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# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-SECOND SESSION

Rapporteur: Mr. V. Rodriguez-Cedeño

## CHAPTER …

## STATE RESPONSIBILITY

Addendum

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## 7. Introduction by the Special Rapporteur of the right of a State to invoke the responsibility of another State (article 40 bis)

1. The Special Rapporteur noted that article 40 was problematic in a number of respects. In the case of several injured States, it failed to recognize the right of every such State to demand cessation, and to distinguish between rights concerning cessation and reparation with respect to such States, which might be very differently affected by the breach, materially or otherwise. Its drafting identified examples rather than concepts, leading to confusion and overlap. In particular in the field of multilateral obligations, it dealt with a whole series of concepts without distinguishing them, notably paragraph 2 (e) and (f) and paragraph 3, or indicating their interrelationship. He noted that the provisions of paragraph 3 were redundant in the context of article 40, because in the event of an international crime, as defined, other paragraphs of article 40 would have already been satisfied. Aspects of the problem currently addressed by articles 19 and 51 to 53 would need to be resolved in later provisions.

2. The Special Rapporteur identified two possible approaches to article 40: either to provide a simple definition which in effect referred to the primary rules or the general operation of international law to resolve issues relating to the identification of persons (this would be a rather extreme but defensible version of the distinction between primary and secondary rules); or to specify more precisely how responsibility worked in the context of injuries to a plurality of States or to the international community as a whole. He proposed the first approach for bilateral obligations, by simply stating in a single provision that, for the purposes of the draft articles, a State was injured by an internationally wrongful act of another State if the obligation breached was owed to it individually. The elaborate provisions in article 40, paragraph 2 (a), (b), (c) and (d) would be unnecessary since international law would say when bilateral obligations existed. In contrast, he proposed a more refined and articulated solution for multilateral obligations, where the real problem was not so much obligations towards several States, but a single obligation vis-à-vis a group of States, all States or the international community as a whole.

3. The Special Rapporteur noted the relatively recent development of categories of obligations that were in some sense owed to a group of States and the breach of which resulted in not merely bilateral consequences, referring *inter alia* to the Barcelona Traction case.[1] He suggested that there was authority for adopting three distinct categories of multilateral obligations: first, a single obligation owed to the international community as a whole, erga omnes; second, obligations owed to all the parties to a particular regime, erga omnes partes; and third, obligations owed to some or many States, where particular States were nonetheless recognized as having a legal interest. The Special Rapporteur emphasized the need to distinguish between different States affected in different ways by a breach in the field of State responsibility, as discussed in paragraphs 108 et seq. of his Third Report. He also drew attention to the question of which responses by "injured States" might be permissible: this was addressed in Table 2 in paragraph 116.

4. As to the reformulation of article 40, the Commission should draw on article 60 of the Vienna Convention on the Law of Treaties which distinguished between cases where a particular State party was specially affected by a breach and those where the material breach of "integral obligations" by one party radically changed the position of every party with respect to performance. A second aspect of the formulation of article 40 concerned the situation where all of the States parties to an obligation were recognized as having a legal interest. The Special Rapporteur saw no reason for requiring an express stipulation to that effect, nor for limiting it to multilateral treaties, as in article 40 adopted on first reading.

5. The Special Rapporteur proposed article 40 bis[2] and suggested that it would be logical to include this provision in a new part concerning the invocation of responsibility.

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[1] I.C.J. Reports, 1970, p. 3.

[2] The text of article 40 bis proposed by the Special Rapporteur reads as follows:

*Right of a State to invoke the responsibility of another State*

1. For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if:

   (a) the obligation breached is owed to it individually; or

   (b) the obligation in question is owed to the international community as a whole (erga

## 8. Summary of the debate on the right of a State to invoke the responsibility of another State (article 40 bis)

### (a) General remarks

6. There was broad agreement that article 40, as adopted on first reading, was defective in a number of respects, including those referred to in paragraph 96 of the Special Rapporteur's report and the topical summary of the Sixth Committee debate on that article (A/CN.4/504).

7. Several members welcomed the Special Rapporteur's proposal for article 40 bis as a major improvement in several respects, including the following: the distinction between the different types of obligations for the purpose of identifying the injured State and the recognition of a greater diversity of international obligations, notably obligations erga omnes; the distinction between injured States and States with a legal interest in the performance of an obligation; and the emphasis on the right of a State to invoke the responsibility of another State, focusing 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. At the same time, a number of members were of the view that

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omnes), or to a group of States of which it is one, and the breach of the obligation:

(i) specifically affects that State; or
(ii) necessarily affects the enjoyment of its rights or the performance of its obligations.

2. In addition, for the purposes of these draft articles, a State has a legal interest in the performance of an international obligation to which it is a party if:

(a) the obligation is owed to the international community as a whole (erga omnes);

(b) the obligation is established for the protection of the collective interests of a group of States, including that State.

3. This article is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue directly to any person or entity other than a State.

See A/CN.4/507, pp. 54-55. For the analysis of this article by the Special Rapporteur, see ibid., paras. 66-118.

various aspects of the proposal needed to be further clarified or developed, as indicated below.

**(i) Definition of an injured State**

8. The view was expressed that the draft articles should include a definition of the injured State. It was remarked that Governments had mentioned the importance of such a provision which would help to strike an appropriate balance between the concepts of "injured State", "wrongdoing State" and State with a "legal interest". However, the view was also expressed that drafting a comprehensive definition of the "injured State" raised major difficulties because the subject matter was extremely technical and complex and could not simply be based on customary law. An inclusive definition should thus be preferred, although one which followed the general line proposed by the Special Rapporteur rather than that adopted on first reading.

**(ii) Obligations erga omnes**

9. The view was expressed that 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 accordance with the Barcelona Traction case. However, the view was also expressed that obligations erga omnes could not necessarily be equated with fundamental obligations, peremptory norms or jus cogens. In addition, some members expressed concern about any attempt to draw a distinction between fundamental human rights and other human rights: any such distinction would be difficult to apply in practice and would go against the current trend towards a unified approach to human rights. It was suggested that in order to define the concept of injured State in respect of human rights, a quantitative criterion might be added, as opposed to the qualitative criterion used to distinguish between fundamental and other rights, so as not to call the unity of human rights into question. It was also suggested that a distinction must be made between obligations owed individually to all States making up the international community and those owed to that community as a whole.

10. The Special Rapporteur agreed on the need to be careful not to assert that all human rights were necessarily obligations erga omnes, and cited the example of human rights under regional agreements and even some provisions in the "universal" human rights treaties.

**(iii) The reference to the international community**

11. The reference to the international community in paragraphs 1 and 2 of article 40 bis gave rise to various comments and questions. A question was raised concerning the meaning of the term "international community as a whole" and whether it included individuals and non-governmental organizations. It was hoped that the Commission would refrain from including private entities such as non-governmental organizations, which did not have the constituent elements to qualify as States, among the subjects of law legally entitled to invoke State responsibility. The view was expressed that "international community as a whole" meant the international community of States as referred to in article 53 of the Vienna Convention on the Law of Treaties.

12. It was suggested that 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. Consequently, the Commission should consider including 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".

13. However, it was also considered 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. It was also seriously doubted that the international community had become a subject of international law with the right to invoke the responsibility of a State which had breached its international obligations.

14. The Special Rapporteur noted that the concept of "obligations owed to the international community as a whole" had been introduced by the International Court of Justice. It was true that the concept was still developing, but it was widely accepted in the literature and could hardly be dispensed with. Moreover, in Parts Two and Two bis, the Commission was not concerned with the invocation of responsibility by entities other than States, and the draft articles should make that clear. But in fact it was the case that victims of human rights abuses had certain procedures available to them for what could only be described as the invocation of responsibility, and in some circumstances others could act on their behalf. A savings clause acknowledging that possibility should be inserted, and the matter left to developments under the relevant instruments.

**(iv) The question of article 19**

15. Several members expressed the view that the Commission would eventually need to consider the issues addressed in article 40 *bis* in relation to State "crimes". It was suggested that international crimes should constitute a separate category under this article. It was also suggested that paragraph 1 (b) should specify that an internationally wrongful act by a State could injure "all States if the obligation breached is essential for the protection of fundamental interests of the international community"; this could be based on the definition contained in article 19 of the draft articles adopted on first reading, perhaps with some refinement. It was further suggested that all the consequences of international responsibility, except perhaps that of compensation, should be applied to all States in cases of such serious breaches, particularly the principle of restitution in the form of a return to the status quo. The obligations provided for in article 53 as adopted on first reading would become far more comprehensible if the concept of "injured State" was applied to all States of the international community in cases of crime. Others, however, pointed out that to allow individual States to respond separately and in different ways to a "crime" was a recipe for anarchy, and that in such cases only collective responses were appropriate. Some members were of the view that in addressing this question it was not necessary or desirable to use the term "crime".

### (v) The structure of article 40 bis

16. In terms of the structure of article 40 bis, there were various suggestions for dividing the provision into several separate articles in the interest of clarity. In particular, it was suggested that dividing it into two articles, one focusing on the State injured by an internationally wrongful act of another State and the other on the State which had a legal interest in the performance of an international obligation, 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.

17. It was also suggested that article 40 bis should be divided according to the type of obligation: with the first part dealing with bilateral or multilateral obligations which, in a specific context, gave rise to bilateral relations; and the second part dealing with obligations erga omnes and 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. It was further suggested that the Commission should consider whether those States might 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. It was noted that the Commission did not have to determine the beneficiary since that was a matter for the primary rules.

### (vi) The placement of article 40 bis

18. There were different views concerning the placement of article 40 bis including the following: it should appear in chapter I of Part Two to identify the categories of States to which obligations arising from a wrongful act were owed; it should be placed in chapter I of Part Two if the Commission intended to specify the secondary obligations without referring to the concept of "injured State"; it should be placed in the chapter on general principles if it differentiated between two groups of injured States; or it should appear at the beginning of Part Two bis, concerning the implementation of State responsibility, if its role was to determine which States had

the right to invoke the responsibility of a State that had allegedly committed an internationally wrongful act.

**(b) Title of article 40 bis**

19. Some members expressed the view that the title of article 40 bis did not fully correspond to its content. Moreover there was no logical link between the first two paragraphs, which dealt successively with the definition of the injured State and conditions in which "a State has a legal interest in the performance of an international obligation to which it is a party". The proposed title of article 40 bis should be retained but its content should be revised accordingly.

**(c) Paragraph 1**

20. There were various proposals concerning this paragraph. It was suggested that paragraph 1 should be amended to clarify the distinction between injured States and States having a legal interest to enable the article to play its role in determining who could trigger the consequences of responsibility. It was also suggested that the concepts of the injured State and the State having a legal interest should be defined before the question of the implementation of international responsibility was discussed and that the proposed list of cases in which a State suffered an injury should be open-ended, since it could be difficult to envisage all cases in which a State could be injured by an internationally wrongful act attributable to another State.

21. There were different views concerning the inclusion of the notion of damage or injury in article 40 bis, paragraph 1 or elsewhere in the draft. The view was expressed that it was unnecessary to include damage since its exclusion as an element of the wrongful act did not mean that all States could invoke the responsibility of the wrongdoing State. On the contrary: only the State whose subjective right had been injured or in respect of which an obligation had been breached could demand reparation. The view was also expressed that injury or damage should not be included as a constituent element of an internationally wrongful act or in article 40 bis, which triggered the invocation of State responsibility, because the concept would have to be

broadened to a degree that rendered it meaningless, and it was virtually impossible to "calibrate" it according to the proximity of a State to a breach.

22. In contrast, it was considered necessary to have a provision equivalent to article 3 of Part One, which might read along the lines of "An internationally wrongful act incurs an obligation to make reparation when (a) that internationally wrongful act has caused injury, (b) to another subject of international law". The concept of damage was also considered 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. There were suggestions that it would be preferable to refer to injury or damage only in connection with reparation (since reparation presupposed damage), as compared with the issue of entitlement to act, e.g. by demanding cessation. It was also suggested that it would be useful to define the concept of damage, preferably in the draft articles.

23. The Special Rapporteur said that the proposal that a provision on damage should be drafted as a counterpart to article 3 of Part One deserved careful study. That concept had to be dealt with in Part Two of the draft articles in a variety of contexts, for example, compensation, to which it was unquestionably related. In terms of a definition of damage, it was first 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, breach of which was calculated to affect all States.

**(i) Paragraph 1 (a)**

24. The view was expressed that the treatment of bilateral obligations was a relatively simple matter, and seemed to be adequately reflected in paragraph 1 (a) of article 40 bis. However, a view was expressed that the invocation of responsibility for such obligations required further regulation: if a third State was to be given the opportunity to intervene in the event of a breach of an international obligation that

was binding solely on two other parties (something which could be useful if the directly injured State did not wish to take action), there was a need for a positive norm creating an exception from the non-intervention rule.

**(ii) Paragraph 1(b)**

25. The view was expressed that the provision should be further clarified with respect to the three categories of multilateral obligations referred to in Table 1 of the report, namely: 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

26. It was suggested that paragraph 1 (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 paragraph 1 (a). Under paragraph 1 (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. The same was true for paragraph 1 (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. On the other hand it was pointed out that even with respect to a breach of an obligation erga omnes, an individual state could be injured (e.g. the victim of an unlawful armed attack).

**(d) Paragraph 2**

27. The view was expressed that paragraph 2 met the need for a reference to States which had a legal interest. States that were not directly affected, although they could not invoke responsibility, could call for cessation of a breach by another State. In agreeing with the Special Rapporteur's approach, attention was drawn to Table 2 on page 52 of the Third Report concerning the rights of States that were not directly

injured by a breach of an obligation erga omnes. This was interpreted as meaning that any State could act on behalf of the victim and had a whole range of remedies, including countermeasures, in cases of well-attested gross breaches.

28. It was suggested that it was important to consider the existence of an obligation and the obligation's beneficiary. Therefore, 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 States that had a legal interest, albeit not for their own benefit, particularly with respect to claiming reparation for human rights obligations infringed by a State with regard to its nationals which otherwise could not be invoked by any other State.

29. In terms of drafting, the inclusion of the words "to which it is a party" was questioned. It was also suggested that paragraph 2 might begin with the following words: "In addition, for the purposes of these draft articles, a State may invoke certain consequences of internationally wrongful acts in accordance with the following articles", after which paragraph 2 (a) and (b) as proposed by the Special Rapporteur would follow.

**(e) Paragraph 3**

30. There were different views concerning paragraph 3. Some members felt that it was necessary to include such a provision since the draft articles were to apply to inter-State relations. But, in practice, there were quite a few cases of the international responsibility of States vis-à-vis international organizations or other subjects of international law. The provision was considered to be particularly important with regard to individuals in the human rights context. However, this paragraph was also considered unnecessary by some, since the Commission was dealing with the responsibility of States and not rights that accrued to any other subject of international law. The reference to rights that accrued directly to any person or "entity other than a State" was described as a very broad and even dangerous notion. However, it was also noted that the term "entity" was already used in various international conventions, such as the 1992 Convention on Biological Diversity.

31. It was suggested that since the Part One of the draft was acknowledged to cover all international obligations of the State and not only those owed to other States, it might therefore serve as a legal basis when other subjects of international law, such as international organizations, initiated action against States and raised issues of international responsibility. In contrast, it was considered preferable to restrict the subject matter of Part Two to State responsibility as between States because the emergence of different kinds of responsibilities with specific features, such as the responsibility of and to international organizations, individual responsibility and responsibility for violations of human rights, could not be dealt with comprehensively in the foreseeable future. The Special Rapporteur agreed with the distinction between the scope of Part One and of Part Two, and noted that his paragraph (3) was merely a savings clause consequential upon the point that Parts Two and Two bis only dealt with the invocation of responsibility by States.

32. There were also suggestions that paragraph 3 should be a separate provision and should be amended by replacing "without prejudice to any rights, arising …" 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.

33. The Special Rapporteur stressed the need for paragraph 3 with respect to human rights obligations. This paragraph was necessary to avoid a disparity between Part One, which dealt with all obligations of States, and Part Two bis, which dealt with 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. It was important to retain the principle in article 40 bis or a separate article.

## 9. Concluding remarks of the Special Rapporteur on the debate on the right of a State to invoke the responsibility of another State (article 40 bis)

34. The Special Rapporteur noted that article 40 as adopted on first reading had few supporters and its deficiencies had been generally recognized. His proposed

treatment of bilateral obligations in a single, simple phrase had likewise been endorsed. However, two approaches had been suggested for multilateral obligations. The first, reflected in his proposal, sought to provide additional clarification and further specification in the field of multilateral obligations. The second approach entailed a series of definitions on the specification of States that were entitled to invoke responsibility without actually saying what they were. The second approach should be used as a fall-back if greater clarity could not be achieved with regard to multilateral obligations. If a general renvoi was adopted, the Commission would disbar itself from making any further distinctions between categories of injured States.

35. The Commission's precise concern was 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 stressed the value of article 60, paragraph 2, of the Vienna Convention on the Law of Treaties. 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 reference to "specially affected State", reflected in article 40 bis helped to deal with the problem of harm raised by some members, 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.

36. Regarding 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. He also agreed 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. The problem with article 40, paragraph 3, adopted on first reading 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 the Court 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.

37. There had 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 resolved the difference in scope between Part One of the draft and the remaining parts.

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