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Summary record of the 2613th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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Adoption of the agenda (A/CN.4/503)

4. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/503).

The agenda was adopted.

Organization of work of the session

[Agenda item 2]

5. The CHAIRMAN proposed that the meeting should be suspended to enable the Enlarged Bureau to meet to consider the organization of work of the session.

The meeting was suspended at 3.40 p.m. and resumed at 4.35 p.m.

Filling of casual vacancies (article 11 of the statute) (A/CN.4/502 and Add.1 and 2)

[Agenda item 1]

6. The CHAIRMAN announced that, on the recommendation of the Enlarged Bureau, the Commission was required to fill two casual vacancies. In accordance with established practice, he suspended the meeting so that the elections could be held in a closed meeting.

The meeting was suspended at 4.45 p.m. and resumed at 5 p.m.

7. The CHAIRMAN announced that the Commission had elected Mr. Kamil Idris to fill the vacancy created by the death of Doudou Thiam and Mr. Djamchid Momtaz to fill the vacancy created by the election of Mr. Awn Al-Khasawneh to ICJ. On behalf of the Commission, he would inform the newly elected members and invite them to take their places in the Commission.

Organization of work of the session (*continued*)

[Agenda item 2]

8. Mr. PELLET said he disapproved of the fact that the Commission was starting its work on 1 May, the day of the celebration of a secular international holiday recognized everywhere but in Switzerland and the United Nations. That was not at all normal, especially as the United Nations was required to observe holidays that had nothing to do with it. He also objected to the fact that the badge he had been given had the English abbreviation "ILC". That was inadmissible in an international organization located in a French-speaking country, Switzerland.

The meeting rose at 5.10 p.m.

2613th MEETING

Tuesday, 2 May 2000, at 10.10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Organization of work of the session (*continued*)

[Agenda item 2]

1. The CHAIRMAN recalled that, at its previous meeting the Commission had adopted its programme of work for the next two weeks. He invited members to inform Mr. Gaja, Chairman of the Drafting Committee, and Mr. Kamto, Chairman of the Planning Group of their interest in participating in either of those bodies. The Drafting Committee would be concerned initially with the articles on State responsibility.

State responsibility[1] (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

2. Mr. CRAWFORD (Special Rapporteur), introducing his third report on State responsibility (A/CN.4/507 and Add.1–4), said that an informal meeting held earlier in the year in Cambridge, United Kingdom, had advanced his consideration of a number of issues, and he was grateful to the participants. ILA had established a study group on State responsibility whose first report was now available. The group consisted of a number of eminent jurists, including the previous Special Rapporteur on the topic, Mr. Gaetano Arangio-Ruiz.

3. The third report launched the Commission's reconsideration of Part Two of the draft articles and would consist of two further components. One would deal with the precise content of reparation, restitution and compensation, with particular emphasis on whether the articles on compensation should be made more detailed in response

[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).

to the criticisms of Governments. Another would address what could be called the implications of responsibility, the possibility that several States, not just one, might be injured States, and any issues that emerged from the consideration of the first two instalments of the report. He reaffirmed his own commitment and, he hoped, that of the Commission, to completing the second reading of the draft articles at the fifty-third session of the Commission, in 2001. To achieve that goal, the Drafting Committee could produce a text, leaving aside the question of settlement of disputes, by the end of the current session, so that the Commission could perform the *toilettage* of the entire text and commentary at its fifty-third session: an ambitious programme, but one that was nonetheless feasible.

4. Chapter I, section A, of the third report identified four issues left outstanding in relation to Part One: State responsibility for breach of obligations owed to the international community as a whole (art. 19), the formulation of an article on exhaustion of local remedies (art. 22) and also of one on countermeasures (art. 30), and the possible insertion of the exception of non-performance as an additional circumstance precluding wrongfulness. The four issues also related to Part Two and so could not be finalized until some aspects of Part Two had been decided. In a number of instances, notably in article 42, paragraph 4, material from Part One was repeated in Part Two. That was unnecessary and raised doubts about whether the principles in Part One on breaches of international obligations were applicable to the international obligations stated in Part Two. It had to be assumed, however, that they were.

5. The report dealt with two interrelated questions: the content of Part Two, chapter I (General principles), and the overall structure and approach for the remainder of the draft articles. In addition to general principles, Part Two incorporated provisions on the rights of the injured State, countermeasures and the consequences of international crimes. Part Three covered settlement of disputes. It had been provisionally decided not to establish a link between the taking of countermeasures and the settlement of disputes. Part Three should accordingly be set to one side for the time being. Once the entire draft was adopted, the settlement of disputes could be considered in general terms, as could the form to be taken by the draft. If it was not to be submitted to the General Assembly as a convention, there was plainly no point in inserting provisions on settlement of disputes. He was sceptical as to whether such provisions would be acceptable, since the text covered literally the whole of the obligations of States.

6. Paragraph 7, subparagraphs (*b*) and (*c*), of the report reflected the difficulties he experienced, as a practitioner of the common law, in addressing the material in Part Two. In the common law, that material was deemed to be part of the law of remedies, and much of it was articulated in terms of the powers or functions of courts. The draft articles, on the other hand, were formulated in terms of the obligations and prerogatives of the States concerned, in line with the approach traditionally taken in international law, wherein judicial settlement depended on the consent of States. It was an approach that required the articles to be formulated in terms of categorical rights, or alternatively, the term "where appropriate" to be inserted throughout. Such awkward drafting had attracted the criticism of Governments from various legal traditions on the grounds that the articles were either too rigid or so vague as to lack content. The problem could not be corrected now, but it must be borne in mind in future drafting work.

7. Paragraphs 8 and 9 of the report set out a number of suggestions, along with the underlying reasons, for improving the structure of Part Two. The current title, "Content, forms and degrees of international responsibility", was not readily comprehensible to the majority of international lawyers and could be replaced by the more straightforward phrase "Legal consequences of an internationally wrongful act of a State", which conformed to the traditional view of State responsibility as a secondary legal consequence arising from a breach.

8. Chapter I of Part Two was entitled "General principles" but contained none. Some should therefore be included, as in chapter I of Part One. There should also be a chapter on the three forms of reparation: restitution, compensation and satisfaction. Cessation, which was currently included in chapter II of Part Two, was not a form of reparation and ought to be formulated in Part One as a general principle, alongside a general principle of reparation. That would make it possible to explain in chapter II of Part Two what restitution, compensation and satisfaction were, without necessarily specifying the modalities of the choice between them. In the tradition of the *Chorzów Factory* case (Jurisdiction), the fundamental obligation of the wrongdoing State was treated as an obligation to make reparation. The content of that general principle varied, depending on the circumstances or the contributory fault of the victim State. Another question he intended to address, in the second instalment of his report, was how to handle cases when a plurality of States was responsible for, or was injured by, a single wrongful act.

9. Consideration should be given to including two additional Parts. One, he was firmly convinced, should be a Part Four on general provisions, to include, inter alia, the provision on *lex specialis*. A more controversial proposal for a new Part would introduce a distinction between the legal consequences for the responsible State of an internationally wrongful act and the invocation of those consequences by the primary victim of the breach or, in certain circumstances, by other States. That distinction would cut out some of the confusion created by article 40. He was therefore proposing the insertion of a Part Two bis, to be entitled "The implementation of State responsibility". At a very early stage in his work, a former Special Rapporteur, Roberto Ago, had had the same idea, taking the view that the Part could also cover diplomatic protection, which he had seen as a method whereby a State invoked the responsibility of another State in respect of injury done to one of its nationals.

10. Article 40 addressed the general question of who was entitled to deal with a breach, but it did so in a highly unsatisfactory manner. The Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention") covered loss of the right to invoke grounds for the termination or suspension of a treaty. By parallel reasoning, there was a case for including in a Part Two bis an article on loss of the right to invoke responsibility. Again, countermeasures could be considered a form of invocation of responsibility. The reason why they were taken against a State was that it had refused to acknowledge its

responsibility and cease its wrongful conduct. Hence, countermeasures fell under the heading of implementation of responsibility rather than that of forms of reparation. In addition, the issues addressed in article 19 could generally be termed the invocation of a responsibility to the international community as a whole.

11. For those reasons, he was proposing for the remaining substantive articles the structure indicated in paragraph 10. The proposal was by no means final and was merely intended to serve the purposes of discussion. Article 40 entangled a great many issues, and the suggested structure was designed to disentangle them.

12. As to Part Two, to be entitled "Legal consequences of an internationally wrongful act of a State", he was indebted to Mr. Pellet for proposals that he had put forward at the Cambridge meeting. Four general principles could be included in a chapter I of Part Two: the principle that an internationally wrongful act entailed legal consequences; the general principle of reparation which was now contained in article 42; the question of cessation; and the issues raised under article 40.

13. Article 36, paragraph 1, was simply a formal introductory provision on the international responsibility of States. No Governments had objected to it as being unnecessary, and as Mr. Brownlie had pointed out, linking articles were sometimes needed. The general principle of reparation was a more complex issue, however. It was formulated throughout the draft articles as a right of the injured State. France had suggested starting with the idea that all responsibility was the responsibility of a wrongdoing State to an injured State.[3] Special Rapporteur Ago had favoured treating responsibility as something stemming from a State's breach of an obligation and addressing the consequences of responsibility only after the obligation had been defined.[4] In other words, the concept of the injured State could be introduced at the very beginning or at the end of a logical construct, but article 40 put it squarely in the middle, without any consequent reasoning. That created serious problems.

14. Moreover, in the framework of responsibility vis-à-vis several States or the international community as a whole, the identification of the rights of an injured State implied that that injured State was the only State involved. The Commission had said it was not simply "bilateralizing" multilateral obligations, but that was precisely what it had done, because it had not carried through its earlier promise, and the result was a radically incoherent text in that respect. He proposed fixing it, not in the "French way", but in the "Ago way", in other words, by maintaining the basic concept of responsibility embodied in Part One, chapter I, and carrying it over to Part Two, leaving Part Three to deal with questions of invocation. As they stood, the draft articles failed to address the problem they created by taking multilateral obligations in article 40 and attributing them singularly to individual States, thereby producing an intolerable situation. The primary victim of a human rights breach under article 40 in its current wording could accept compensation and treat the matter as closed; other States were nonetheless entitled to intervene by way of countermeasures. As a number of Governments had already pointed out, that could not possibly be true. He proposed to address the problem by dealing with the general principles in Part Two and the content of reparation in its chapter II and formulate them in terms of the obligation of the State identified in Part One, i.e. the responsible State. No content was lost by so doing, and much was gained by leaving for subsequent treatment the question as to who could do what in relation to that State. Whether that was taken up in a later section of Part Two or in his proposed Part Two bis was of lesser concern. The analytical point was essential: it was necessary either to start out with the concept that responsibility arose vis-à-vis another State or to carry through the Ago concept that responsibility existed before the law in respect of a breach, a concept embodied in draft articles 1 and 3, and then carry that through, at least to the immediate consequences of the breach. That was what had to be done in respect of both the obligation of reparation generally speaking and the obligation of cessation.

15. He had argued that the general principle of reparation should be formulated as an obligation of the State committing the internationally wrongful act to make reparation, in an appropriate form, for the consequences of that act. A number of questions arose with regard to giving effect to such a general principle, which was of course already contained in the formulation of a right of an injured State in article 42, paragraph 1. The first problem related to causation. Special Rapporteur Arangio-Ruiz had had strong views on the subject, which were formulated in the commentary to article 42, arguing that if particular consequences of a wrongful act arose by reason also of other circumstances and there were thus concurrent causes, the State should only be responsible for the loss to a certain degree.[5] Personally, he disagreed. A State was responsible for the direct or proximate consequences of its conduct. Admittedly, it was difficult to specify what adjective to use in that context. Different legal systems used different terms, but they all distinguished between consequences which flowed directly from a wrongful act and the long-term by-product, the inadvertent consequences, that followed from human conduct in general.

16. He saw no reason to depart from the tradition which addressed the question of causation in that manner, and he was proposing simple language in the draft article to achieve that end, bearing in mind the warning of one legal scholar that the problem could not be solved by a given wording, but only in the application of the particular rules to the particular facts. It was clear, however, that a problem did exist concerning remoteness or directness of damage or whatever one wished to call it. It needed to be properly formulated and the commentary amended accordingly. Of course, there were cases in which the law would, as it were, intervene to rule that only certain consequences could follow from particular sorts of breach, and in relation to other sorts of breach it might be much

[3] See *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3.

[4] Second report (*Yearbook . . . 1970*, vol. II, p. 192, document A/CN.4/233).

[5] See paragraph (6) of commentary to former article 6 *bis* (*Yearbook. . . 1993*, vol. II (Part Two), p. 59).

more severe. The concept must be incorporated in the general article, at least in general terms.

17. Article 42, paragraph 3, namely, "In no case shall reparation result in depriving the population of a State of its own means of subsistence", had been included in the draft because the previous Special Rapporteur had been concerned about excessively penal consequences for wrongdoing States. It was a concern reflected in some of the provisions on restitution. For example, where restitution was so onerous as compared with the advantage the injured State would gain, there was no obligation to make restitution. Thus, there were ways of dealing with excessive penalization of reparation in the specific articles. Yet the previous Special Rapporteur had felt that some general provision was also required. The wording of article 42, paragraph 3, had been strongly criticized by Governments; only one country, Germany, had supported it, for historically understandable reasons. The criticism seemed justified. The form that reparation might take, its timing and questions of modalities might well be affected by the position of the responsible State. Moreover, in extreme instances, as in the *Russian Indemnity* case, a State might have to defer compensation until it was in a position to make such payments. But except for the fiasco of reparations payments at the end of the First World War, there was no history that called for a guarantee of the kind in question. In addition, including such a guarantee created huge problems. In principle, reparation required a State to make restitution of something which, by definition, was not its own means of subsistence, but someone else's, i.e. someone else's territory or property. The questions that might come up could be covered at the level of modalities.

18. For those reasons, he proposed deleting article 42, paragraph 3, and dealing with the problems raised in the context of the specific forms of reparation in chapter II. The basic principle, as stated in the *Chorzów Factory* case, was that the responsible State should make reparation for the consequences of its wrongful act, and provided that there was some concept of "direct and not too remote" implied in that wording, there was no reason to fear that the requirement to do so would deprive that State of its own means of subsistence. Vastly greater liabilities of States in the context of international debt arrangements were settled every year than ever arose from compensation payments. Also, for those reasons, article 42, paragraph 3, created more problems than it resolved.

19. Pursuant to article 42, paragraph 4, the State that had committed the internationally wrongful act could not invoke the provisions of its internal law as justification for the failure to provide full reparation. However, that had already been stated in article 4 of the draft. He therefore proposed, in paragraph 119, that a general principle should be incorporated in Part Two, chapter I, namely in article 37 bis, paragraphs 1 and 2.

20. The general principle of cessation appeared in two slightly different forms in article 36, paragraph 2, and article 41. He agreed with the draft's underlying idea that the two were related and should be placed in a single article, but favoured a slightly different wording.

21. The first issue was the consequence of the breach for the primary obligation. There was no obligation to cease conduct if the primary obligation ceased to exist, and in certain circumstances, most obviously the material breach of a bilateral treaty which the other State used as a ground for the termination of the treaty, issues of cessation would not arise. That point needed to be made in the form of a saving clause, but it was an important one.

22. As to the more positive issue of cessation (art. 41), few States had complained about that provision. But the view had been expressed in the literature that cessation was really the consequence of the primary obligation, not a secondary consequence of breach, and therefore did not belong in the draft. He had sought to explain in paragraph 50 of his report why he disagreed with that opinion. The notion of cessation arose only after the breach occurred. It might not be a secondary consequence in quite the same way as reparation was, but it was a consequence of a breach. Moreover, there was a relationship between cessation and the other consequences of the breach, for example—but not only—in respect of countermeasures. Secondly, and most importantly, in the majority of State responsibility cases that raised questions in the context of the draft articles, the primary concern of the State was not so much the monetary compensation which would flow from the breach, but cessation of the wrongful act and restoration of the legal relationship impaired by the breach. That was why remedies such as declarations had played such an important part in State responsibility cases. It would misrepresent the reality of State responsibility to omit a provision on cessation.

23. The question remained of the wording. France had proposed a formulation that he had included in paragraph 52. For the purpose of discussion, he had suggested a somewhat different wording which took into account the fact that the question of cessation could arise only if the primary obligation continued in force. That was set out in article 36 bis, in paragraph 119 of the report. The general principle of cessation should be stated first because, logically, it came before reparation: there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further. He had formulated the obligation in respect of cessation by reference to the concept of the continuing wrongful act, which also took up that concept as rightly retained in Part One of the draft.

24. The second question to be discussed was that of assurances and guarantees of non-repetition, which the previous Special Rapporteur had treated as a sort of *sui generis* consequence of the breach, aware that it was not exactly a question of reparation because, by definition, one was talking about the future, not the past. Mr. Arangio-Ruiz's separate identification of the notion of assurances and guarantees was extremely useful. The consequences of an internationally wrongful act were essentially twofold, one future-oriented and one past-oriented. The future-oriented one was cessation and assurances and guarantees against non-repetition, on the assumption in both cases, of course, that the obligation continued. The other aspect was reparation, i.e. undoing the damage which the breach had caused. That was a coherent way of approaching the question, and it was equally appropriate to include assurances and guarantees under an article dealing with cessation. After all, a State

seeking cessation wanted assurances that the legal relationship impaired by the breach had been restored. Two conditions had to be met: first the breach stopped, and second, if appropriate, there were guarantees that it would not be repeated. The legal relationship was then back in place, without prejudice to questions of reparation arising from the breach.

25. In some cases, the assurances and guarantees demanded were extraordinarily rigorous and, in others, mere promises or undertakings were deemed sufficient. Despite his earlier criticism of such imprecision, he saw no alternative but to use the word "appropriate" and to incorporate the phrase "to offer appropriate assurances and guarantees of non-repetition".

26. He agreed with France that articles 37 and 39 were saving clauses which could be placed in a general part, but not article 38, which was concerned with other consequences of a breach and should stay where it was if it was to have any meaning. Article 38 implied that there were specific rules, whether of treaty law or of customary international law, which governed the consequences in a specific case of a breach. Of course such rules applied, but they did so under the *lex specialis* principle; there was no need for article 38 to say so. However, a further implication behind article 38 was that there were other general consequences of a breach under international law that were not set out in the provisions of that Part. The Sixth Committee was likely to say that if, after 40 years, the Commission still did not know what those were, then article 38 was perhaps unnecessary. The commentary identified two consequences of a wrongful act, but neither had any bearing on the subject of responsibility. If the Commission could pinpoint other consequences of an internationally wrongful act within the field of State responsibility, then it might try to indicate what they were. The only case for retaining article 38 was the general principle of law embodied in the maxim *ex injuria ius non oritur*, which held that, when a State had committed a wrongful act, it could not rely on that act to extricate itself from a particular situation. That general principle of law could generate consequences in different situations. ICJ had cited that principle in the *Gab Ź kovo-Nagymaros Project* case to generate a consequence about Hungary not being able to terminate a bilateral treaty that had been breached. The particular consequences the Court had drawn in that case had fallen within the framework of the termination of treaties rather than responsibility, but legal obligations might conceivably arise in specific contexts because of the generating effect of the principle *ex injuria ius non oritur*. Accordingly, there might be a case for retaining article 38 and a more convincing explanation for it in the commentary. His tentative proposal was, however, to place article 38 in square brackets, in the hope that the Commission would do away with it once and for all.

27. As to article 40, the term "injured State" could not simply be defined. It had to be considered in the context of the draft as a whole to determine what the consequences were of including it. Every injured State had the right to restitution, compensation and satisfaction and to take countermeasures but not, oddly enough, to demand cessation; there were, however, reasons for distinguishing between cessation and reparation in the case of several injured States.

28. Article 40 conveyed the impression of a whole series of concepts put forward without any attempt to sort out how they were interrelated. For instance, it was extraordinary to say that every State was injured by any breach of any human rights obligation in general and then to add international crimes at the end. The provisions of paragraph 3, as pointed out by one State, were completely otiose 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.

29. There were essentially two ways in which article 40 could have been handled. One, proposed by a former member of the Commission, Mr. Balanda, was set out in a footnote to paragraph 68 of the report.[6] It was a very simple definition, and its effect would have been to refer back to the primary rules or general operation of international law all the issues involved in the identification of persons injured or affected. That would have been a rather extreme version of the distinction between primary and secondary rules, but it would have been defensible. The other course would have been to try to explain more precisely how responsibility worked in the context of injuries to a plurality of States or to the international community as a whole. The problem was that the article merely stopped in a fatal limbo in between. He proposed what was basically Mr. Balanda's solution for bilateral obligations and a more refined and articulated solution for multilateral obligations. In regard to bilateral obligations, Mr. Balanda had been absolutely right, and the rather elaborate provisions set out in article 40, paragraph 2, subparagraphs (*a*), (*b*), (*c*) and (*d*), were unnecessary; international law would say when bilateral obligations were applicable. The Commission could simply affirm that, where a State had an obligation vis-à-vis another State, then the other State was injured by the breach of that obligation. The real problem lay in the context of multilateral obligations, not so much several obligations towards several States which might have the same content, but a single obligation vis-à-vis a group of States, all States or the international community as a whole. That category of concepts was dealt with in article 40, paragraph 2, subparagraphs (*e*) and (*f*), and paragraph 3, without any distinction being drawn between them and the others. That was where the various concepts had not been sorted out.

30. The first point to note was that until recently there would have been a credible case for claiming that, even though obligations might in some sense be owed to a group of States, when a breach occurred the consequences were always bilateral. If that were so, then Mr. Balanda's approach to the definition in article 40 was the right one. Amazingly, even Mr. Ushakov had adopted that stance, despite the persistent support of the Soviet Union for the notion of crimes of State.[7] However, in his own view that approach was no longer possible, for several reasons.

[6] He had stated: "Rather than consider each and every instance in which a State was deemed to be injured, at the risk of overlooking some possibilities, the Commission could define the injured State as the State which had suffered material or moral prejudice as a result of an internationally wrongful act attributable to another State." (*Yearbook . . . 1984,* vol. I, 1867th meeting, pp. 315–316, para. 9).

[7] See *Yearbook . . . 1985,* vol. I, 1929th meeting, p. 310, para. 47.

31. First, in the *Barcelona Traction* case ICJ had categorically stated that there were obligations owed to the international community as a whole. Those obligations were not owed to any individual State as such, even though that State was part of the international community and was entitled to invoke responsibility. Instead, they were owed to some collective. And the basic dilemma was that, although the obligations were in a sense owed to the collective, there was no collective. In his dissenting opinion in the *Namibia* case, Sir Gerald Fitzmaurice had pointed out that the international community as a whole was not a separate legal entity, and that no person was authorized to act on its behalf for general purposes. No organ personified the international community in the way in which, for instance, the Attorney-General personified the public interest in common law systems.

32. What was required was to fashion an equivalent in the context in which States could not or did not act validly and collectively. In doing so, it was necessary to distinguish, first, between the primary victim of the breach and the legal interests of other States. Indeed, the Court had done precisely that in the *Namibia* case, immediately following its dictum in the *Barcelona Traction* case, where it had pointed out that the breach in that case, which the Court had refused to decide upon in 1966, was a breach vis-à-vis the people of South West Africa, rather than vis-à-vis any State. In the *South West Africa (Second Phase)* case, the Court had said that in the circumstances it was not prepared to hold that two other African States were entitled to invoke the responsibility of South Africa in respect of that breach. However, the Court had not said it was legally impossible for them to do so; it had merely said that, on the interpretation of a jurisdictional provision dating back to 1920, they had not been given that right. Deplorable as the fact might be, the decision in that case had simply been a decision on the interpretation of a particular jurisdictional provision. That being so, and in the light of the subsequent development of international law, the legal issue facing the Court in the *South West Africa (Second Phase)* case could be set entirely to one side. What was clear from later decisions was that it was possible that States would be recognized as having a legal interest in compliance, i.e. the right to invoke responsibility, without themselves being the entity injured by the breach. It was not a mere academic distinction, and it made a huge difference. Part One said that wrongfulness was precluded where consent had been validly given. But it was perfectly clear that the consent of Ethiopia and Liberia could not have cured the illegality: they had been acting, as it were, in the public interest in respect of a breach; it had not been their right that was involved. Any coherent system of State responsibility that went beyond the "Balanda formula", by seeking to address those issues rather than referring them elsewhere, would have to make that distinction.

33. As to the reformulation of article 40, the Commission should draw as heavily as possible on existing legal experience, the primary element of which was article 60 of the 1969 Vienna Convention, which represented the Commission's previous attempt, first, to distinguish between bilateral and multilateral treaties in terms of their legal consequences; and secondly, to work out, in the field of multilateral treaties, what the consequences of a breach might be. In the course of that exercise the Commission had been concerned, not with the consequences of a breach in the field of responsibility, but with the consequences in terms of giving States individually the right to respond, for example, by suspending the operation of a treaty. The Convention, which had been adopted prior to the *Barcelona Traction* dictum, distinguished between two kinds of cases: those where a particular State party was specially affected by a breach; and those where the material breach of the provisions by one party radically changed the position of every party with respect to performance—what he would term "integral obligations".

34. Article 60 of the 1969 Vienna Convention was concerned only with material breach—the breach that gave rise to suspension or termination of treaties. The Commission was now concerned, not just with material breach, but with any breach. It should also be noted that an integral obligation of itself affected all States parties. Clearly, such obligations could exist. For example, under a regional disarmament treaty, the undertaking of each State not to acquire particular weapons was conditional upon none of the other States doing so. If one State acquired such weapons, all the other States were affected ipso facto, not specially but equally. So the notion of integral obligations developed by Sir Gerald Fitzmaurice as Special Rapporteur on the law of treaties seemed to be of value.

35. 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 relevant provision of article 40 required express stipulation and was limited to multilateral treaties. He saw no reason why the stipulation should be express: it needed to be clear, but might be clearly implied. Nor did he see any reason why it should not be an obligation under general international law. Exactly the same interest might be reflected in a general rule of international law—for example, respecting the freedom of the seas—as would be reflected in the equivalent provision of the United Nations Convention on the Law of the Sea.

36. Accordingly with respect to bilateral obligations there should simply be a single provision stating 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. That was in effect the "Balanda approach" as applied to bilateral obligations.

37. It should be noted in passing that, even in regard to obligations normally viewed as bilateral, some interest of other States might exist. For instance, diplomatic immunity was normally thought of as a purely bilateral relationship between the sending State and the receiving State, and those States were plainly free to modify the content of the relationship by abolishing the immunities of their diplomats if they so wished. Yet there were examples of other States expressing concern at grave breaches of diplomatic immunity. There was, however, no need to abolish the concept of purely bilateral breaches of international law. Instead, it could be pointed out in the commentary that, even in the context of a bilateral obligation, the possibility existed of informal diplomatic exchanges in the interests of compliance.

38. As for multilateral obligations, previously tackled by the Commission in article 60, paragraph 2, of the 1969 Vienna Convention, suspension of treaties and State responsibility were of course two very different matters. However, it would be very odd if a State that was specially affected by a breach of an international obligation to which it was a party, or that was a party to a breached integral obligation, was able to suspend the obligation but unable to require performance, namely, cessation of the breach. State responsibility was about requiring performance and accepting the consequences of non-performance. Thus, the coverage of article 40 should be no less than that of article 60, paragraph 2, of the Convention, bearing in mind that the concept of "material" breach was specific to that Convention. There was thus authority for adopting three distinct categories of multilateral obligation. The first was the *Barcelona Traction* category, namely, obligations to the international community as a whole. Unfortunately, the literature had tended to trivialize that category. In fact, an obligation to the international community as a whole was a single obligation owed to that community, not a large number of minor individual obligations owed to individual States. If a particular obligation was deemed to be subject to derogation between two States, there was a strong implication that it was not an obligation *erga omnes*. Such obligations constituted a very restricted category indeed.

39. The second category, often confused with the first, was that of obligations to all the parties to a particular regime, *erga omnes partes*. Examples were to be found among at least some of the obligations under the Antarctic Treaty. A claim to sovereignty by any of the States parties to the Treaty would necessarily affect the others. Integral obligations were a subcategory of obligations *erga omnes partes*. A regional human rights treaty embodying a human right that was not of such standing as to be owed to the international community as a whole was, presumably, an obligation *erga omnes partes*. Of course, the Commission need not state—as, to its discredit, did article 40—which obligations fell into which category. It need only decide what the categories were, and the existing corpus of international law offered significant help in that regard. There were also obligations owed to some or many States, where particular States were recognized as having a legal interest: for example, where a particular State was specially affected in terms of article 60. Table 1, in paragraph 107 of the report, gave examples of those categories.

40. The question of how to distinguish between different States affected in different ways by a breach was discussed in paragraphs 108 et seq.. Part Two as it stood already made such a distinction, though inchoately, as it did not use the term "injured State" in respect of cessation. There must be a broader interest on the part of States in seeking cessation, as compared with, for example, compensation, since, as parties to the system, all had an interest in compliance.

41. A further example, on the assumption that the draft was to deal with countermeasures in Part Two or Two bis rather than Part One, was the case where a State was the particular victim of a breach. Serious problems arose with countermeasures taken by third States where the victim State did not want the countermeasures to be taken, just as, in the regime of collective self-defence, difficulties arose where third States acted in defence of a State that had not sought their assistance. Any exploration of those issues demonstrated that there was some need for differentiation.

42. As a general point, it should be noted that Part Two, and especially article 40, was concerned with the responses of States to breaches of international law. Part One, on the other hand, was concerned with breaches of obligations by States. Hence there was a disjunction between Parts One and Two. The obligations covered in Part One might, for example, be obligations to an international organization or to an individual—breaches whose implications were not dealt with in Part Two. That was simply a corollary of the approach to responsibility adopted by Special Rapporteur Ago, whereby the Commission would not deal with international responsibility as distinct from State responsibility. Accordingly, he was proposing a saving clause stating that Part Two was without prejudice to any rights arising from the commission of an internationally wrongful act by a State that accrued to any person or entity other than a State.

43. As to the question of which responses by "injured States" might be permissible, table 2 in paragraph 116 set out one possible approach. It must be recognized that, where the Commission was concerned with obligations to the international community, it found itself fairly and squarely in the area of progressive development. Any proposals he made were inevitably somewhat tentative.

44. Table 2 proposed that, in the purely bilateral context, the injured State would have each of the rights to respond that were included in the existing text. In the framework of multilateral obligations, the analogy with article 60, paragraph 2, of the 1969 Vienna Convention implied that specially affected States would be treated as if they were in the position of States injured by the breach of a bilateral obligation. As for the other categories, where a State was a party to an obligation *erga omnes* or where there was an obligation to the international community as a whole, all those States could reasonably be regarded as having the right to demand cessation. The question was to what extent they could go further and demand the rights associated with reparation. His suggestion was that, assuming those States were no more affected than any other State in the group, they could not individually demand any of those rights, but could do so only in agreement with the other States in the group—except in the case of an obligation *erga omnes* where the breach was a gross breach.

45. That attempt to impose order on a disorderly and somewhat scanty body of material was intended simply to facilitate a logical discussion of the issues. The existing text answered each of the questions posed in table 2, but the answers were very unsatisfactory. Could any State party to an obligation *erga omnes* demand restitution? The answer in the existing text was "yes", that in the existing commentary was "no". Could any State party to an obligation *erga omnes partes*, though not affected, demand compensation? The answer was again "yes". Could any State take countermeasures? Again the answer was "yes". Those answers he could not accept. The Commission needed to identify the cases in which an answer in the affirmative was acceptable. Such an approach would be consistent with general international law in

analogous fields such as collective self-defence, and would enable States that were victims of breaches *erga omnes* to have some control over the situation without being left isolated, as would be the case under a bilateral conception. The implication was that aspects of the problem currently addressed by articles 19 and 51 to 53 would be resolved in later provisions. What was clear was that the problem should not be resolved by lumping together the whole concept of crimes, along with a multitude of other issues, in article 40.

46. He also wondered whether it was advisable still to apply the concept of injured State to all the States included in table 2 that were entitled to respond, or whether a distinction should be drawn between the injured State and other States with a legal interest, a form of language that had actually been used by ICJ in the *Barcelona Traction* case, quoted in paragraph 97 of the report. It was a moot point whether it should be adopted. Another question was the positioning of article 40 or article 40 bis. If a new part were to be adopted on the invocation of responsibility, it would be logical for the part to incorporate article 40 bis. Again, that would depend on whether the Commission opted for that distinction, but there was nothing to preclude discussion of the underlying issues associated with article 40 itself.

47. He was therefore proposing a new title for Part Two, but chapter I should retain its existing title and it should consist of at least three articles: article 36, a general introductory article, article 36 bis, dealing with cessation as a general principle, and article 37 bis on reparation as a general principle. Furthermore, the draft articles should contain a definition of "injured State", set out in article 40 bis, but it could be placed somewhere else in the text. It was uncertain whether article 38 was needed, but it had been included for the purposes of discussion. On that basis, there would then be a chapter II dealing with restitution, compensation, satisfaction and the consequences including the contributory fault of the injured State, or the State concerned, together with any other provisions that might be considered appropriate in the light of the debate.

48. His presentation had raised fundamental issues about the structure of the draft as a whole. It did not seem that the Commission could reach a considered conclusion about the proposed new schema on the basis of the material before it, nor could a satisfactory debate be held on whether there should be a separate Part Two bis. He suggested that discussion of that matter be postponed. Since there was no doubt that articles 37 and 39 should be put in Part Four, they could be examined in that context. Each of the principles formulated in articles 36, 36 bis, 37 bis and 38 obviously needed to be discussed, as did the range of issues associated with existing article 40 and its alternative, so they could perhaps form the material basis of the debate on the text. It was for the Commission to decide whether it wished to divide up those issues or to deal with them as a group. If it decided to consider them as a group, he suggested that articles 36, 36 bis, 37 bis and 38 be studied first, before moving on to the nexus of questions associated with article 40, which were of a structural character. That approach might facilitate early reference to the Drafting Committee of the first four articles, together with the titles of the part and chapter. Article 40 and its implications might be considered thereafter.

49. Mr. PELLET said the third report was so meaty that it was hard to pick out particular points and he would have preferred the Special Rapporteur to make his presentation in several parts, as each would certainly have given rise to a fruitful debate. The Special Rapporteur had decided to give an overall presentation of what in fact corresponded to chapter I of Part Two of the draft. His own remarks for the moment would be confined to paragraphs 1 to 65 of the report and to draft articles 36 to 38. Although he supported the main thrust of the report, there were some points where he disagreed with the Special Rapporteur and the introduction in particular called for a number of observations.

50. In paragraph 2 (*a*) of the report, the Special Rapporteur introduced the notion of obligations *erga omnes*, which he defined, as he had done in his oral introduction, as obligations owed to the international community as a whole, in accordance with the formulation adopted by ICJ in the *Barcelona Traction* case. Nevertheless, within obligations to all States, a distinction must certainly be made between obligations owed individually to all States making up the international community and those owed to that community as a whole. His impression was that the Special Rapporteur had forgotten the first category and concentrated too heavily on the obligations owed to the international community as a whole. He was somewhat concerned about that emphasis because, for example, the right of innocent passage in the territorial sea was an obligation owed by each State to all other States and was indeed an obligation *erga omnes*. Hence it was not an obligation to the international community as a whole. It was important for that first category to be taken into account somewhere. If the Special Rapporteur did not wish to term it an obligation *erga omnes*, he should find another name for it. It was nonetheless an obligation which had its place among international rules and obligations and which should be differentiated from obligations to the international community as a whole.

51. In contrast, some legal theory regarded the ban on genocide or the obligation to respect fundamental human rights as integral obligations owed by a State not to other States individually, but to the international community as a whole, and that category of obligations was indeed dealt with extensively and thoroughly in the report. It was only in relation to that second category of obligations that the issue arose of an international crime committed by a State, briefly mentioned by the Special Rapporteur in paragraph 2 (*a*).

52. He agreed that, as the Special Rapporteur had indicated in paragraph 9 (*d*) of his report, the question of crime was doubtless of no relevance in chapter I of the restructured Part Two, at least up to and including article 38. Nevertheless, the problem would inevitably arise and would have to be settled when article 40 was tackled and when chapters II and III of Part Two were examined. The Commission had not studied Part Two until the very end of the first reading. The perusal of articles 51 to 53, in other words, the consequences of the notion of a crime on the implementation of State responsibility, had been undertaken separately and, in his opinion, the Commission had botched those articles. Moreover, several States had often expressed that view in their observations. He hoped the Special Rapporteur would not repeat that

mistake by the Commission. Before discussing chapter II of Part Two, the Commission ought to know whether something resembling the notion of a crime did exist.

53. It was clearly necessary to drain the abscess of articles 19 and 51 to 53 before seriously broaching chapters II and III of Part Two. Despite the Special Rapporteur's promises, he felt only partially reassured that such action would be taken. While he noted with approval that, in paragraph 59, the Special Rapporteur recognized in connection with non-repetition that much depended on the nature of the obligation and of the breach, he would have preferred a statement to the effect that particularly serious breaches of essential obligations could not be treated in the same way as ordinary breaches. That would have amounted to an oblique reference to acts deemed by article 19 to constitute a crime, without attaching any penal connotations to that word, notwithstanding the viewpoint expressed by the Special Rapporteur in paragraph 9 (*d*) of his report. The conundrum did not seem to have been resolved by article 40 either, yet it was vital for the Commission to acknowledge that serious breaches of essential obligations had to be subject to a special regime, in order that consensus might be achieved.

54. He was greatly attracted by the proposed restructuring of the draft and was convinced in particular that Part Three, on the settlement of disputes, had to be set aside. Nothing would be more harmful than to make substantive rules on State responsibility depend on the highly hypothetical acceptance of compulsory dispute settlement procedures by States, as was the case with countermeasures at the current time. The Commission's attitude implied a belief that it was going to succeed in "selling" its entire draft to States. The conscience of some members was salved by the argument that it was of no importance if the right to take countermeasures was poorly regulated, because recourse could always be had to dispute settlement. That approach was hazardous, because it was by no means certain that the whole draft would be accepted.

55. Similarly, the Special Rapporteur was right to propose the addition of a Part Four—or what might be an introductory part—containing common "without prejudice" clauses as well as any definitions other than that of responsibility. If such a general part was drawn up, it should include all the provisions concerning more than one part of the draft. For example, the Special Rapporteur had made two very interesting points in paragraph 7 (*a*), to wit that article 42, paragraph 4, and article 4 were identical in meaning. He was not entirely certain of that, but if so, an attempt should be made to fuse those articles into a single provision in the general part. The working group set up at the previous meeting might usefully concern itself with that matter over the next few days. Further on in paragraph 7 (*a*), the Special Rapporteur stated that force majeure could be a circumstance precluding the wrongfulness of the non-payment of compensation. Later on, in the highly convincing arguments set out with regard to article 42, paragraph 3, the Special Rapporteur appeared to suggest that, as it stood, the draft was open to criticism. He concurred, because the legal reason was not that a population should be deprived of its means of subsistence, but because a state of necessity existed and that particular reason could be linked to a much more general legal reason which precluded wrongfulness.

56. If that was so, should not the articles on circumstances precluding wrongfulness be moved to a general part when article 35 came to be revised? It might prove to be a somewhat complicated solution, but if such a course of action was not taken, it would prove necessary to indicate somewhere, possibly in chapter I, that circumstances precluding wrongfulness applied in the event of a failure to respect the obligations set forth in Part Two and it should be explicitly stated that the rules on circumstances precluding wrongfulness applied to the obligations to make reparation. As he had said in the past, obligations deriving from State responsibility were international obligations to which the rules of responsibility applied. In a way, the rules of Part One were primary rules when the rules of Part Two had to be applied. The Special Rapporteur seemed to agree that in some cases the obligations stemming from responsibility might not be respected, for circumstances did exist in which wrongfulness was precluded. It was necessary to say so in chapter I.

57. In that context, he echoed an idea apparently cherished by the Special Rapporteur and alluded to in paragraph 7 (*b*), namely that the draft was worded in terms of the rights of victims and not in terms of the obligations of the responsible State. While the Special Rapporteur's reasoning was highly persuasive, he could also see some counter-arguments. The Special Rapporteur was quite right to point out that in a system like international law which depended so little on courts, it was better to speak in terms of obligations. Nevertheless, two matters were somewhat disturbing.

58. The first, and less important, point was that an obligation would remain virtual if no injured State or member of the international community as a whole demanded performance. A State might well have an obligation to make reparation, but no consequence would ensue if no one demanded performance. Nevertheless, that was how the whole system of international responsibility worked and it did not unduly bother him. On the other hand, he was more concerned that no explicit mention was made anywhere of injury. Of course, it could be affirmed that articles 40 or 40 bis implicitly referred to injury because they alluded to victims, but that was not the same thing. Although he was a fervent supporter of the Ago position on the incurring of responsibility, which excluded injury from the actual definition of responsibility—an approach that was confirmed by the adoption of articles 1 and 3—he felt that the idea of injury had to be mentioned when drawing the inferences of responsibility. It seemed 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". Nevertheless, the Special Rapporteur had said he wanted no mention of injury to another subject of international law but only to a State, in which case it would be necessary to explain somewhere that the draft was not simply a draft on State responsibility, but a draft on State responsibility vis-à-vis States. That was not perfectly plain at the current time. It was essential to reintroduce the notion of injury somewhere else in the draft as well as in article 40. Injury must have occurred and someone must have been injured, but those were two quite different matters. Symmetry with article 3 was required. An indispensable provision on

that subject might be better placed in Part Two bis, on the implementation of State responsibility.

59. While the division of the current draft into Part Two and Part Two bis was an excellent idea, it nonetheless called for some comment. He was not enamoured of the title of Part Two, "Legal consequences of an internationally wrongful act of a State", as it applied equally well to Part Two bis. "The implementation of State responsibility" (Part Two bis), including possible recourse to countermeasures, was also a legal consequence of an internationally wrongful act. Perhaps an enumerative title like "Reparation and obligation of performance" might be preferable for Part Two.

60. Part Two bis ought to have contained articles on diplomatic protection, an issue central to the implementation of State responsibility where injury was caused to a person other than a subject of international law, but since diplomatic protection was being treated as a separate topic, there could be no question of re-including it in Part Two bis. Nevertheless, he strongly urged the Special Rapporteur to think about proposing a draft "without prejudice" provision referring to diplomatic protection. The natural place for that clause would be in chapter I of Part Two bis.

The meeting rose at 1 p.m.

2614th MEETING

Wednesday, 3 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

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

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN extended a warm welcome to Mr. Idris, who had been newly elected as a member of the Commission, and invited the members of the Commission to continue their consideration of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. IDRIS thanked the Chairman and said that, owing to the spectacular development of information technologies and world trade, the Commission's role in the codification and progressive development of international law was more important than ever before.

3. In recent years, the Commission had studied important topics such as the establishment of an international criminal court, the draft Code of Crimes against the Peace and Security of Mankind, jurisdictional immunities of States and their property and State responsibility. It had also made tangible progress on reservations to treaties, unilateral acts of States, prevention of transboundary damage and diplomatic protection. He intended to participate actively in the Commission's work in all fields of international law and believed it should tackle new topics, such as information technologies.

4. Mr. PELLET, replying to comments by two members of the Commission who thought that the term *préjudice* was better than the term *dommage*, said that, in international law, the two terms were synonymous.

5. Continuing with his comments (2613th meeting) on the third report of the Special Rapporteur, he said that, as it stood, Part Two of the draft articles was a failure compared with Part One, which was undeniably a success. The Special Rapporteur recognized that Part Two needed to be fully revised. In paragraph 8 of his report, the Special Rapporteur had stated that Part Two had been formulated on the basis of detailed and careful reports of the previous Special Rapporteur. He himself did not share that view. The previous Special Rapporteur, Mr. Gaetano Arangio-Ruiz, had greatly neglected the technical aspects of reparation and he earnestly hoped that, particularly in chapter II of Part Two, the current Special Rapporteur would propose much more specific and detailed articles on the forms and modalities of reparation, including its purpose, particularly compensation for *lucrum cessans*, and the means of calculating the amount and possible interest payments, on which the draft as it stood said nothing. States needed to know when they had to make interest payments and required general guidelines for calculating them. The more detailed provisions which the Special Rapporteur undertook to provide in paragraph 19 of the report would therefore be welcome.

6. With regard to reparation in cases of a plurality, not of injured States, an issue dealt with in article 40, but of authors of an internationally wrongful act, as covered in paragraphs 31 to 37 of the report, he had identified a number of weaknesses. Paragraph 37 stated that the case where concurrent acts of several States together caused injury was dealt with in further detail below; but it was not; the problem was not analysed further on in the report. He therefore hoped that the Special Rapporteur would take up the major issue of joint and several responsibility in international law. That was a very important and real

[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).