose infringement constituted what in the past had been called "crimes of State", i.e. serious violations of some obligations *erga omnes*. Whether or not the theory was right, he had referred to it because, contrary to the Special Rapporteur's suggestion, he did not think that the Commission should dwell on *jus cogens*. The basic distinction was the one drawn in the text of article 40 bis between bilateral obligations and obligations *erga omnes*, irrespective of whether those obligations *erga omnes* were imposed by peremptory norms. The State which was directly affected by the infringement of an obligation *erga omnes* could not cancel that obligation by agreement or unilateral consent and it could not even cancel the consequences of an infringement by a waiver. It was in the very nature of obligations *erga omnes* that the obligations were owed to all the other States in any given case. In his view, the concept of obligation *erga omnes* was sufficient for the Commission's purposes. All that remained was to see whether, in the presence of serious infringements of certain obligations *erga omnes*, further provisions needed to be added in Part Two or elsewhere.

39. Mr. GOCO said that his comments on article 40 bis, especially on the question of the "injured State", were provisional and he reserved the right to return to the subject in the future, in particular during drafting. He commended the Special Rapporteur on his very lucid presentation of the question in his report.

40. As seen in the topical summary, the Sixth Committee had formulated a number of general comments on the meaning of the words "injured State". Some delegations had suggested that the provision on "injured State" should clearly define the delictual infringement of a right of an injured State and that an explicit reference should be made to material or moral damages suffered by the State in question. Others had maintained that it was not necessary to refer to the damage so caused, since the infringement of a right might give rise to potential damage and not cause actual damage. Support had been expressed for the proposal that a State or States specifically injured by an internationally wrongful act should be distinguished from other States which had a legal interest in the performance of the relevant obligations, but which did not suffer quantifiable injury. Only the specifically injured State should have the right to seek reparation and to be compensated; States could not seek reparation in the absence of actual harm. It had also been observed that the list of situations in article 40, paragraph 2, was not exhaustive, since it did not expressly mention either bilateral custom or breach of obligations arising from a unilateral act. Finally, it had been maintained that violations of treaty provisions

should first be governed by the provisions of the treaty itself, after which the appropriate legal framework would be the law of treaties, and not State responsibility.

41. The Special Rapporteur's references, in paragraph 67 of his report, to the discussions that had led to the formulation of the original version of article 40[7] were very useful. At that time, some members of the Commission had proposed a wording "flexible enough to cover all cases".[8] He fully agreed with the Special Rapporteur when he had said that article 40 operated as a hinge for the entire draft, linking the treatment of obligations in Part One and that of rights in Part Two.

42. Article 40, paragraph 1, of the original version was very clear: it gave a general definition of injured State as a State whose rights had been infringed by the internationally wrongful act of another State. One could not help but draw a parallel with the provisions of internal law: in the area of criminal law or simply in that of damages and torts, the injured party was the one whose rights had been violated or infringed by an act or omission of another party. That act or omission afforded the injured party relief or remedies against the author of the violation. The concepts were always the same: the existence of an act or omission violating the rights of a party, the responsibility of the author of that act or omission and the granting of some form of reparation to the victim. Incidentally, article 3 in Part One of the draft also spoke of "action or omission". Thus, it was perhaps unnecessary to list the various situations that might occur, as had been done in paragraph 2 of the original version of article 40. After all, it was the injured State which must raise the issue of the violation of its rights.

43. Governments had expressed concern, in connection with article 40, about possible overlapping or inconsistency with the law of treaties. One delegation had rightly considered, as a condition for invoking responsibility under customary international law, that there must exist a sufficient connection between the violation and the State claiming the status of "injured State".

44. The first version of article 40 had been too cluttered and complex. Most fortunately, the Special Rapporteur had proposed, in paragraph 119 of his report, a new, "lighter" version which was much simpler and easier to understand and apply. Article 40 bis emphasized on the obligation breached, an obligation which was owed to the injured State individually, to the international community as a whole or to a group of States of which the injured State was one. Paragraph 2 of the new version also referred to the case of a State which had a legal interest in the performance of an international obligation to which it was bound if the obligation was owed to the international community as a whole or if the obligation was established for the protection of collective interests. Lastly, paragraph 3 dealt with the question of rights which accrued directly to any person or entity other than a State. That question should be the subject of a separate provision.

45. With all due apologies to the drafters of the original provision, the new wording of article 40 was definitely an improvement over the old version. It was now up to the Drafting Committee to improve it further, taking into account the comments of the Sixth Committee and seeking to find a sufficiently flexible formulation to cover all cases.

46. The provisions to be drafted on such an important topic as State responsibility must be clear and comprehensible not only for lawyers and professors, but also for all readers, and students in particular. He had been very struck by a comment of one of his students in Manila, who had asked him whether the extreme complexity of rules of international law had not been intentional, so that States had an excuse for not applying them. That ought to give the Commission food for thought.

47. Mr. HAFNER said that the Commission had two options for taking a position on the issues raised by article 40 and proposed article 40 bis: it could go back to the roots of international relations and law or it could simply try to find an acceptable formulation for the article. In view of the difficulties inherent in the two exercises, it might be necessary to steer a middle course.

48. Despite the progress of multilateralism, the "Westphalian" system, in which it was for individual States, not a central organ, to enforce the law, prevailed today. On the basis of that concept, it would be very easy to formulate an article indicating that the injured State had the right to invoke responsibility. But what was meant by injured State still had to be defined. For example, could a landlocked State consider itself injured if a coastal State extended its exclusive economic zone or its rights over the continental shelf beyond the admissible distance? ICJ had considered that problem and had come to the conclusion that, because of its geographical situation, a landlocked State could not consider itself injured by such an activity. He did not think that that was true, since conclusions regarding a State's interests could not be derived solely from its geographical location. In addition, there were new developments in international law stemming from the emergence of human rights law and of the notion of duties owed not to individual States, but to all States or to mankind in general. International law was no longer to be seen only as governing synallagmatic relations between identifiable States; multilateralism was progressing. In trying to come to grips with those new trends, ICJ now referred to *erga omnes* obligations.

49. In attempting to determine which States should be entitled to invoke international responsibility, the Commission had to bear those trends in mind. It had to take account of the fact that States which were not really or not at all injured must have the right to respond to breaches of certain norms of international law. Three situations could arise when such a norm was breached: (*a*) there was no injured State per se (for example, when there was a violation of human rights); (*b*) all States considered themselves injured (for example, in a case of environmental damage or the breach of an environmental protection treaty); or (*c*) there was a fundamental breach of international law to which all States must be entitled to react (for example, in the event of aggression). Increased multilateralism led to a further category: (*d*) obligations which were owed to

[7] For former article 5 proposed by the Special Rapporteur, Mr. Riphagen, in his fifth report, see *Yearbook . . . 1984,* vol. II (Part One), p. 3, document A/CN.4/380 and vol. II (Part Two) pp. 101–102, para. 355.

[8] Ibid., p. 103, para. 367.

several States, but fulfilled only in relation to one individual State (as in the case of diplomatic immunities). In case (*b*), any State party to an environmental treaty would normally be entitled to respond and to invoke international responsibility if, for example, another State violated the prohibition on the emission of chlorofluorocarbons. In case (*d*), however, it could be asked whether States other than the directly affected State should be considered endowed with a legal interest in the abstract observance of the relevant norm—in other words, whether their legal interest sufficed to give them the right to invoke responsibility. A reflection of that question could be seen in Article 63 of the Statute of ICJ, which dealt with the right of States to intervene in cases relating to the interpretation of a treaty to which they were parties. It could therefore be asked whether this system should also apply to the right to invoke responsibility. In general, there was a tendency to broaden the right to invoke responsibility, but it did not go so far as to give that right to all States in all circumstances.

50. Having identified the problem, he wished to find out how the Special Rapporteur had tried to solve it in his article 40 bis. The new text considerably differed from the former insofar as it no longer distinguished between bilateral and multilateral norms, but instead differentiated between bilateral obligations and obligations *erga omnes*, a difference which had a major impact on the definition of the State entitled to invoke responsibility.

51. Bilateral obligations were analysed in paragraphs 99 to 105 of the report. In paragraph 105, the Special Rapporteur explained that there might be an interest of third States to refer to a given breach but that did not need to be regulated in the draft articles. He himself held the opposite view: if a third State was to be given the opportunity to intervene in the event of a breach of an international obligation owed to a particular State but resulting from a multilateral treaty, there was a need for a positive norm (something which could be useful if the directly injured State did not wish to take action), creating an exception to the non-intervention rule, which was that of classical doctrine.

52. As to the breach of obligations *erga omnes*, the new draft article provided only two cases when States had the right to invoke responsibility: when they were directly affected by the breach and when they were parties to an integral treaty. According to that definition, no State would be entitled to invoke the responsibility of another State for human rights violations and, in respect of environmental damage which did not amount to injury of another State, the right likewise would not exist systematically. The Special Rapporteur had accordingly included a provision in his article 40 bis, paragraph 2, stating that a State which had a legal interest in the performance of an international obligation to which it was a party was entitled to act if the obligation was owed to the international community as a whole, respectively an *erga omnes* obligation, or if it was established for the protection of collective interests. Certainly, since it was not easy to grasp the precise meaning of *erga omnes* obligations, it would be necessary to include a definition in the commentary.

53. It would be interesting to see the consequences of that distinction between two categories of States, since the wording of the provision did not make those consequences clear. The Special Rapporteur explained, in his report, that the "interested" States could intervene either on behalf of the victim (something which raised no problems) or by agreement between the States parties, by analogy with article 60, paragraph 2, of the 1969 Vienna Convention. He himself agreed with Mr. Simma that the requirement of a prior agreement could cause problems. If the "interested" State was entitled only to claim cessation or restitution, then such a prior agreement was not needed, provided, however, that the victim State did not consider that there had been interference with its rights. It was a different matter to claim compensation or satisfaction or to take countermeasures. In that case, unless the interested State acted on behalf of the victim, an agreement seemed necessary since otherwise disorder would be generated. The final wording on those problems, which urgently needed to be dealt with clearly, had not yet been worked out.

54. To sum up, a final judgement on article 40 bis could not be made as long as the consequences of the distinction between the two categories of States were not known. Lastly, as Mr. Simma had pointed out in proposing a new title, the wording of the title of article 40 bis as proposed by the Special Rapporteur did not correspond to its content and a link should be established between the two. He also agreed with Mr. Goco that paragraph 3 should be kept separate.

55. Mr. PELLET said that the role of article 40 bis as the Special Rapporteur saw it was to determine which States had the right to invoke the responsibility of a State that had allegedly committed an internationally wrongful act. That approach had the advantage of being more pragmatic than the general theories of obligations under international law put forward by Mr. Gaja and Mr. Hafner and ultimately answered the questions asked by the Special Rapporteur in paragraphs 117 and 118 of his report. The Special Rapporteur's version of article 40 bis should therefore appear at the start of Part Two bis because that Part was to be about the implementation of State responsibility and the article dealt with the question of who could trigger such implementation. That was, moreover, the solution which the Special Rapporteur had proposed. He had certainly been right to amend both the title and the philosophy of article 40 as adopted on first reading, which could be criticized on a number of grounds, but it was unfortunate that he had not followed his approach through to the end by drawing all the logical conclusions from his critical analysis. He seemed to have remained imprisoned in the doctrinal approach of former Special Rapporteur Riphagen, which Mr. Brownlie had said was much too complex. Mr. Simma's version was better, at least at the beginning. In paragraph 1, it identified the cases in which a State had the right to invoke the responsibility of another State for an internationally wrongful act. Unfortunately, it then again raised the question of what type of obligation had been breached, whereas the problem really was to determine when a State had the right to draw the consequences of international responsibility. The nature of the obligation breached mattered very little: what did matter was the position of the State that wished to react to the breach.

56. If article 40 bis was moved to the beginning of Part Two bis, as was logical, the immediate consequences of

responsibility would have been listed and defined in Part Two. In referring articles 36, 36 bis and 37 bis to the Drafting Committee, the Commission had sketched out the broad lines of what Part Two would be, even though provisions on interest payments in connection with reparation must be added and the Special Rapporteur had agreed to do so. He himself continued to believe that the articles on reparation should be made a bit more complicated. Part Two should also include the article 45 bis which the Special Rapporteur was planning to draft on a plurality of wrongdoing States and which he believed belonged more in Part Two than in Part Two bis. In the final analysis, the consequences of responsibility were not very complicated. As had already been pointed out, they included performance of the international obligation (art. 36 bis, para. 1), cessation of the internationally wrongful act (art. 36 bis, para. 2 (*a*)), perhaps also assurances and guarantees of non-repetition (art. 36 bis, para. 2 (*b*)), if that was considered important, although the Special Rapporteur still had not given real examples thereof, and, last but not least, one or a combination of the three forms of reparation. That would all be in Part Two. Then would come article 40, where it would be only logical to indicate who had the right to call for cessation, assurances, etc. The four consequences could easily be grouped together. Reparation would come first and the rest would follow: cessation, performance and, perhaps, guarantees of non-repetition. It would be better to deal with countermeasures after the Special Rapporteur had completed his report.

57. If that reasoning was accepted and if what preceded article 40 was to be taken as a starting point, the only problem that article 40 had to solve was which consequence or consequences of responsibility could be triggered by a State on the basis of its position in relation to the obligation breached. That was what the Special Rapporteur tried to do in table 2, in paragraph 116 of his report. It was also what article 40 bis tried to put into words, but it did so in a way that seemed extremely complicated without being very precise because it could be read every which way. It was clear that differences existed, but it was hard to see what could be triggered on the basis of which situation. Once again, the Special Rapporteur was much more concerned with the theory of obligations than with the triggering of the process of responsibility. His approach was nearly as complicated as the article which Riphagen had proposed as article 5 in his sixth report[9] and which, in principle, had been based on different thinking. In his own view, a simple distinction that emerged fairly clearly from the report should be made between injured States strictly speaking, namely, those which had suffered damage or injury directly, and other States, which could be called indirectly injured and which were identified by the judgment of ICJ in the *Barcelona Traction* case as having a legal interest, namely, the other States concerned.

58. He agreed with the Special Rapporteur on that point, but found the conclusions he reached on the basis of his reasoning to be strange. The situation was clear. On the one hand, there were States that had the right to invoke all the consequences deriving from responsibility, namely, injured or directly injured States and then there were other States which had the right to invoke all the consequences of responsibility except reparation. A State could not claim pecuniary reparation for genocide committed in another State and affecting the population of that State. On the other hand, it was entirely clear, and that was one of the major virtues of the notion of crime, that all other States certainly had the right and probably the duty to react. At the very least, they had the right to demand cessation, performance of the obligation and, where appropriate, guarantees of non-repetition. In short, the State directly injured had the right to request reparation, either on its own or through its nationals. Other States had the right to trigger the consequences of responsibility, but not to claim reparation.

59. There was nothing very complicated in that and it was what he was trying to say in his proposed articles 40-1 and 40-2 (ILC(LII)/WG/SR/CRD.2). The wording of his proposal, which he thought was simple and more functional than that of the texts submitted by the Special Rapporteur and Mr. Simma (ILC(LII)/WG/SR/CRD.1), could be improved and must be supplemented. Somewhere, it would no doubt be necessary to define what was meant by damage or injury. Personally, he would prefer that it be done in a draft article rather than in the commentary. Legal interest would also have to be defined and that could be done without difficulty in a draft article which could simply use paragraph 2 as proposed by the Special Rapporteur and as reproduced by Mr. Simma in his proposal, perhaps with some drafting changes. In his own proposal, he had merely transposed article 40 bis, paragraph 2, into article 40-2, subparagraph (*b*), with a minor drafting change. Paragraph 3 as contained in the proposals of both the Special Rapporteur and Mr. Simma must be retained and he used it in article 40-X of his own proposal. He nevertheless agreed with Mr. Hafner that paragraph 3 did not belong in article 40 bis. It should be removed and its wording might be amended: "without prejudice to any rights, arising …" could be replaced by "without prejudice to the consequences flowing from the commission of an internationally wrongful act", for the consequences of responsibility were not only rights, but also obligations. In the case of a crime like genocide, for example, it was obvious that the States concerned, i.e. all States in the international community, had not only the right, but indeed the obligation, to react and that had to be reflected in paragraph 3.

60. To sum up, his first proposal was that article 40 bis should be divided into three articles because, compared to the other draft articles, it was much too wordy. That was, however, purely a drafting amendment that should be made even if the proposal by the Special Rapporteur or that by Mr. Simma was adopted.

61. His second proposal was that the wording of paragraph 1 should be totally changed in order to bring out the distinction, which the Special Rapporteur himself, had made, between injured States and States having a legal interest. That was a helpful clarification that would allow the article to play its role of determining who could trigger the consequences of responsibility, something that was not at all clear from the proposals by the Special Rapporteur and Mr. Simma.

[9] *Yearbook . . . 1985,* vol. II (Part One), p. 3, document A/CN.4/389.

62. His third proposal was designed to bring back the concept of damage or injury. Damage had to exist if the obligation of reparation was to be justified because, otherwise, international law would become completely immoral. However, if the fact of having suffered damage was what authorized a State to demand reparation, what authorized it and, in some cases, made it an obligation for it to react otherwise than to demand reparation might be that an obligation *erga omnes* had been breached.

63. His fourth proposal was designed to ask the Special Rapporteur whether it might be possible to define the concept of damage, preferably in the draft articles. If the Special Rapporteur did so in the commentary, however, he would not object.

64. What he was proposing was basically no different from what the Special Rapporteur had analysed in his report, except for article 40 bis, paragraph 1, in which the Special Rapporteur said that he drew the appropriate conclusions from his report. He had based himself on the report of the Special Rapporteur in proposing a text which was clearer. He nevertheless wished to reaffirm that he agreed with the general philosophy underlying paragraphs 66 to 118 of the report, without prejudice to his future reactions to what the Special Rapporteur would propose with regard to serious violations essential for the safeguard of fundamental interests of the international community of States as a whole, alias crimes under article 19. The Special Rapporteur was, however, entirely right to say that, as far as what could trigger the consequences of responsibility was concerned, it mattered little whether or not a crime had been committed if an obligation vis-à-vis the international community had been breached. There was, in his opinion, thus practically no need to reintroduce the concept of crime in article 40 bis.

65. Mr. SIMMA, reserving the right to come back to Mr. Pellet's proposal in greater detail at a later stage, said that it might be misleading to call the approach taken by Mr. Pellet a much simpler and more elegant one. Article 40-1 bis did not, of course, take up much space in the proposal, but it might open up Pandora's box. If the Commission really tried to nail down a definition of the terms "damage" and "injury", the elegance and simplicity of Mr. Pellet's approach might quickly dissolve. Without going so far as to remove the concept of damage from the draft as a whole, it might be a good idea to avoid making it a constituent element of an internationally wrongful act. It would be much easier to mention it only in connection with reparation, since reparation presupposed damage, rather than in connection with the issue of entitlement to act.

66. In his view, article 40-2, of Mr. Pellet's proposal, entitled "Protection of a legal interest", was based on the same wrong reading of the judgment of ICJ in the *Barcelona Traction* case as that by the Special Rapporteur, i.e. on too narrow an interpretation of the concept of "legal interest". Both Mr. Pellet's proposal and that by the Special Rapporteur gave the impression that the fact of having "a legal interest" was something less than being directly injured. That was, however, not how he himself read the judgment in that case. His own view was that States having a legal interest had rights which were not inferior to those of directly injured States, which would, according to the proposals by Mr. Pellet and the Special Rapporteur, be the only ones fully entitled to act.

67. In respect of article 40-1, paragraph 2, of Mr. Pellet's proposal, granting States which had a legal interest, but had not suffered injury, the rights provided for in article 36 bis proposed by the Special Rapporteur did not go far enough. He was in favour of adding other elements which the Special Rapporteur sketched out in table 2, in paragraph 116 of his report, such as acting on behalf of the victim or by agreement with the States parties, even though he recognized that it might be difficult to arrive at precise definitions of those concepts.

68. Mr. CRAWFORD (Special Rapporteur) thanked the members who had proposed new versions of article 40 bis containing common features on the basis of which the Drafting Committee could begin its work. Without being mischievous, he would suggest to Mr. Pellet that what was missing in his proposal were the three elements of the definition of damage which he had managed to get into a single article. He agreed that that article could well be disaggregated. He was certainly adopting a strategy of disaggregation in order to try to solve the problems of article 40, which adopted a strategy of aggregation. It might be that he had not gone far enough.

69. If he was asked to define "damage", he would say that it was first, by definition, what was suffered by a State party to a bilateral obligation which was breached; secondly, what was suffered by the State specially affected; and, thirdly, what was suffered by the State affected just by virtue of the fact that it was a party to an integral obligation and the fact that such obligations were calculated to affect all States. He and Mr. Pellet thus agreed on the substance.

70. Without wanting to play the role of a third-division professor, he pointed out that those concepts did have a theoretical basis. What he had tried to do in developing the concept of injury was to take the bilateral case and the case indicated in article 60, paragraph 2, of the 1969 Vienna Convention. It had to be said that the Commission had worked on that paragraph at a fairly late stage in the drafting of the Convention. It had made it up. There had not been much material on which to base it. The commentary[10] did not give many arguments in favour of that provision and yet it had been widely accepted. Inspiration could apparently be drawn from that example. In any event, there was more in the general theory of obligations than met Mr. Pellet's eye.

71. He noted that Mr. Simma had also offered valuable suggestions for taking the matter further and one of the virtues of Mr. Simma's radical proposal was that it avoided any debate on concepts such as injury and interest. He had tried to draft article 40 bis on the basis of interest rather than on the basis of injury, but he had come to the conclusion that that was not an improvement.

72. It was not impossible that all the elements of the proposed solutions might be adopted. What he thought all

[10] See the commentary to article 57, *Yearbook . . . 1966*, vol. II, pp. 253–255.

the members did agree on—and that was the only point he considered essential and was to be found in the judgment of ICJ in the *Barcelona Traction* case—was that there was a distinction between the position, for example, of the peoples of South West Africa and those of Ethiopia and Liberia. Once the members had agreed on that, they would have gone a long way towards disentangling the problems which article 40 had entangled.

73. He welcomed those constructive contributions. He agreed with Mr. Brownlie that the Commission would have to be ready to go to the Sixth Committee with a proposal that was clear and had a sufficiently firm basis in pre-existing texts to meet with some level of acceptance. The Commission's own level of acceptance had been fairly good so far and, with the efforts of the members of the Drafting Committee, the problem could be solved. If it was not solved and if the Commission did not go back to the original article 40, there would have to be a much simpler formulation—and that would be regrettable. Just as the Commission had considered that it had to go further than article 60, paragraph 1, of the 1969 Vienna Convention in the context of multilateral treaties, so must it go further in the field of the law of responsibility in the context of multilateral obligations. On the basis of the current discussion, it could take that important step forward.

74. Mr. HAFNER, agreeing with Mr. Simma and the Special Rapporteur, asked Mr. Pellet whether two consequences should be drawn from the interpretation of the words "a State which has suffered [material or moral] injury" in his proposed article 40-1, paragraph 1: first of all, that a breach of an international obligation did in itself constitute moral injury; and secondly, that in a situation where there had been a violation of a bilateral agreement on the protection of a minority, the State which protected the minority must, even if it could not be regarded as having suffered injury, be authorized to take any measures deriving from the responsibility of the other State. In other words, the interpretation of that article depended greatly on the definition of injury.

75. Mr. Sreenivasa RAO, reserving the right to refer again to the question at a later stage, said he thought that Mr. Pellet had been trying to propose a manageable way of dealing with the very difficult concepts underlying responsibility. If reparation was not what was intended in article 40 for indirectly injured States which had no *locus standi* to raise the issue of compliance with the obligation breached, he asked what was being invented that was new and did not already exist in United Nations forums. An indirectly injured State could go only to a multilateral forum to obtain satisfaction. It could, of course, send diplomatic notes, but, if it wanted to achieve results, it had to turn to United Nations resolutions, the WTO system for the settlement of disputes and other mechanisms created for that purpose. If those mechanisms were not used, a new wheel had to be invented. Otherwise, there would be only a unilateral, highly disoriented and selective set of reactions to the defence of a community of interests. That was the fundamental difficulty and it had not been discussed.

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

[Agenda item 2]

76. The CHAIRMAN announced the establishment of a working group on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). The Working Group would be composed of Mr. Sreenivasa Rao (Chairman and Special Rapporteur), Mr. Baena Soares, Mr. Galicki, Mr. Hafner, Mr. Kateka, Mr. Lukashuk, Mr. Rosenstock and Mr. Rodríguez Cedeño (ex officio).

The meeting rose at 1 p.m.

* Resumed from the 2613th meeting.

2617th MEETING

Tuesday, 9 May 2000, at 10.05 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (A/CN.4/506 and Add.1[1])

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his first report on diplomatic protection (A/CN.4/506 and Add.1), containing draft articles 1 to 9, which read:

Article 1. Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the

[1] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).