Document:-

**A/CN.4/SR.2621**

# Summary record of the 2621st meeting

Topic:

**State responsibility**

Extract from the Yearbook of the International Law Commission:-

**2000, vol. I**

breached. The State of nationality could, of course, exert pressure on his behalf, but it was not a question of diplomatic protection. The latter applied when there had been a breach of international law relating to the treatment of aliens or to human rights and when the injured national had been unable to obtain reparation after exhausting domestic remedies. In that case, the State of nationality could take up the case at the international level. It was necessary to distinguish clearly between those different situations in order to avoid any risk of confusion.

63. Mr. Sreenivasa RAO congratulated the Special Rapporteur on the quality of his work. However, in his next report, he should concentrate his attention on the conditions under which diplomatic protection was exercised: it was necessary to know when such protection was legitimate or illegitimate, in what conditions it was legitimate and at what point it touched on the area of State responsibility. The current confusion was the result of his failure to provide precise guidelines. The definition of diplomatic protection given in article 1 also gave rise to a problem, as it was linked only to State responsibility. In his future reports, the Special Rapporteur should therefore provide guidelines for the Commission in those areas.

64. Mr. SIMMA said that it was necessary to go even further. Before asking the Special Rapporteur to come up with clear replies to the questions raised about the limitations on or the conditions for the exercise of diplomatic protection, it had to be indicated clearly what was meant by diplomatic protection. He noted that there was no consensus on that point.

65. Mr. CANDIOTI said it was true that the Commission did not have a clear idea of what the legal concept it was trying to codify actually was. The first thing to do was therefore to agree on a strict definition of diplomatic protection under international law; the Commission should not include in diplomatic protection other kinds of diplomatic actions that were unrelated to it.

66. Moreover, as Mr. Hafner had said, it was essential to understand the effects of diplomatic protection. As he believed that that question could be studied in a working group before written rules were drafted, he supported Mr. Pellet's proposal that such a working group should be set up. Diplomatic protection was well defined in a number of judgements, including the judgment of PCIJ in the *Mavrommatis* case, but, if unrelated concepts were added to them, there was a risk of opening a Pandora's box, by mixing up fundamentally different concepts. That was why it was important to set up the working group to help the Special Rapporteur define the scope of diplomatic protection.

67. Mr. OPERTTI BADAN said that he supported that proposal and suggested that the working group should be set up the following week.

68. Mr. DUGARD (Special Rapporteur) said that he would like not only to reply to Mr. Opertti Badan's suggestion, but also to sum up the comments made on articles 1 to 4 at the soonest possible date.

*The meeting rose at 1.10 p.m.*

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## 2621st MEETING

*Tuesday, 16 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. Idris, 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.

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### 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, extending a warm welcome to Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, invited the Commission to continue its consideration of the third report by the Special Rapporteur (A/CN.4/507 and Add.1–4), and specifically, of article 40 bis.

2. Mr. GAJA said that he wished to respond to Mr. Pellet's proposal (2616th meeting) that issues currently dealt with in article 40 bis should be addressed in Part Two bis, on the implementation of State responsibility. Paragraph 118 of the report showed that the Special Rapporteur was inclined to share that view. He endorsed the idea of couching the provisions in Part Two in terms of obligations of the wrongdoing State, but thought that those obligations had to be owed to someone: either one or more States or another subject of international law. Hence the need in chapter I of Part Two for a provision such as the current article 40 bis, a text which, irrespective of its heading, attempted to identify the categories of subjects to which obligations arising from a wrongful act were owed. On the other hand, there was no need to characterize the legal position of the *omnes* with regard to obligations stemming from the commission of a breach of an obligation *erga omnes* in terms of rights, legal interests or in any other way.

* Resumed from the 2616th meeting.

[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. As he understood the majority opinion in the Commission, the draft articles should envisage only the relations established between States as a consequence of a wrongful act. If that was so, when the draft said that the wrongdoing State was under an obligation, it necessarily implied that the obligation was owed to one or more States. Thus, if a State that infringed an obligation *erga omnes* was said to be required to make reparation, the obligation was owed to all the other States, whether or not they were the ultimate beneficiaries of restitution and/or compensation.

4. What he had said about the need to include in Part Two a reference to the States to which the obligation was owed did not mean that there was no need to refer to invocation of responsibility in Part Two bis, but the issue of concurrent claims relating to a breach of an obligation *erga omnes* could be resolved when Part Two bis came to be discussed later.

5. Mr. RODRÍGUEZ CEDEÑO welcomed the Special Rapporteur's efforts to improve the texts already adopted on first reading, particularly in regard to article 40. The earlier version had a number of merits, although it was undoubtedly complex and too detailed. A number of its defects were listed in paragraph 96 of the report, and by and large he agreed with what was said there.

6. Article 40 bis raised four issues: the meaning of "injured State", the definition of legal interest in the performance of an international obligation, the right to invoke responsibility and the right of a State with a legal interest. None of the proposed versions of the article addressed all four issues, and the Drafting Committee should look into that problem. For example, the Special Rapporteur's proposal as set out in the report did not incorporate a definition of "injured State", although apparently a proposal submitted to the Drafting Committee did so. The draft should include a paragraph, preferably an entire article, specifically covering the meaning of that term. Many Governments had mentioned the importance of such a provision, and it would help to balance the text, placing "injured State", "wrongdoing State" and State with a "legal interest" on an equal footing.

7. The title of the article did not fully conform to its content. On the other hand, the Special Rapporteur's proposal for paragraph 2 met very well the need for a reference to States which had a legal interest, States that were not directly affected and, although they could not invoke responsibility, could call for cessation of a breach by another State. Mr. Pellet's proposal put it very clearly, referring back to the provisions in article 36 bis on the continued duty of the State to perform the obligation, to cease the wrongful act and to offer assurances and guarantees of non-repetition.

8. Paragraphs 1 (*a*), 1 (*b*), 2 (*a*) and 2 (*b*) of the Special Rapporteur's proposal for article 40 bis mentioned specific obligations the breach of which constituted the foundation for the injured State's invocation of international responsibility. The two categories of obligations mentioned covered all obligations, including those arising from unilateral acts and customary international law. He agreed with other members, however, that it would be better not to list the obligations, so as to avert a complex discussion and avoid complicating the drafting.

9. He did not see the need for the Special Rapporteur's proposed paragraph 3 and was particularly opposed to the reference to rights that accrued directly to any person or "entity other than a State", which was a very broad and even dangerous notion.

10. All the proposals now before the Commission could be referred to the Drafting Committee, but the Commission should decide whether detailed consideration would be given to obligations and whether paragraph 3, one which in his opinion had no place in the draft, was to be retained. Lastly, in the interests of clarity, the Drafting Committee should divide article 40 bis into four separate provisions.

11. Mr. SIMMA said it should be remembered that, in its judgment in the *Barcelona Traction* case, ICJ had in mind solely fundamental human rights, although these exact words had not been used. It was therefore problematic to say that obligations deriving from human rights were obligations *erga omnes* across the board. The category of obligations *erga omnes* should be reserved for fundamental human rights deriving from general international law and not just from a particular treaty regime, in the context of which they could be considered as obligations *erga omnes partes*. That distinction should be taken into account in dealing with article 40 bis.

12. Regional treaty-based regimes imposed human rights obligations of various kinds, some of them going far beyond those of a fundamental nature in the sense of the *Barcelona Traction* case. In some situations the general regime of State responsibility could be applied to obligations under such treaties, but only in a residual manner. The human rights enshrined in the European Convention on Human Rights were interpreted in such a way as to scrutinize every nook and cranny of the administrative law of member States. For example, Germany had found certain judgements made by the European Court of Human Rights on the German law on misdemeanours to be entirely out of place, the issues involved not having the necessary stature for consideration by a human rights organ. The very idea of regarding each and every obligation derived from the Convention or from the International Covenant on Civil and Political Rights as an obligation *erga omnes* was simply absurd and led to untenable conclusions.

13. The notions of injury and of damage should be kept out of the draft. A perusal of previous commentaries indicated that, if damage was included as a constitutive element, the concept would have to be broadened to a degree that rendered it meaningless. Damage should accordingly be absent from the list of elements of an internationally wrongful act and from article 40 bis, which triggered the invocation of State responsibility, and should be mentioned solely in the provision on compensation, where such a reference was entirely appropriate.

14. He wholly disagreed with Mr. Rodríguez Cedeño about article 40 bis, paragraph 3, and thought it was a good place to express human rights sensibility. The paragraph said that, irrespective of what was agreed with regard to the operation of human rights obligations between States, the fact that States had the power to remedy breaches of human rights obligations had no impact on rights to which other entities might be entitled. Of

course, in the human rights context, such entities included persons. The principle set out in paragraph 3 was of the greatest importance for Germany and for Austria in the current debate on compensation for forced labour. One legal claim was that if reparations were being dealt with at the State-to-State level, there was nothing left for individuals. He did not believe that approach was justified: hence the need for a "without prejudice" clause with regard to individuals in the human rights context.

15. He had already explained that his proposal for the wording of article 40 bis had been motivated by a concern to bring the text into line with the title and that the contents of his proposed paragraph 1, subparagraphs (*a*), (*b*) (i) and (*b*) (ii), were negotiable. He now considered that subparagraph (*b*) could be deleted altogether, since all the cases it envisaged had to do with obligations owed to States individually as well as to the international community as a whole, and were therefore covered by subparagraph (*a*).

16. Under paragraph 1, subparagraph (*b*) (i), an obligation *erga omnes* the breach of which specially affected one State was an obligation also owed to that State individually. An obligation *erga omnes* could be broken down into obligations owed by one State to other States individually: for example, Austria owed Liechtenstein an obligation not to occupy it by military means. The same was true for subparagraph (*b*) (ii): an obligation *erga omnes* whose non-performance necessarily affected a State's enjoyment of its rights or performance of its obligations was, at the same time, owed to the State individually.

17. If subparagraph (*b*) was deleted in its entirety, the analogy with the 1969 Vienna Convention, as proposed by the Special Rapporteur, could be placed in the commentary. He was not convinced that the analogy worked, for article 60, paragraph 2, of the Convention could be criticized from a number of standpoints, and such distinctions were confusing and unnecessary.

18. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Simma about the need to be careful not to assert that all human rights were necessarily obligations *erga omnes*: clearly, human rights under regional agreements and some provisions even in universal human rights treaties were not. One of the faults of the earlier version of article 40 was that it had very broadly singled out human rights as a special category of obligation. To try to limit it would have also created problems. The Commission must adhere to the basic methodology. Although the distinction between primary and secondary rules could be rather ragged, in drafting the articles on State responsibility the Commission was not making statements about the content of particular primary rules. That was as true in the field of human rights as anywhere else. Human rights were an important part of international law, and the draft articles should accommodate them, but it was equally important for the articles not to overlap with the field of substantive human rights or to proceed on the basis that the general international law of human rights was one thing or another. It was sufficient to know that it existed and that it was capable of producing certain effects; the rest could be dealt with in the interpretation and application of the primary rules.

19. By inference from the foregoing, he agreed with Mr. Simma on the need for paragraph 3, but human rights obligations were not the only category which that provision was meant to preserve. Paragraph 3 was a saving clause, although it did not say anything about the content or operation of the rules described therein. It was necessary, because otherwise there would be a disparity between the content of Part One, which dealt with all obligations of States, and the content of Part Two, which, in accordance with what Mr. Gaja had identified as the majority opinion, would touch only upon the invocation of the responsibility of a State by another State. Since it was possible for a State's responsibility to be invoked by entities other than States, it was necessary to include that possibility in the draft. Whether that should be done in a separate article or as part of article 40 bis was a question that could be addressed in the Drafting Committee, but the principle set out in paragraph 3 was important.

20. He wished to defend his analogy with the 1969 Vienna Convention. It was not enough to insert, by stipulation or by way of commentary, the proposition that the States identified in paragraph 3 and in article 60, paragraph 2, were themselves the beneficiaries of the obligations concerned. They might be, but then again, they might not. The structure of article 60 of the Convention was such that it distinguished between bilateral treaties and multilateral treaties. By analogy, the Commission was distinguishing between bilateral obligations and multilateral obligations. In the event of a breach of a bilateral obligation, the State affected had the right to invoke the obligation, and that was the end of the matter. However, when a State was a party to a multilateral treaty or obligation, it might not be identified as the State to which the obligation was owed, but it was reasonable for it to be able to invoke the obligation in the circumstances identified in paragraph 2. It was also a reasonable analogy to say that if the State could unilaterally suspend the obligation, as it could under article 60 of the Convention, it ought to be able to invoke the obligation of cessation.

21. International law must speak in favour of the preservation, rather than the suspension, of obligations and it would be incoherent to specify that the sole option open to a State confronted with a serious breach of an obligation was to suspend the obligation. It might not be in anyone's interest for the obligation to be suspended and in everyone's interest for the breach to cease. At least when talking about cessation and reparation itself, it was reasonable to extend the scope of the draft articles in that manner. There were different ways of doing so, as a matter of drafting. But simply to force those two categories into the category of bilateral obligations was artificial.

22. Mr. PELLET said Mr. Simma's comments showed that it was impossible to separate diplomatic protection from State responsibility. It could not be argued that the two drafts were unrelated; not only was it the same problem, but diplomatic protection was nothing more than the extension of State responsibility.

23. He was somewhat concerned about Mr. Simma's interpretation of the expression "*erga omnes*", which basically meant "towards everyone". It did not mean "peremptory" or "fundamental". He did not see why the Commission mutilated a term on the pretext that it was interpreting in a certain manner an esoteric dictum of ICJ in the *Barcelona Traction* case, in which the Court had found that, in view of the importance of the rights at issue,

all States could be regarded as having a legal interest in seeing that those rights were safeguarded. That meant that at issue was an obligation which created a legal interest on the part of all States, but not automatically that a fundamental obligation was involved. It might be that in its enumeration, the Court had given examples of fundamental obligations. But the idea of *erga omnes* could not be reduced to that of such an obligation. Several distinctions must be made.

24. First, there were obligations which the Court had found were owed to the international community as a whole. Those obligations could concern, for example, human rights, environmental matters or the prohibition on the use of force: they were obligations towards everyone. It might be tempting for Austria to invade Liechtenstein or for Germany to invade Austria, but temptation was not a legal concept, regardless of the state of mind of Germany or Austria in respect of a particular neighbour. He did not see how that could be a particular interest. States, including each State individually, owed it to the international community as a whole not to use force; it was an obligation *erga omnes*, the respect of which concerned the international community as a whole. Such obligations could be fundamental, such as the non-use of force, but there could also be "smaller" obligations, such as those concerning human rights obligations entered into through a treaty and owed to all the States parties, for example the particular obligations *erga omnes* which the Special Rapporteur had in mind. Nevertheless, they were obligations towards everyone, or towards the entire community bound by the obligation.

25. Secondly, there were obligations which were not owed to the international community as a whole, but to each of its members, for example, the right of innocent passage: the obligation owed to each State of the international community to allow ships to pass through one's territorial waters. It was not an obligation owed to the international community as a whole, but it was nonetheless an obligation *erga omnes* because it was owed to all States. The problem was that some of those obligations owed to the international community as a whole were *cogens*, or peremptory, and others were not. It was a very important distinction. But it was unacceptable, as Mr. Simma had done, to equate obligations *cogens* and obligations *erga omnes*.

26. Another associated problem was the nature of the breach. A State could breach a *cogens*, *erga omnes* rule without committing a crime. To cite one example, in the *Selmouni* case France had been condemned for torture by the European Court of Human Rights. It seemed indisputable that the prohibition of torture was a peremptory rule of international law, both *cogens* and *erga omnes*. The act of torture for which France had been condemned was different from a systematic policy of torture: no one claimed that France practised systematic, widespread torture as a principle of government. That difference must have consequences in the law of responsibility. That was where crime came in: if France used torture as a systematic policy, it would commit what article 19 called a crime. In the example given, it had violated a rule of *jus cogens*, *erga omnes*, but it was not a crime. Thus, at some point, most likely in Part Two bis, the Commission would need to address not only the obligations breached but also the nature of the breach. He had the impression that the Special Rapporteur was in agreement on that point, although the Special Rapporteur rejected his "criminalistic" vocabulary. It must be made clear that obligations towards the international community as a whole were not all obligations *erga omnes*; that obligations *cogens* were not the same as obligations *erga omnes*; and that the nature of the breach was important in the area of responsibility. But it was not for the Commission to produce a general theory of international obligations in the context of the draft articles; it was sufficient for it to weigh up the consequences of such a theory with regard to responsibility.

27. Mr. HAFNER, noting that according to Mr. Pellet the obligation stemming from innocent passage could not be considered an obligation *erga omnes*, cited the example of a State that closed a strait with its warships or by a legal act, which was then publicized. Was that a breach of an obligation *erga omnes* that entitled every State to react, or was it a breach of an obligation solely to neighbouring States or to States that used the strait?

28. Mr. Sreenivasa RAO said that the issue of human rights was raised with increasing regularity. If some fundamental human rights obligations could be treated as *erga omnes*, a breach thereof could be something of common concern and give *locus standi* to States at large to demand their observance. Did such human rights obligations also compel States to contribute to their fulfilment as a matter of duty? Perhaps it should not be entirely left to the authorities concerned, particularly as they are willing but unable to discharge the duty. There must be a meaningful discussion on human rights that went beyond generalities. He was most grateful to Mr. Simma and to the Special Rapporteur for their observations in connection with human rights.

29. Mr. PELLET, replying to Mr. Hafner, said that the right of innocent passage was a right of all, and therefore an obligation owed to all, and not an obligation *cogens*. In Part Two bis, specific consequences must stem from that dual nature. The State whose passage was refused, regardless of whether it was a riparian State, would therefore have a right of reparation for the harm suffered, and the other States members of the international community could probably demand cessation. He greatly hoped that the Special Rapporteur would provide an answer to that in Part Two bis. For the moment, his own reply was that the obligation was *erga omnes* but not *cogens*.

30. Mr. SIMMA thought that the word *omnes* simply did not capture all the implications of multilateral obligations found in the literature and in jurisprudence. It was therefore not very useful to read too much into the meaning of the word.

31. Mr. IDRIS said that the notion of an injured State was the raison d'être of the topic of State responsibility. The subject raised a number of questions. Could an *erga omnes* breach, such as a crime of aggression, result in injury to all other States? If so, were all other States entitled to reparation, and to what degree? What should be the nature of the response by all other States to an internationally wrongful act? Should the response be collective and, if so, what collective interests were to be protected? Furthermore, should material loss or damage be the basis for defining the injury suffered and for seeking redress, or

should a mere legal or moral interest suffice to justify a claim for reparation or compensation for a breach of an internationally wrongful act? Should a distinction be made between States which were directly harmed and those indirectly harmed by a breach of an international obligation? Should aggression be classified as an international crime?

32. The Special Rapporteur's approach to article 40 differed in two aspects from that of former Special Rapporteur Riphagen, in his sixth report,[3] for he took the view that the earlier version of the provision was not adequate to deal with situations in which more than one State was injured by the same wrongful act and that it also shifted the focus from breach of obligations by the wrongdoing State to the rights of the injured State.

33. The Special Rapporteur nonetheless seemed to believe that the earlier version of article 40 had focused more on injury and consequences on a bilateral basis than in terms of a multilateral relationship in which all States were injured and had a right to act. For that reason, he had expressed doubts that article 40 provided a suitable basis for the codification and progressive development of the legal consequences of State responsibility.

34. Article 40 bis was different, as it sought to differentiate between the affected States by categorizing them in groups and drawing different legal consequences for different obligations breached, ranging from cessation, including assurances and guarantees, to restitution, compensation, satisfaction and countermeasures.

35. With regard to the scope of article 40 bis, he found merit in making a distinction between States that were directly injured by an internationally wrongful act and those that merely had a legal interest. He was also sympathetic to the view that only those States whose rights were directly affected by the breach should be eligible to seek appropriate remedies, and that States which might have a mere legal interest should not seek compensation, though they could be entitled to seek other measures for redress of a wrongful act involving a breach of an *erga omnes* obligation, such as the crime of aggression, mass violations of human rights, and massive destruction of the environment or the common heritage of mankind. The measures of redress to be applied might take the form of cessation, restitution, satisfaction or countermeasures. That distinction was well supported by the *Barcelona Traction* case, in which ICJ had distinguished between rights arising in a bilateral context and a mere legal interest of the international community as a whole, a point well reflected by the Special Rapporteur in paragraph 97 of his report.

36. In addition, there should be material damage or a tangible loss in order for the affected State to assert a claim of State responsibility. A mere infringement of a State's legal interest, that did not result in material damage or loss, should not be grounds for an automatic claim for damages or compensation.

37. The draft should also contain a saving clause in favour of specific legal regimes governed by a treaty or convention in a given subject area, such as the common heritage of mankind, which was governed by the outer space treaties and the conventions on the law of the sea respectively.

38. The reference in article 40 bis, paragraph 1 (*b*), to "a group of States of which it is one" further complicated the issue and questioned the very foundation of international law. Was the sovereignty of the State the basis for invoking the State responsibility of the infringing State or was the basis the fact that the State was part of that group? Where did the entitlement stem from? He very much hoped that the Special Rapporteur would shed more light on that question in the general debate. The same questions could be posed with regard to the reference in paragraph 2 to the international community as a whole. It was difficult to see how the rule on State responsibility could be applied in practice to such a loose and theoretical characterization of the affected group. The reference might perhaps be attractive in a political statement, but caution was needed when it came to the practical legal utility of such a concept.

39. Reverting briefly to the question of aggression, he said that his response to the Special Rapporteur's question would be in the affirmative. Article 2, paragraph 4, of the Charter of the United Nations was crystal clear.

40. As to the place of the draft article, if there was an inclination to differentiate between those two groups of injured States, then the article should be placed in the chapter on general principles.

41. Mr. CRAWFORD (Special Rapporteur) said that Mr. Idris had several times referred to a "mere legal interest", an expression that might give rise to confusion. Obviously, in the case of a breach of an obligation owed to the international community as a whole, an individual entity or State might well be the primary victim, for example, of an armed attack, but it would be agreed that in such a case other States had an interest of a juridical character. In that instance, those States' situation could in a sense be said to be secondary. But the category dealt with in his article 40 bis, paragraph 2, and in the other versions submitted, was not in any sense secondary to the category of bilateral obligations: it was simply different, in the same way that legal systems distinguished between the right to invoke responsibility in the framework of private law and in that of public law. The public law tests were obviously different because of the character of the subject matter: one was not simply dealing with subjective rights, as was the case in the field of private law (contract and tort or delict). So it was not a case of one category being superior to the other, it was simply that there was a distinction. The Commission was grappling with draft articles dealing with the whole field of international obligations, not just with the aspect of the field of international obligations that was analogous with private law in national legal systems.

42. Mr. LUKASHUK said that article 40 bis occupied a key place among the draft articles. With globalization, the interests of the international community as a whole took on increasing importance, and one of the chief tasks of international law was to defend the interests of that community. The task could be achieved only on a universal basis, and no individual State or group of States was

[3] See article 5 of part 2 of the draft articles, together with a commentary thereto (*Yearbook . . . 1985*, vol. II (Part One), pp. 5–8, document A/CN.4/389).

entitled to consider itself the representative of the international community as a whole.

43. In substantiation of his assertion he referred to the current debate among legal experts concerning the questions of the intervention in Kosovo and of unilateralism. Mr. Simma had initiated the first debate by publishing an article[4] in which he had convincingly demonstrated that the actions of NATO were a breach of international law. All would have been well if Mr. Simma had left it at that, rather than concluding that the thinnest of red lines separated NATO's action from legality. The same tendency could be seen at work in the debate on unilateralism, in which the participants had tried to clarify the circumstances in which unilateral acts otherwise prohibited by international law were permissible. In other words, while the Commission was discussing liability for the consequences of acts not prohibited by international law, the unilateralists found a way to avoid responsibility for acts prohibited by international law.

44. On article 40 bis, Mr. Simma had rightly pointed out that the Commission was speaking of responsibility rather than of the consequences of the breach, because responsibility was a legal consequence of the breach. He had not had time properly to acquaint himself with Mr. Simma's new proposal, but his impression was that it was inferior to his initial draft. Though the article was entitled "Right of a State to invoke the responsibility of another State", paragraph 1 for some reason referred to the right of a State to invoke, not the responsibility of another State, but all legal consequences of the responsibility of another State. It thus appeared that responsibility had some further, accessory legal consequences. In his view, it would have been enough simply to say that a State was entitled to invoke the responsibility of another State.

45. It would also be advisable to discuss the possibility of including at the end of the Special Rapporteur's proposed paragraph 1 (*b*) a provision reading: "(iii) or [the breach of the obligation] is incompatible with the object and purpose of the obligation". That provision flowed directly from article 60, paragraph 3, of the 1969 Vienna Convention, and would make it possible to cover the worst breaches of an obligation, those that called into question the very possibility of the continuing existence of the obligation.

46. It followed from the judgment in the *Barcelona Traction* case that, in order to file a claim relating to bilateral obligations, a State must first establish the existence of its right to do so; whereas in the case of *erga omnes* obligations, all States had legal interests relating to the protection of those obligations. It seemed to him that the Special Rapporteur's proposal met precisely those requirements, basically reproducing the decision of ICJ, and that it represented the best that could be done in the circumstances. The difficulties the Commission was encountering were partly explained by the fact that it was discussing the international community and the obligations owed to it, while ignoring the international community as such in the draft. Yet the international community was a genuine legal phenomenon. The 1969 Vienna Convention had established that only the international community as a whole created peremptory norms. Furthermore, States bore responsibility vis-à-vis the international community in the event of a breach of international law. No one disputed that. The crux of the problem was how responsibility was to be implemented. Mr. Simma had rightly referred to the impossibility of securing the unanimous will of States. But in fact there was no need for such unanimous will. In the course of its work on drafting the Convention, the Commission had clearly established that the international community of States as a whole was to be understood as a sufficiently representative majority, rather than as all States in the literal sense—a decision confirmed at the United Nations Conference on the Law of Treaties.[5] It was thus possible to achieve the agreement of the international community in the framework of the United Nations, of its specialized agencies, or of representative international conferences.

47. Consequently, the Commission should consider the desirability of including in the draft articles a provision entitled "Responsibility of the State in respect of the international community", the text of which would read: "In the case of a breach of an obligation *erga omnes* the State bears responsibility towards the international community of States represented by the universal international organs and organizations". Such a provision seemed indispensable.

48. The proposal for a Part Two bis submitted by Mr. Pellet merited careful consideration. Though entitled "Implementation of State responsibility", the draft appeared to refer, not so much to implementation, as to the concept of legal interest. The first sentence of paragraph 1 of article 40-1 basically repeated the general rule on responsibility already set out in chapter I, on general principles. The text did not single out responsibility for a breach of a bilateral obligation, as, crucially and importantly, did the text proposed by the Special Rapporteur.

49. Lastly, it did not seem desirable to take a decision lightly, as it were in passing, on the highly controversial problem of the international community as "a subject of international law", referred to by Mr. Pellet in his article 40-X. The Commission had already taken a position on that question at its fifty-first session, when discussing the draft articles on unilateral acts of States.[6] He would comment on the proposal submitted by Mr. Economides once he had had the opportunity to study it in detail.

50. Mr. KAMTO said that the Special Rapporteur's proposed article 40 bis seemed not to correspond entirely to its title, focusing as it did on the definition of the injured State. It would be advisable to establish a provision to that issue, in accordance with the wishes expressed by States in the Sixth Committee, so as to distinguish between the

[4] B. Simma, "NATO, the UN and the use of force: Legal aspects", *European Journal of International Law*, vol. 10 (1999), No. 1, p. 1.

[5] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 472, 80th meeting of the Committee of the Whole, para. 12; and ibid., *Second Session, Vienna, 9 April–22 May 1969*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 94, 19th plenary meeting, paras. 11 and 17.

[6] See *Yearbook . . . 1999*, vol. II (Part Two), p. 138, para. 586.

different categories of obligation whose breach entailed international responsibility of the State; and to consider the question of implementation in a separate article.

51. The Commission should also consider whether the notion of damage should, at the risk of complicating the Special Rapporteur's task, be reintroduced into the debate. That concept was presently better established in internal and international law than much vaguer notions such as "specially affected State". Furthermore, the concept seemed indispensable if the essential distinction was to be drawn between a State suffering direct injury on the basis of which it could invoke article 37 bis, and one that, in the framework of *erga omnes* obligations or as a member of the international community, merely had a legal interest in cessation of the internationally wrongful act. The approach adopted by the Special Rapporteur enabled that distinction to be drawn.

52. It was essential to retain paragraph 3, either in article 40 bis or elsewhere in the draft, since States not only had responsibilities towards other States but also towards other entities. He saw no problem in using the term "entity", which was already used in various international conventions, such as the Convention on Biological Diversity.

53. On the question of the link between the concept of *erga omnes* obligations and human rights, he had serious doubts about whether it was advisable to attempt to draw a distinction between fundamental human rights and other human rights. Any such distinction would also be very difficult to put into practice and would go against the current trend to take a holistic approach to human rights. Attempts to draw such a distinction would raise several awkward questions: was it feasible to rank human rights? Would a right set out in a regional instrument, or in customary law, not be considered a fundamental right if it was not also contained in a universal human rights instrument? Some rights that had been eventually recognized as fundamental human rights had first been enunciated in regional instruments before being incorporated in universal instruments.

54. There might be some practical value in the Special Rapporteur's suggestion that the question of the settlement of disputes should be left aside, for it might permit the Commission to complete its work on State responsibility within the time limits of its current mandate. However, it was a crucial issue and one that needed to be considered in the debate on State responsibility. Since the landmark advisory opinion of PCIJ in the *Eastern Carelia* case, the question of dispute settlement had been considered purely a matter for States, but there was a trend in international law for each multilateral instrument to be viewed as a kind of legal subsystem, with its own dispute settlement procedure. Nevertheless, the inclusion of such procedures in particular instruments did not imply that a general dispute settlement procedure was being established for all other instruments. Recently, several major universal instruments had incorporated such a procedure; for example, the United Nations Convention on the Law of the Sea contained a very flexible procedure which did not prevent States from settling their disputes through traditional diplomatic or political channels, but which did establish the principle of judicial settlement if all else failed. The question was, regardless of the final form of the draft, whether a State should be allowed to block any judicial settlement if it was unable to resolve a dispute with another State. While he was not suggesting that the provisions of the Convention could be applied to the current draft, he was in favour of a provision that would allow a dispute to be settled by an impartial third party if it could not be settled by any other means.

55. Mr. LUKASHUK said he understood why Mr. Kamto was pleading for a special position for the injured State. In one case, the interests of the State suffered, while in the other, injury was inflicted. Interests were affected in both instances, but the thing was to identify the specific nature of the interests that caused material damage.

56. He was not in favour of incorporating a provision on the settlement of disputes in the draft articles. The United Nations Convention on the Law of the Sea had introduced its own dispute settlement procedure as it was creating its own legal regime, but the Commission had a very different task, namely, to codify the general provisions on State responsibility. To codify the rules on the settlement of disputes would be a huge task, one which would take years to complete and would make it impossible for the Commission to adopt the draft articles in the foreseeable future. There were already substantial obstacles to the adoption of the draft articles by the General Assembly.

57. Mr. CRAWFORD (Special Rapporteur) said that the settlement of disputes was a separate issue and one that could hold up the progress of the draft. The majority view in the Commission, as he understood it from the previous year's debate, was that there was no integral relationship between countermeasures and the settlement of disputes; on that basis, the work on countermeasures had been carried forward. Moreover, if the draft articles were not to take the form of a convention, provisions for the settlement of disputes would be out of place. The United Nations Convention on the Law of the Sea, which had a very complex dispute settlement regime, dealt with a special area of conduct, whereas the draft articles on State responsibility were very general and dealt with all the obligations of States. Even residual provisions on the settlement of disputes covering the draft articles would therefore provide a residual regime in respect of all the obligations of States. The introduction of such a regime was not necessary for the success of the draft articles, and indeed might well guarantee their failure.

58. While it would be disappointing if the draft did not take the form of a convention, in the current international climate that option might be unrealistic. The question of including provisions on dispute settlement therefore would not arise. In any case, even if the articles were to take the form of a convention, the inclusion of such provisions would sink the text as a whole. It was one thing to adopt dispute settlement procedures in the context of WTO or the United Nations Convention on the Law of the Sea, but it would be quite another to do so on a global basis. Although the debate in the Sixth Committee later in the year might shed new light on the attitudes of States, it was clear that States were reluctant to adopt new general conventions. Moreover, the draft articles might provide a better and more integral product if they could be adopted without wholesale renegotiation at a diplomatic conference.

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.*

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## 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.

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