Document:-
A/CN.4/SR.2623

Summary record of the 2623rd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

2623rd MEETING

Thursday, 18 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, 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. 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. Mr. AL-BAHARNA said that, for the sake of completeness, three basic elements must be incorporated in article 40. The first was the notion of the injured State, as identification of the injured State was a vital part of the process of invoking the responsibility of a State for an internationally wrongful act. The second was the notion of the State's legal interest, for a distinction had to be made between a State that was directly injured by an internationally wrongful act and other States that merely had a legal interest in the act giving rise to the obligation invoked by the injured State. The third element was the obligation to the international community *erga omnes*, because, where an obligation was owed to the international community as a whole, all States had a legal interest in the performance of the obligation, in which case the obligations *erga omnes* would arise, according to the judgment of ICJ in the *Barcelona Traction* case, either directly under international law or under generally accepted multilateral treaties, such as human rights treaties.

2. Article 40, as adopted on first reading, included all three elements, but had been criticized for not being comprehensive and for its inconclusive formulation, which had led to some confusion over the correlation of obligations and rights, as pointed out by the Special Rapporteur in paragraph 75 of his third report (A/CN.4/507 and Add.1–4). As stated in paragraph 78, Governments had also expressed serious concerns over the wording of paragraph 2, subparagraphs (*e*) and (*f*), and paragraph 3, although they had supported the idea of drawing a distinction between States specifically injured by an internationally wrongful act and States having a legal interest in the performance of the obligation. That distinction would lead to the creation of two categories of States: those in the first category would have the right to seek reparation in their own right, whereas those in the second could only claim cessation of the wrongful conduct and for reparation to be made to the specifically injured State.

3. He agreed with the Special Rapporteur, in paragraph 96, that article 40 failed to spell out the ways in which multilateral responsibility relations differed from bilateral ones, equated all categories of injured State and failed to distinguish between States "specially affected" by a breach of a multilateral obligation and States not so affected. Draft article 40 bis addressed those shortcomings and contained all the necessary elements within the context of the legal consequences of State responsibility: it drew a distinction between specifically injured States and those having a legal interest in the performance of the obligation, and it clarified the obligation owed to the international community *erga omnes* or to a group of States of which the injured State was a member. It also distinguished between cases where the obligation breached was owed to the injured State individually and cases where a State had a legal interest in the performance of an obligation established for the protection of the collective interests of a group of States. In addition, it differentiated between responsibility arising from multilateral relations and that arising from bilateral ones.

4. Mr. Simma's proposal (ILC(LII)/WG/SR/CRD.1/Rev.1) did not meet the requirements he had outlined, as it completely avoided the central issue of the injured State. The proposal did retain the distinction between cases where an obligation breached was owed to the State individually and cases where it was owed to the international community, or where it had been established to protect the collective interests of a group of States. However, to say that a State was entitled to invoke all legal consequences of an internationally wrongful act while drawing no distinction between the individual injured State and States not directly injured but having a legal interest in the performance of the obligation was not helpful in determining the legal consequences of the author State's responsibility. Moreover, there was an apparent contradiction between paragraphs 1 and 2: paragraph 1 stated "all legal consequences" but "all" was replaced by "[certain]" in paragraph 2.

5. Mr. Pellet's proposal (ILC(LII)/WG/SR/CRD.2) included all the necessary elements to which he had referred, but the English version, at least, was confusing and stood in need of redrafting. Paragraph 2 seemed to be irrelevant since its application was dependent on article 36 bis and it overlapped with the proposal's article 40-2, which also dealt with the legal interest of a State. Moreover, the confusion was compounded by the inconsistent numbering of the paragraphs and the use of unnecessary headings. However, it was significant that neither Mr. Pellet's nor Mr. Simma's formulations changed paragraph 3 of the Special Rapporteur's proposal for article 40 bis.

6. The one merit of Mr. Pellet's proposal was that it contained a definition of an injured State, defining it as "a State which has suffered [material or moral] injury as a

[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).

result of internationally wrongful conduct attributable to the State responsible". It would be recalled that the Government of France considered that the articles should make express reference to the material or moral damage suffered by a State as a result of an internationally wrongful act of another State.[3]

7. As to the proposal by Mr. Economides (ILC(LII)/WG/SR/CRD.3), it contained all the elements of the Special Rapporteur's proposal but with stylistic variations. In paragraph 1, the choice of the words "may, as the case may be, … in particular" weakened the paragraph, making it non-exclusive. However, the introduction in paragraph 1 (*b*) of the notion of the "protection of fundamental interests of the international community", even though the expression was rather vague and there was no legal basis to define when an obligation was "essential" for that protection, would be welcomed by those in favour of taking stronger measures against States responsible for serious violations.

8. With regard to the contentious issue of paragraph 3 of article 40 as adopted on first reading, it could be argued that paragraph 1 (*b*) of the proposed article provided general coverage of the most serious internationally wrongful acts and violations of human rights that affected the international community as a whole, but, in his view, such acts, which constituted international crimes, should be placed in a category of their own. A reference to such acts should therefore be included in one form or another in paragraph 1 (*b*) of article 40 bis. Moreover, the Special Rapporteur, in response to the concerns expressed by some members, should provide a definition of the injured State in a new paragraph to be added to his proposals.

9. Mr. GALICKI said that the Special Rapporteur had done an excellent job of redrafting an article which, in its original form, was a model case of the over-detailed but unproductive exemplification of possible situations. He had shifted the emphasis from the complicated, though still not exhaustive, definition of an "injured State" to the question of the right of a State to invoke the responsibility of another State. In doing so, he had focused on the problems of States' entitlement to invoke responsibility in respect of multilateral obligations and on the extent to which differently affected States might invoke the legal consequences of a State's responsibility. He had also introduced a distinction between injured States, in the narrow sense, and States with a legal interest which were not themselves specifically affected by the breach of an international obligation. That distinction seemed to be fully justified, especially in the light of the *Barcelona Traction* case concerning obligations *erga omnes*—obligations towards the international community as a whole, where all States could be held to have a legal interest in the protection of the rights involved.

10. Article 40 bis seemed to meet with the general approval of the members of the Commission. The individual proposals submitted by members were aimed, not at contesting the Special Rapporteur's ideas, but at improving and clarifying them. An emphasis on the right of a State to invoke the responsibility of another State, rather than on the definition of an injured State, was common to all the proposals. The best way forward would be to identify the common points in the proposals and in the opinions expressed during the debate and to combine them with the draft article submitted by the Special Rapporteur.

11. The final version of article 40 bis would have to take into account the basic distinction between the two main possible sources of a State's right to invoke the responsibility of another State, namely, the injury suffered by a State as a result of an internationally wrongful act and the legal interest of a State in the performance of an international obligation. Mr. Pellet had rightly stressed that distinction, which was important for further consideration of the secondary consequences of State responsibility. When a State's legal interest was affected, but the State did not suffer direct injury, the range of permissible responses appeared to be narrower. However, another distinction should also be reflected in the article, namely, the distinction between bilateral and multilateral obligations. The treatment of bilateral obligations was, as pointed out by the Special Rapporteur in paragraph 102 of his report, a relatively simple matter, and seemed to be adequately reflected in paragraph 1 (*a*) of article 40 bis. In the much more complex case of multilateral obligations, the Special Rapporteur had distinguished, in table 1, three categories of multilateral obligations: obligations to the international community as a whole (*erga omnes*); obligations owed to all the parties to a particular regime (*erga omnes partes*); and the obligations to which some or many States were parties, but in respect of which particular States or groups of States were recognized as having a legal interest. Unfortunately, that classification was not clearly reflected in the actual text of article 40 bis. The classification into three categories of multilateral obligations seemed to be lost when combined with the distinction between injured States and States with a legal interest, which was reflected in the division of the article into two paragraphs. There was also some repetition: for example, obligations *erga omnes* appeared in both paragraph 1 (*b*) and paragraph 2 (*a*), and obligations concerning a group of States appeared in paragraph 1 (*b*) and paragraph 2 (*b*). The need to harmonize the two systems of classification—according to the sources of the right of States to invoke the responsibility of another State and according to the categories of obligations—appeared unavoidable.

12. In the proposals put forward by members, there was a common trend towards simplifying the wording and the underlying concept, although Mr. Gaja's proposal (ILC(LII)/WG/SR/CRD.4) went rather too far. It would be of use only if the concepts presented by the Special Rapporteur were rejected, but in the light of the discussion, that did not seem likely. The best course would be to refer article 40 bis as proposed by the Special Rapporteur to the Drafting Committee, together with the comments and proposals made during the discussion.

13. One proposal, that of Mr. Rosenstock (2622nd meeting), seemed particularly worthy of note, concerning the possible division of article 40 bis into two separate articles. Paragraphs 1 and 2 dealt with different sets of problems relating to injury and legal interest, and they could be separated if that would make it possible to formulate more clearly the conditions for, and the extent of, the right of a State to invoke the responsibility of another State. A proper place would have to be found for

[3] See 2613th meeting, footnote 3.

article 40 bis, paragraph 3, since the importance of the content had been stressed during the debate.

14. Lastly, he thought the text of article 40 bis did not fully or optimally reflect the ideas expressed by the Special Rapporteur in his report. Since those ideas seemed to be fully acceptable, the Drafting Committee should try to give them final form.

15. Mr. KABATSI thanked the Special Rapporteur for an excellent third report and the five draft articles on general principles under chapter I of Part Two. Useful questions had been raised and important suggestions had been made during the discussion enriching the topic and furnishing guidance for the Special Rapporteur and the Drafting Committee. The first four articles were quite satisfactory, but article 40 bis was less so. The disparity between the title and contents of the article, for example, had already been pointed out.

16. An article clearly indicating which State or States could invoke the responsibility of another State or States was indeed necessary and was central to the whole project. Article 40 bis as proposed by the Special Rapporteur substantially met the need. Since a State could invoke the responsibility of another State only if it could claim to be materially or morally injured by an internationally wrongful act of another State, it was important to spell out how and when a State was considered to be so injured.

17. The article was in many respects a major improvement over article 40 as adopted on first reading. For legal advisers and practitioners, including leaders who were not lawyers, a more concise provision than the earlier article was very much called for. The four proposals by members of the Commission each had great merit and the Drafting Committee should take them duly into account. The Special Rapporteur's formulation, however, went a long way towards meeting the needs of the final users. Particularly welcome was the important distinction drawn between article 40 bis, paragraph 1, relating to direct injury to a State owing to a breach of a bilateral or multilateral obligation, and article 40 bis, paragraph 2, concerning a State that had only a legal interest in the performance of an obligation. Such a legal interest could be satisfied by ensuring that the international obligation was performed. In such a case the State should be concerned only with cessation and, where appropriate, assurances of non-repetition, and not with seeking reparation, which would be the concern of the States envisaged in paragraph 1.

18. With the various suggestions made during the discussion, article 40 bis as proposed by the Special Rapporteur should be referred to the Drafting Committee.

19. Mr. CRAWFORD (Special Rapporteur), summing up the discussion, thanked members for their helpful comments and penetrating criticisms in what had been the first debate since the thirty-seventh session of the Commission, in 1985, on the central question of Part Two. Another virtue of the discussion was that to some degree it put to rest Mr. Brownlie's concern that the Commission was taking on too much.

20. Article 40 had few supporters, and his catalogue of its deficiencies had been generally endorsed. The article was prolix in dealing with bilateral obligations. On multilateral obligations, it was diffuse, repetitive and lacking in symmetry with the rest of the draft, as Mr. Tomka had cogently argued (ibid.). It failed to build on existing law on the invocation of multilateral responsibilities, in particular the *Barcelona Traction* case and article 60, paragraph 2, of the 1969 Vienna Convention. Lastly, it equated obligations and rights and consequently failed to cope with the issue of States that had differing interests in the performance of an obligation. Mr. He had pointed to the dramatic difference between an obligation *erga omnes* and a right *erga omnes* (ibid.). There was general support for the formulation of Part Two in terms of the obligations of the responsible State rather than the rights of another State or States, and for the proposed distinction between Part Two and Part Two bis. Plainly, there was also strong support for referring article 40 bis to the Drafting Committee. The proposed treatment of bilateral obligations in a single, simple phrase had likewise been endorsed.

21. Beyond those points, however, were areas of greater controversy. Mr. Brownlie had indicated (2616th meeting) the need to write, not for law professors, but for practitioners, a text that was intended primarily for use by States, and not to delve so deeply into underlying theory as to lose sight of the purpose of the draft. Mr. Opertti Badan had very pertinently recalled that the text had to be completed for submission to the General Assembly at its fifty-sixth session, in 2001. He agreed with Mr. Brownlie on the need for caution and that it was a question, not of whether there was to be a *renvoi* to general international law in the matter of multilateral obligations, but of how extensive that *renvoi* should be. Clearly, the situation was still developing and could hardly be enunciated comprehensively, let alone codified, and the formulations therefore had to be flexible to some degree.

22. Two approaches had been suggested. The first, reflected in his proposal and those of Messrs Economides, Pellet and Simma, sought to provide additional clarification and further specification in the field of multilateral obligations. The second, advocated by Mr. Gaja, pointed to the placement of a series of definitions on the specification of States that were entitled to invoke responsibility without actually saying what they were. It was true, as Special Rapporteur Riphagen had said in his preliminary report,[4] that the more important and general the obligation, the less guidance there was in international law concerning who had the right to invoke the obligation. ICJ had hardly distinguished itself by the guidance it gave, despite the dictum in the *Barcelona Traction* case. Yet the second approach should be used, not as a first line of reasoning, but as a fall-back, in case the work in the Drafting Committee did not yield greater clarity with regard to multilateral obligations. If a general *renvoi* were adopted, the Commission would disbar itself from making any further distinctions between categories of injured States. Such distinctions were nonetheless necessary, for it was widely held that the positions of a victim—even of a crime like aggression—and of a third State with an interest in the maintenance of peace and security were different. The Drafting Committee should explore the

[4] *Yearbook . . . 1980,* vol. II (Part One), pp. 128–129, document A/CN.4/330, para. 97.

various versions of article 40 bis with a view to providing some further specification with regard to multilateral obligations.

23. He agreed with Mr. Brownlie and Mr. Pellet, though not with Mr. Hafner, that although article 40 must be approached against the background of the general theory of obligations, the Commission had a more precise concern, namely to identify those States which ought to be able to invoke the responsibility of another State, and the extent to which they could do so. In that respect he wished to stress the value of article 60, paragraph 2, of the 1969 Vienna Convention , which was the only place in the Convention where the word "bilateral" appeared. The Commission had approached the problem in the context of the law of treaties, had distinguished between bilateral and multilateral obligations, and had emphasized that the State specially affected by a breach of a multilateral obligation should be able to invoke that breach against a background in which the "ownership" of the rights associated with a multilateral obligation lay with the States that were collectively parties to a treaty, and not with individual States. The recent discussion in the Commission had implied that the relevant rights belonged to particular States. That was true in regard to bilateral treaties and of bilateral obligations. Article 60, paragraph 2, was concerned with a different problem, however, namely the suspension of multilateral treaties for a material breach. It would be odd if a State could suspend a treaty but could not require the cessation of the breach. There was thus a direct analogy between the two problems.

24. The reference to "specially affected State" also helped to deal with the problem of harm or damage, because the State that was injured must surely be regarded as being in a special position. There might be a spectrum of specially affected States, but if so it was a relatively narrow one. The failure of article 40 to address that issue was a problem, as was the failure of some of the proposals, including Mr. Simma's revised proposal, to do so.

25. In the discussion of multilateral obligations there had been some disagreement about the interpretation of relevant passages of the judgment of ICJ in the *Barcelona Traction* case, but that case had been only the starting point of the discussion. No one disputed the contention that there was a difference between the victim of a breach and a State which had an interest in the performance of the obligation, and that article 40 should reflect that difference.

26. There had also been some disagreement about the reservation concerning the invocation of responsibility by entities other than States as set out in article 40 bis, paragraph 3, but the prevailing view seemed to be that it was of value. He thought it essential, because it reconciled the difference in scope between Part One of the draft and the remaining parts. It had, accordingly, to find a place somewhere, but exactly where was a matter for the Drafting Committee to decide.

27. Article 40 had referred to human rights in very broad terms, had overridden other provisions in the draft and had indirectly conferred rights of response that went well beyond anything that could be justified in the context of "ordinary" breaches of human rights. His own view was that the Commission should be consistent in insisting that the draft should apply to the whole range of international obligations and did not operate on the basis of any particular primary obligation. A position should be reached in respect of international obligations, and the various human rights obligations, universal and regional, particular and general, widely accepted and controversial, should be allowed to find their place within that framework. Mr. Hafner was right to say that the implicit treatment of regional human rights obligations in article 40 bis was questionable, and the Drafting Committee would have to consider that matter.

28. He wholly agreed with Mr. Simma's reaction to the issue of injury raised by Mr. Pellet. The concept of harm, to use a neutral term, was directly relevant, and he had incorporated the reference to the "specially affected State", derived from article 60, paragraph 2, of the 1969 Vienna Convention, to reflect it. Mr. Galicki had mentioned the overlapping of references to multilateral obligations, and it was certainly inelegant, but it was necessary, because the victim of aggression was in a different position from a third State that was concerned by the aggression. That was precisely what ICJ had said in the *Namibia* case with respect to the distinction between the rights of the people of South West Africa and the concerns of the United Nations or of individual Member States such as Ethiopia and Liberia. A further problem with Mr. Pellet's proposal was that the phrase "[material or moral] injury" called up a morass of uncertainty. It was a *renvoi* to some unspecified body of law, not a description in its own right.

29. Another point common to the various alternatives was what could be described as "the article 19 issue". He fully respected the wish of some members that the draft should incorporate proper distinctions between the most important obligations, those of concern to the international community as a whole, and the most serious breaches of such obligations, and he agreed with Mr. Pellet that there could be breaches of non-derogable obligations which did not raise fundamental questions of concern to the international community as a whole in terms of collective response.

30. The problem with article 40, paragraph 3, was that it overlapped with and was subsumed by the more general category of obligations owed to the international community as a whole, of which, if it existed, it was a subcategory. But once it was established, as ICJ had done in the *Barcelona Traction* case, that all States had an interest in compliance with those obligations, no more need be said for the purposes of article 40 bis. Mr. Pellet, although asserting that States could commit crimes, had expressly accepted that point in his proposal. For his own part, he thought it might well be necessary to reflect those other elements elsewhere in the draft, but the approach he had been advocating for several years was to treat the problem in a functional manner and scrutinize responsibility for the particular purposes for which it arose in the draft. Invocation of responsibility was one thing: the consequences of the invocation might be something else. In that way, the problem could be disaggregated and agreement reached on some of its elements. He thus preferred Mr.

Pellet's approach to the one followed by Mr. Economides, although aspects of Mr. Economides' proposal were very elegant and economical and could be considered by the Drafting Committee. Nevertheless, once it was accepted that States had a legally protected interest in respect of compliance with obligations *erga omnes*, then the question of invocation was to that extent solved. Further questions could be dealt with as they arose. Mr. Economides had also asked whether the definition should be inclusive or exclusive. It was a thoughtful observation the Drafting Committee should bear in mind. In the context of a changing horizon, there was a case for an inclusive definition.

31. Mr. SIMMA said that in order to simplify the Drafting Committee's work, he withdrew his revised proposal (ILC(LII)/WG/SR/CRD.1/Rev.1), but maintained his original proposal (ILC(LII)/WG/SR/CRD.1).

32. Mr. GAJA said that both the Special Rapporteur's draft and members' proposals implicitly referred to concepts the Commission could not possibly define, such as "obligations *erga omnes*", "specially affected State", and so on. The Drafting Committee would endeavour to address those questions, but it could only go so far; the Commission was heading towards the difficulties of which Mr. Brownlie had spoken at the outset of the discussion.

33. According to some of the proposals, the *omnes*, the States that had only a legal interest, would be merely in a position to invoke responsibility: they could ask for cessation and perhaps assurances and guarantees of non-repetition, but nothing else. Supposing that one of the obligations in question was a human rights obligation which had been infringed by a State with regard to its nationals, the Commission was saying that there was an obligation of reparation. However, when no other State was specially affected, should no other State be entitled to invoke the obligation of reparation, the Commission might as well say that there was no obligation of reparation. It was important to consider both aspects: to whom the obligation was owed and who was the obligation's beneficiary. The right to invoke, in the sense of the right to claim that a certain obligation must be fulfilled, should be given to all the *omnes*, albeit not for their own benefit. Countermeasures were not the issue at present.

34. Mr. SIMMA said that Mr. Gaja's comments were a telling example of the procedural problem facing the Commission that was responsible for part of the confusion and some of the misgivings voiced by Mr. Sreenivasa Rao and others about opening the door to invoking State responsibility. In other words, the Commission did not really have a clear picture of all the implications. All it had at the moment was table 2 of the report, which, regarding the rights of States that were not directly injured by a breach of an obligation *erga omnes*, listed a number of possibilities. As he understood that list, those States could go beyond merely putting something on paper or claiming a breach: any State could act on behalf of the victim and had a whole range of remedies, including countermeasures in case of well-attested gross breaches. It was on the basis of that reading of table 2 that he generally agreed with the Special Rapporteur's approach.

35. Mr. KAMTO said that, regarding an approach based on obligations and not on rights, he had never been opposed to including the element of exceptional seriousness to justify intervention. Confusion between human rights and international obligations to protect a certain number of rights meant that it was difficult to introduce a distinction between different categories of human rights. As for the potential rights of any other State member of the international community to intervene or to invoke the responsibility of another State for human rights violations, it was clear that a degree of seriousness was required. It might even be necessary expressly to use the term "seriousness" in the text, because when the Commission spoke, for example, of torture or genocide, it approached the issue from the standpoint of international obligations, whereas when it spoke, say, of the right to life, it addressed the question from the standpoint of human rights. That distinction was useful.

36. Clearly, the content of the concept of obligations *erga omnes* was unknown. If the term was used without defining it or providing for safeguards, it might well be concluded that every State faced with an obligation *erga omnes* had the right to invoke the responsibility of another State and even take countermeasures. It was a very dangerous course, because it would open Pandora's box. It should be remembered that other mechanisms already existed for dealing with situations affecting human rights: the Security Council intervened regularly in such instances under Chapter VII of the Charter of the United Nations, and hence there was no reason for the Commission to allow States to take countermeasures in response to breaches of obligations *erga omnes*.

37. Mr. GOCO said that when article 40 had been adopted on first reading, it had been hoped that a provision could be produced that was brief, yet flexible enough to encompass all relevant issues. His initial impression was that Mr. Gaja's proposal did just that.

38. Mr. Sreenivasa Rao had referred to *locus standi*, which he seemed to equate with legal interest. That point was germane to the current discussion and might be addressed in the Drafting Committee.

39. Mr. ECONOMIDES said that Mr. Gaja was entirely right: the example he had given was pertinent and was not covered by the Special Rapporteur's draft. He also agreed with most of Mr. Kamto's remarks. For certain very serious breaches, it was necessary to expand the list of injured States. But in any event, the Commission's final version must not prevent the development of international law through customary law.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft article 40 bis to the Drafting Committee.

It was so agreed.

The meeting rose at 11.25 a.m.