STATE RESPONSIBILITY

[Agenda item 3]

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Third report on State responsibility, by Mr. James Crawford, Special Rapporteur

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CONTENTS

* Incorporating A/CN.4/507/Add.1/Corr.1, A/CN.4/507/Add.2/Corr.1 and 2 and A/CN.4/507/Add.3/Corr.1.

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Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, No. 2889, p. 221.
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Introduction[1]

A. Programme for completion of the second reading

1. At its fifty-first session in 1999, the International Law Commission completed the review of part one of the draft articles on second reading, which it had begun in 1998. Articles 1–35 have been considered by the Drafting Committee and reported to the plenary.[2] Since their consideration, some further comments have been forthcoming from Governments within the framework of the debates in the Sixth Committee of the General Assembly.[3] There have also been relevant developments in the jurisprudence.[4] As a matter of impression, it may be said that the changes provisionally made to part one in 1998 and 1999 have on the whole been welcomed as a simplification and clarification of the original intent of that part. The underlying conception of part one (setting out the framework of general secondary rules of international law for determining whether a State has committed an internationally wrongful act) has remained essentially unchallenged, and each of the existing chapters of part one has been retained.

[1] The Special Rapporteur wishes to thank Mr. Pierre Bodeau, Research Fellow at the Research Centre for International Law, University of Cambridge, for significant assistance with this report, as well as John Barker, Ann Bodley, Petros Mavroidis, Jacqueline Peel, Christian Tams, Carole Moal, Johanne Poirier and Arnaud Macé, for their assistance in its preparation, and the Leverhulme Trust for its generous financial support.

[2] For the text of the draft articles provisionally adopted by the Drafting Committee, see *Yearbook … 1998*, vol. I, 2562nd meeting, p. 287, para. 72; and *Yearbook … 1999*, vol. I, 2605th meeting, p. 275, para. 4. See also the reports of the Chairman of the Drafting Committee in 1998 (Mr. Simma, *Yearbook … 1998*, vol. I, 2562nd meeting) and in 1999 (Mr. Candioti, *Yearbook … 1999*, vol. I, 2605th and 2606th meetings).

[3] See the topical summary of the discussion held in the Sixth Committee during its fifty-third (A/CN.4/496) and fifty-fourth sessions (A/CN.4/504).

[4] For example, the decision of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Duško Tadić*, case No. IT–94–1–A (1999), ILM, vol. 38, No. 6 (November 1999), pp. 1518–1623.

2. The Commission itself has reserved for further consideration a number of issues in relation to part one. They are:

(*a*) The need for a provision dealing with State responsibility for breach of obligations owed to the international community as a whole (obligations *erga omnes*) and its relation to the provisions of article 19 as adopted on first reading;[5]

(*b*) The formulation and location of former article 22 (Exhaustion of local remedies);[6]

(*c*) The formulation of article 30 (Countermeasures in respect of an internationally wrongful act), in the light of the treatment of countermeasures elsewhere in the draft;[7]

(*d*) The possible insertion of a further circumstance precluding wrongfulness, viz., the exception of non-performance (*exceptio inadimpleti contractus*), as proposed by the Special Rapporteur in 1999.[8]

3. It should be noted that each of these issues is implicated with the treatment of the provisions of existing part two.[9] Moreover, if the Commission is to complete its second reading of the draft articles by 2001, as scheduled and as demanded by the General Assembly, it is essential that a complete text of the draft articles as a whole be presented to the Sixth Committee in 2000. This should enable the Commission to review the draft articles as a whole in the light of any further comments received before its next session.

4. Accordingly it is proposed in the present report to make recommendations on the whole of part two as adopted on first reading, and in the process to consider the four issues enumerated in paragraph 2 above. On that basis the Special Rapporteur would hope to present in 2001 a complete text of the draft articles with commentaries for consideration and adoption by the Commission at its fifty-third session.

[5] See *Yearbook … 1998*, vol. II (Part Two), p. 77, para. 331. Associated with this question are doubts expressed by some as to the need for proposed article 29 bis (Compliance with peremptory norms): see *Yearbook … 1999*, vol. II (Part Two), p. 76, paras. 309–315.

[6] *Yearbook … 1999*, vol. II (Part Two), pp. 66–68, paras. 223–243.

[7] Ibid., p. 88, para. 448.

[8] Ibid., pp. 78–80, paras. 334–347. For the proposition made by the Special Rapporteur, see *Yearbook …1999*, vol. II (Part One), A/CN.4/498 and Add.1–4, pp. 78–83, paras. 316–331).

[9] Thus, to take each of the four issues identified in paragraph 2, these relate to issues in present part two in the following ways:

(*a*) There is a clear relation between articles 19, 40 and 51–53, whereas considered in isolation article 19 is a category without consequences;

(*b*) It has been suggested that article 22 is better placed in a section on the invocation of responsibility rather than in part one;

(*c*) To the extent that the regime of countermeasures is not covered elsewhere in the draft articles, there is a strong case for greater elaboration of article 30 itself, whereas if the subject is dealt with in part two, a simple formulation of article 30 in the nature of a cross-reference should be sufficient;

(*d*) One view is that the *exceptio inadimpleti contractus* is either coextensive with, or would be adequately covered by, the regime of countermeasures, and the Commission has deferred consideration of it in that context.

B. Parts two and three as adopted on first reading: general considerations

5. As adopted on first reading, part two[10] deals with a wide range of issues:

(*a*) A statement of general principles, of which the most important is a "definition" of the term "injured State" (chap. I, arts. 36–40);

(*b*) A chapter, lengthily entitled "Rights of the injured State and obligations of the State which has committed an internationally wrongful act", which sets out basic principles of cessation and reparation as well as the specific content of reparation (chap. II, arts. 41–46);

(*c*) A chapter dealing with countermeasures (chap. III, arts. 47–50);

(*d*) A chapter dealing briefly with the consequences of international crimes as defined in article 19 (chap. IV, arts. 51–53).

6. So far as concerns the settlement of disputes in part three, the retention of that part depends on a decision as to the form of the draft articles. The Special Rapporteur has already given his reasons for rejecting the special linkage adopted on first reading between compulsory dispute settlement and the taking of countermeasures.[11] Those reasons were endorsed by many members of the Commission during the debate on the second report of the Special Rapporteur.[12] Thus it is possible, and in the Special Rapporteur's view desirable, to focus on the substance of the law of State responsibility, including its implementation, before considering the related questions of the form of the draft articles and the settlement of disputes.

7. In considering issues arising in part two, certain initial points should be made:

(*a*) *Internal application of the draft articles.* The obligations associated with cessation, reparation and countermeasures in part two are themselves international obligations of the State concerned, and the draft articles, which apply to all international obligations of States, are thus reflexive. In consequence article 4, which provides that a State may not invoke its internal law as an excuse for failure to comply with its international obligations, applies to the international obligations in part two. The same holds true for circumstances precluding wrongfulness: thus, a State should be entitled to rely, for example, on force majeure as a circumstance precluding the wrongfulness of the non-payment of compensation, to the extent allowed by part one, chapter V. This reflexive quality of part one was perhaps not always clearly realized during the drafting of part two. For example, the substance of article 4 is repeated in article 42, paragraph 4, a repetition which is not strictly necessary and may have undesirable *a contrario* implications elsewhere in part two;[13]

[10] See *Yearbook … 1996*, vol. II (Part Two), pp. 62–64.

[11] Ibid., p. 64, art. 58, para. 2, as adopted on first reading, and for a critique, *Yearbook … 1999* (see footnote 8 above), pp. 94–95, paras. 386–389.

[12] *Yearbook … 1999*, vol. II (Part Two), pp. 87–88, paras. 441–447.

[13] See also paragraph 42 below.

(*b*) *Part two and the substance/procedure distinction.* The draft articles, although they cover a field which might be described as "judicial remedies",[14] are generally formulated in terms of rights and obligations of States. In many national legal systems, equivalent provisions would more naturally be expressed in terms of the powers of the court with respect to remedies. This approach is not possible in a system where there is no a priori right to a court, and where a wide variety of courts, tribunals and other bodies may be faced with issues of responsibility. Despite these differences, the language of national law (the so-called "private law analogy") quite often creeps into international judicial decisions.[15] Although the draft articles are not concerned with such issues as the jurisdiction of courts, it is often said that limitations on remedies (e.g. punitive damages) arise from the terms of a *compromis* or special agreement,[16] and there is a clear overlap between such jurisdictional issues as the power to indicate or order provisional measures and the obligation of cessation. This is a particular problem with declarations, which international courts frequently grant as a form of remedy, on the basis that the formal finding of a breach is in the circumstances sufficient reparation.[17] Indeed in many State responsibility cases (as in many national court cases in the field of public law), the primary relief sought is declaratory;

(*c*) *Rights and remedies: the problem of discretion.* There is a related point. The formulation of part two in terms of rights not only tends to exclude aspects of reparation such as declaratory relief; it also requires the draft articles to be formulated in terms which suggest that the appropriate form of reparation is predetermined by international law. The truth is that international courts and tribunals have shown considerable flexibility in dealing with issues of reparation.[18] In a system in which rules of responsibility can be formulated in terms of powers or judicial discretions, this is no great problem. In a system in which everything has been conceived in terms of rights and obligations,[19] the position is different, and it is one of the reasons why part two has been criticized alternately for excessive rigidity and unhelpful vagueness.[20]

On balance, these points do not call in question the basic structure or approach of part two. They will, however, need to be taken into account in considering particular provisions and especially in drafting.

8. Part two as adopted on first reading has both positive and negative features. On the positive side, key aspects of the draft articles (cessation, reparation and countermeasures) were formulated on the basis of detailed and careful reports of the previous Special Rapporteur, Mr. Gaetano Arangio-Ruiz.[21] That work certainly does not need to be repeated: rather the focus should be on the formulation and possible elaboration of certain draft articles, in the light especially of the comments of Governments. On the negative side, there are a number of elements to be considered, both in relation to parts two and three:

(*a*) The relation between the concepts of reparation in article 42 and restitution in kind in article 43 has been criticized as confused and overlapping; more generally the question of the selection between forms of reparation (especially restitution and compensation) requires further attention;

[14] See Gray, *Judicial Remedies in International Law*; and Shelton, *Remedies in International Human Rights Law*. Restitution, compensation, etc. were described as "remedies" by the Chairman of the Drafting Committee in introducing article 42, paragraph 1 (*Yearbook … 1992*, vol. I, 2288th meeting, p. 217, para. 17).

[15] See Arbitrator Mahmassani's discussion, in the same passage, of specific performance and restitution in *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic* (1977), ILR, vol. 62, p. 198.

[16] On the relation between punitive damages and the terms of a *compromis*, see, inter alia, the *"Lusitania"* case (1923), UNRIAA, vol. VII (Sales No. 1949.V.5), pp. 41–42; the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (1930), UNRIAA, vol. II (Sales No. 1949.V.1), pp. 1076–1077; and *Lillian Byrdine Grimm* v. *The Islamic Republic of Iran, Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 2, pp. 78–79.

[17] See, for example, *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 35; and the Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 272–273, paras. 122–123. See generally Gray, op. cit., pp. 127–131; and Shelton, op. cit., pp. 68–69.

[18] See, for example, the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. For a case where this flexibility almost went to the point of infringing the *ne ultra petita* principle, see the *"Rainbow Warrior"* arbitration (footnote 17 above), p. 272, paras. 116–120, and pp. 274–275, paras. 124–128. Generally on the distinction between cessation and reparation, see paragraphs 47–50 and 54 below.

[19] But see article 42, paragraph 2, which provides that "account shall be taken" of contributory fault in determining the form and amount of reparation; and article 46, which provides for assurances and guarantees "where appropriate". Both articles imply not merely a measure of discretion of flexibility but some form of third-party settlement.

[20] The point can be illustrated by reference to the entitlement to interest on unpaid compensation. There is authority in some cases for the award even of compound interest; in others, no payment of interest may be appropriate, or the value of unpaid money can be taken into account in other ways. But it is very difficult to specify in advance the conditions under which interest (including compound interest) may be appropriate. See, for example, *Compañía del Desarrollo de Santa Elena S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Review: Foreign Investment Journal*, vol. 15, No. 1 (spring 2000), final award (17 February 2000), paras. 96–107. The Special Rapporteur, Mr. Arangio-Ruiz's proposal for a separate article on interest was not retained by the Commission on first reading, and is reflected only by a vague reference in article 44, paragraph 2. See *Yearbook … 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, pp. 23–30 and 56; and *Yearbook…1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, paras. (24)–(26) .

[21] For the reports on State responsibility by Mr. Arangio-Ruiz, see:

Preliminary report: *Yearbook … 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1;

Second report: *Yearbook … 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1;

Third report: *Yearbook … 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1;

Fourth report: *Yearbook … 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1–3;

Fifth report: *Yearbook … 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1–3 ;

Sixth report: *Yearbook … 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1–3;

Seventh report: *Yearbook … 1995*, vol. II (Part One), p. 3, document A/CN.4/469 and Add.1 and 2;

Eighth report: *Yearbook … 1996*, vol. II (Part One), document A/CN.4/476 and Add.1.

(*b*) Whatever approach may be taken to the question of "international crimes" as defined in article 19 on first reading, articles 51–53 have been widely criticized as inadequate and as poorly integrated into the text;[22]

(*c*) A number of the general provisions contained in part two (e.g. arts. 37 (*Lex specialis*) and 39 (Relationship to the Charter of the United Nations)) belong more properly in a final general part, and should be made applicable to the draft articles as a whole. Further general provisions may also be required;[23]

(*d*) Part three deals only with the settlement of disputes and not with the broader substantive topic of the implementation (*mise en œuvre*) of responsibility;

(*e*) So far as concerns the implementation of responsibility, there may be a case for dealing with such subjects as the loss of the right to invoke responsibility (by analogy with article 45 of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention)). A number of other issues may also fall within that general heading.

9. In addition, the division of part two into four chapters raises a number of questions:

(*a*) Chapter I purports to state the general principles applicable, but it mainly consists either of introductory or savings clauses, together with an extended "definition" of the injured State. To the extent that there are basic principles specific to part two, they are mostly in later chapters;

(*b*) Chapter II contains articles dealing with cessation and with reparation in the broad sense (restitution, compensation, satisfaction, assurances and guarantees of non-repetition). But cessation is distinct from reparation, and is treated in one respect by a provision in chapter I (art. 36, para. 2). Moreover, chapter II only sets out some of the "rights of the injured State", while others are specified in chapters III and IV. It would seem desirable to distinguish those consequences of an internationally wrongful act that concern the question of the continued performance of the obligation in question (e.g., cessation, and possibly assurances and guarantees of non-repetition) from those which concern reparation in the proper sense. In addition, it may be useful to set out in chapter I the general principle of reparation, as a corollary of the general principles set out in articles 1 and 3. On that basis chapter II can be used to elaborate the content of reparation in relation to particular cases;

(*c*) Chapter III, dealing with countermeasures, does not seem to be concerned so much with the "content, forms or degrees" of State responsibility as with the reactions that may lawfully follow a breach of an international obligation so far as the injured State is concerned. The notion that countermeasures are instrumental, and are concerned not with punishing the responsible State but with inducing it to comply with its obligations of cessation and reparation, is expressed in article 47 and was endorsed by ICJ in the *Gabčíkovo-Nagymaros Project* case.[24] It implies that the provisions on countermeasures might be better located in a part (hereinafter referred to as part two bis) dealing with the implementation of responsibility;[25]

(*d*) Chapter IV purports to set out the specific consequences of international crimes as defined in former article 19, but as noted in the first report of the Special Rapporteur,[26] these consequences are rather limited and do not involve "penal" consequences as that term is normally understood. For example, they do not include punitive damages, let alone other sanctions which may be appropriate for the gravest breaches of international law. The Commission decided in 1998 to try to resolve the issues raised by article 19 through the concepts of obligations to the international community as a whole, and peremptory norms.[27] To the extent that such obligations have immediate legal consequences analogous to those dealt with in chapter II, they should no doubt be identified either in that chapter or elsewhere in part two. To the extent that such obligations may give rise to collective measures against the responsible State, they could be dealt with in the proposed part two bis;

(*e*) Nowhere in part two is there any treatment of situations where more than one State is injured by, or is responsible for, the same internationally wrongful act. Nor is there any express provision dealing with the relationship between the modes of reparation available to a State primarily affected by such an act and other States with a legal interest in the breach (the so-called "differently … injured" States).[28] These issues are particularly important with multilateral obligations, i.e. obligations owed to a group of States collectively, or to the international community as a whole.

10. For these reasons, and others which will be developed in the course of the present report, it is suggested that the remaining substantive sections of the draft articles could have the following structure:

PART TWO. LEGAL CONSEQUENCES OF AN INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I. General principles

Chapter II. The forms of reparation

[Chapter III. Cases involving a plurality of States]

[22] See *Yearbook … 1998*, vol. II (Part Two), pp. 72–73, paras. 298–301.

[23] For example, the proposed article A (Responsibility of or for conduct of an international organization) (*Yearbook … 1998*, vol. I, 2562nd meeting, p. 288, para. 72): see the first report of the Special Rapporteur, *Yearbook … 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, pp. 50–51, paras. 253–259; and *Yearbook … 1998*, vol. II (Part Two), pp. 85–86, paras. 427–429.

[24] *I.C.J. Reports 1997* (see footnote 18 above), pp. 55–57, paras. 83–87.

[25] For Mr. Arangio-Ruiz's reasons for including countermeasures in part two, and dispensing with the notion of the implementation of responsibility, see his preliminary report, *Yearbook … 1988* (footnote 21 above), p. 10, para. 19. No consideration was given to other issues relating to the invocation of responsibility than those concerned with countermeasures.

[26] *Yearbook … 1998* (see footnote 23 above), p. 11, para. 51.

[27] *Yearbook … 1998*, vol. II (Part Two), p. 77, para. 331.

[28] An omission noted in *Yearbook … 1993*, vol. II (Part Two), commentary to article 6 *bis* [present art. 42], p. 59, footnote 155.

PART TWO BIS. THE IMPLEMENTATION OF STATE RESPONSIBILITY

Chapter I. Invocation of the responsibility of a State

Chapter II. Countermeasures

[Chapter III. Invocation of responsibility to the international community as a whole]

PART FOUR. GENERAL PROVISIONS

This structure will incorporate the substance of all the draft articles in part two as adopted on first reading. It should also enable the outstanding issues identified above to be addressed.

11. In the present report, the draft articles will be discussed not in the order in which they currently stand in part two, but generally in their proposed new order. For the reasons explained in paragraph 6 above, part three on settlement of disputes will be set to one side for the time being.

CHAPTER I

Part Two. Legal consequences of an internationally wrongful act of a State

12. Part two is currently entitled "Content, forms and degrees of international responsibility". This is neither very clear nor very illuminating as to the content of part two. For example, the taking of countermeasures hardly qualifies as part of the "content" of responsibility or as one of its "forms". This will not be a problem if, as is suggested, countermeasures are to be considered as an aspect of the implementation of responsibility (part two bis). Even so, a clearer and less convoluted title for part two is called for. The title "Legal consequences of an internationally wrongful act of a State" is suggested.

A. Chapter I. General principles

1. TITLE AND CONTENT OF CHAPTER I

13. Chapter I is presently entitled "General principles". It consists of five articles, as follows:

Article 36. *Consequences of an internationally wrongful act*

Article 37. *Lex specialis*

Article 38. *Customary international law*

Article 39. *Relationship to the Charter of the United Nations*

Article 40. *Meaning of injured State*

A number of these articles are essentially savings or "without prejudice" clauses (arts. 36, para. 2, and 37–39). Article 36, paragraph 1, has an introductory character. Article 40 is formulated as a definition, whose operation is determined by the use of the phrase "injured State" in later articles. As noted above, if there are "general principles" in part two, they are hardly to be found in chapter I.

14. It is nonetheless appropriate that part two, chapter I, should set out general principles as to the legal consequences of an internationally wrongful act of a State, just as, part one, chapter I does as to the requirements for the existence of an internationally wrongful act. In that respect, articles 41 and 42, paragraph 1, seem to state general principles, which could be included in this chapter alongside article 36, leaving the specific forms of reparation to be addressed in chapter II. The issues raised by article 40 also raise questions of general principle; the placement of that article can only be resolved in the context of a discussion of those questions.

15. On the other hand, articles 37 and 39 express principles or provisos that are applicable to the draft articles as a whole. They should be moved to new part four.

16. On that basis, four issues of general principle remain to be considered in the context of chapter I. They are:

(*a*) The general principle of reparation arising from the commission of an internationally wrongful act by a State. This corresponds to articles 36, paragraph 1, and 42, paragraph 1;

(*b*) The question of cessation of any continuing wrongful act by the responsible State (corresponding to articles 36, paragraph 2, and 41); it is convenient to discuss article 46 (Assurances and guarantees against repetition) in the same context;

(*c*) The question whether the legal consequences of an internationally wrongful act set out in part two are comprehensive. This corresponds to article 38;

(*d*) The question which State or States can be considered injured by an internationally wrongful act. This corresponds to article 40.

These will be dealt with in turn.

2. THE GENERAL PRINCIPLE OF REPARATION[29]

(a) *Current provisions*

(i) *Article 36, paragraph 1*

17. Article 36 is a formal introductory article, entitled "Consequences of an internationally wrongful

[29] See Mr. Arangio-Ruiz's preliminary and second reports, *Yearbook …1988*, and *Yearbook … 1989* (footnote 21 above). See further Brownlie, *System of the Law of Nations: State Responsibility*, pp. 199–240; Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", pp. 9–149; Iovane, *La riparazione nella teoria e nella prassi dell' illicito internazionale*; Decaux, "Responsabilité et réparation"; Dominicé, "La réparation non contentieuse", and "De la réparation constructive du préjudice immatériel souffert par un État", in *International Law in an Evolving World*.

act". Paragraph 2 deals with an aspect of cessation and is considered below. Paragraph 1 provides that:

> The international responsibility of a State which, in accordance with the provisions of part one, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this part.

According to the commentary, its "sole object" is "to mark the transition, and the link" between parts one and two.[30] The commentary also notes that article 36, paragraph 1, "does not exclude that an internationally wrongful act entails legal consequences in the relationships between States and *other** 'subjects' of international law".[31] That is of course true, and it follows from article 1 itself, which covers all international obligations *of* the State and not only those owed *to* other States. Thus the draft articles cover, for example, human rights violations—that is to say, cases where the primary beneficiary of the obligation is not a State.[32] On the other hand, part two does not address the invocation of responsibility by a non-State entity such as an international organization[33] (or even a private entity, in those cases where such invocation is possible[34]), or the reparation available to the primary victim or beneficiary in such cases. This apparent discrepancy will be discussed further in the context of the definition of "injured State" under article 40.

18. Very few Governments have commented so far on article 36, no doubt owing to its introductory character. Argentina considers that chapters I and II of part two "adequately codify the basic rules of responsibility and outline the subject in a satisfactory manner".[35] France suggests a new wording for article 36, in order to relate its provisions to the obligation of cessation in article 41. According to the French proposal, article 36, paragraph 2, could be drafted as a savings clause, which would read as follows:

> This obligation [of performance of the obligation and cessation of the wrongful conduct] is without prejudice to the legal consequences of an internationally wrongful act as set out in this part.[36]

(ii) *Article 42, paragraphs 1, 3 and 4*

19. In conjunction with article 36, paragraph 1, it is also necessary to consider article 42. Paragraph 2 deals with the attenuation of responsibility on account of the negligence or wilful act or omission of the victim, i.e. with cases of contributory fault. That concept should probably find a place in the more detailed provisions of chapter II rather than as a general principle, and it will be discussed subsequently. The remaining provisions of article 42 are as follows:

> ***Article 42. Reparation***
>
> 1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.
>
> …
>
> 3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.
>
> 4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

20. Mr. Arangio-Ruiz, Special Rapporteur, did not originally propose any version of article 42, although his reports address a number of the issues it covers. It was formulated by the Drafting Committee as "a general *chapeau* article on the concept of reparation, which would list the various forms of reparation and regroup the substantive legal consequences of a wrongful act and clarify their relationship with one another".[37] The commentary notes that, consistently with the understanding of the term "reparation" embodied in article 36, paragraph 2 *d*, of the ICJ Statute, paragraph 1 "lays down the general rule that full reparation should be provided so as to wipe out, to the extent possible, all the consequences of the internationally wrongful act".[38] It also notes the contrast between article 41 (Cessation of wrongful conduct), which is formulated as an obligation of the responsible State, and article 42, which refers to the right of "the" injured State.[39]

21. The commentary goes on to note that the obligation of reparation does not extend to indirect or remote results which may flow from a breach, as distinct from those flowing directly or immediately. "The injury may … be the result of concomitant factors among which the wrongful act plays a decisive but not an exclusive role. In such cases, to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory—an issue which is extensively dealt with in the commentary to article 8 [present art. 44]."[40] But the requirement of a sufficient causal link between the conduct and the harm complained of applies not only to questions of compensation, but to the principle of reparation itself.

22. Governments which have commented on article 42 express general approval of the principle of full reparation embodied in paragraph 1. Germany, for

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[30] *Yearbook…1983*, vol. II (Part Two), commentary to article 1 [present art. 36], p. 42, para. (1).

[31] Ibid., para. (4).

[32] Express reference to human rights obligations is made in articles 19, paragraph 3 (*c*), 40, paragraph 2 (*e*) (iii) and 50 (*d*) as adopted on first reading (*Yearbook … 1996*, vol. II (Part Two), pp. 60, 62 and 64).

[33] See the Special Rapporteur's first report, *Yearbook … 1998* (footnote 23 above), pp. 30–31, paras. 123–125, p. 46, paras. 230–231, and pp. 50–51, paras. 253–259; and draft article A as provisionally adopted by the Drafting Committee in 1998 (footnote 23 above).

[34] For example, in cases where private parties have standing before an international tribunal for the vindication of rights conferred by treaty (e.g. ICSID tribunals, international human rights bodies).

[35] *Yearbook … 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, p. 136.

[36] Ibid.

[37] *Yearbook … 1992*, vol. I, 2288th meeting, p. 216, para. 14, and see further pages 216–218, paras. 15–28, for the Drafting Committee's account of the new article.

[38] *Yearbook … 1993*, vol. II (Part Two), p. 59, commentary to article 6 *bis* [present art. 42], para. (2).

[39] Ibid., para. (4).

[40] Ibid., para. (6).

example, expresses its "agreement with the basic rule … that the injured State is entitled to full reparation in the form mentioned".[41] However, most of these Governments have reservations as to paragraphs 2 and 3, which provide "two potentially significant exceptions from the general principle of full reparation".[42] The obligation not to deprive the population of its own means of subsistence gives rise to particular concern, on the ground that it could be "used as a pretext by the wrongdoing State to refuse full reparation".[43] The United Kingdom questions paragraph 3 on another ground, viz. its relevance in the context of reparation. In its opinion, the only form of reparation paragraph 3 could refer to is compensation; but even in that case, it raises difficult issues (e.g. as to the level of financial hardship required). In addition, it does not explain "why [ability to pay] should not be a factor in all cases",[44] and not only when there is a risk of deprivation. By contrast, Germany considers that "paragraph 3 has its validity in international law and in the context of the draft article".[45] It refers to international practice in such cases as egregious breaches caused by war, where full reparation has not been awarded for every single case of damage sustained. Such cases are justified so as to avoid beggaring the defeated State and causing further instability in the future. It calls for careful examination by the Commission of the implementation of Security Council resolutions 662 (1990) and 687 (1991), requiring full reparation for acts related to the aggression against Kuwait.[46]

(b) *A proposed general principle*

23. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Chorzów Factory* case, in the following words:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[47]

In this passage the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.[48]

24. In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[49]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the reestablishment of the situation affected by the breach.[50] In the second sentence it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(i) *Reparation as obligation or right?*

25. In each of the above passages, the Court was able to formulate the principle of reparation without specifying to whom reparation was owed, i.e. without using the term "injured State" or any equivalent to it. One reason was, perhaps, that concurrent proceedings by the German companies before a mixed arbitral tribunal presented a difficulty for its exercise of jurisdiction over essentially the same matter under the form of an inter-State claim. By contrast, article 42, paragraph 1, like all other articles in part two, chapter II, except article 41 (Cessation of wrongful conduct), is formulated in terms of the rights of the "injured State". This works well enough in the strictly bilateral context, where the obligation in question is owed exclusively by one State to another and the latter is (correspondingly) the only possible injured party. But it creates a significant difficulty in those cases where the same obligation is owed simultaneously to several, many or all States, some or all of which are legally interested in its breach. The commentary to article 42 notes that:

> The possible implications for the provisions on reparation of the existence of a plurality of injured States, including the question of the

[41] *Yearbook … 1998* (see footnote 35 above), p. 145. See also the comments by the United States (ibid.), the United Kingdom (which regards the draft article "as largely uncontroversial" (ibid.), Mongolia (ibid., p. 144), and Australia (*Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 23rd meeting (A/C.6/54/SR.23), para. 43).

[42] United States (*Yearbook … 1998* (see footnote 35 above), p. 145).

[43] Japan (*Yearbook … 1999*, vol. II (Part One), document A/CN.4/492, p. 108). See also United States (acknowledging that a claim for prompt reparation "could lead to serious social instability" but criticizing the "loophole" and "avenues for abuse" created by paragraph 3 (*Yearbook … 1998* (footnote 35 above), p. 146); France (suggesting deletion of the paragraph (ibid.); and Australia (*Official Records of the General Assembly* (footnote 41 above), para. 43).

[44] *Yearbook … 1998* (see footnote 35 above), p. 145. The United Kingdom suggests a separate article on reparation in the form of a "statement of principle concerning the making of reparation" and pointing out "that an injured State cannot insist upon a particular kind or level of reparation" (ibid.).

[45] Ibid., comments on article 42, paragraph 3.

[46] Ibid.

[47] *Factory at Chorzów, Jurisdiction, Judgment No. 8, P.C.I.J., Series A, No. 9*, p. 21.

[48] Ibid., p. 17, as the Court noted.

[49] Ibid. *(Merits), Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[50] Cf. Dupuy, "Le fait générateur de la responsabilité internationale des États", p. 94, who uses the term "*restauration*" to convey this general idea.

so-called differently or indirectly injured States, will be considered at a later stage.[51]

As it happened, the articles on reparation on first reading were discussed on the footing that only breaches of bilateral obligations were involved, and were not reconsidered in the context, for example, of articles 51–53.[52]

26. This question will be discussed in greater depth when considering article 40. For present purposes, however, it seems possible to formulate the general obligation of reparation as the simple and immediate corollary of a State's responsibility, i.e. as an obligation of the State concerned resulting from the breach. The commentary to article 42 justifies the translation of reparation as a right of the injured State on the ground that "it is by a decision of the injured State that the process of implementing this right in its different forms is set in motion".[53] As to the choice between different forms of reparation, this may well be so. In particular, the victim of an internationally wrongful act is, under normal circumstances, entitled to elect compensation rather than restitution in kind, to forgo claims to satisfaction, or indeed to focus on cessation and future performance rather than seeking reparation at all. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility, the fact remains that the general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form which reparation should take in the circumstances may be contingent. For these reasons, the proposed general article should be formulated in terms of the obligations of the State which has committed the internationally wrongful act.[54]

(ii) *Other issues of formulation: causation, remoteness and mitigation of damage*

27. The proposed general article should also specify that the subject matter of reparation is, globally, the situation resulting from and ascribable to the wrongful act.[55] As noted in the commentary to part one, State responsibility is not determined simply on the basis of "factual causality".[56] Rather, the allocation of harm or loss to a wrongful act is, in principle, a legal and not a merely historical or causal process. That principle is not limited to compensation. It applies, at least, to restitution in kind and probably to other forms of reparation as well, and it is too important to be stated, as at present, only in the commentary to article 44.

28. The question is how such a link should be expressed. In State practice, arbitral decisions and the literature, various terms are used. For example, reference may be made to losses "attributable [to the wrongful] act as a proximate cause",[57] or to damage which is "too indirect, remote, and uncertain to be appraised",[58] or to "any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of " the wrongful act.[59] Thus "factual causality" is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of harm that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "proximity" or "foreseeability".[60] But other factors may also enter into the calculation: for example, whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[61]

[51] *Yearbook … 1993*, vol. II (Part Two), commentary to article 6 *bis* [present art. 42], p. 59, footnote 155. To the same effect, see the commentary to article 8 [present art. 44], para. (15) (ibid., p. 71).

[52] The commentary subsequently describes the general principle of reparation in terms of an obligation of the responsible State, without reference to the notion of "injured State" (ibid., p. 59, para. (6)).

[53] Commentary to article 6 *bis* [present art. 42], para. (4) (ibid.).

[54] See, to similar effect, de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, pp. 138–140.

[55] For discussion of the causal link requirement, see Mr. Arangio-Ruiz's second report, *Yearbook … 1989* (footnote 21 above), pp. 12–16, paras. 37–43, and *Yearbook…1993*, vol. II (Part Two) (footnote 20 above), pp. 68–70, paras. (6)–(13). See further Gray, op. cit., pp. 21–26.

[56] *Yearbook … 1973*, vol. II, document A/9010/Rev.1, p. 181, para. (6) of the commentary to article 3.

[57] See United States-German Mixed Claims Commission, *Administrative Decision No. II* (1923) UNRIAA, vol. VII (Sales No. 1949.V.5), p. 30.

[58] See the *Trail Smelter* arbitration (1938), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1931, reprinted in *International Environmental Law Reports*, Cairo A. R. Robb, ed. (Cambridge, Cambridge University Press, 1999), vol. 1, pp. 231 et seq.

[59] Security Council resolution 687 (1991), para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, for example, Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC" claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[60] In some national legal systems, different criteria are used to deal with the problem of remoteness of damage, depending on the nature of the claim. For example, in the common law, "foreseeability" was the criterion in cases of negligence; "directness" in cases of trespass. Like the two torts, the two tests overlapped but were not identical. For comparative reviews of issues of causation and remoteness, see, for example, Hart and Honoré, *Causation in the Law*; Honoré, "Causation and remoteness of damage"; Zweigert and Kötz, *Introduction to Comparative Law*, pp. 601–627, especially pp. 609 et seq.; and Markesinis, *The German Law of Obligations—Volume II The Law of Torts: A Comparative Introduction*, pp. 95–108, with many references to the literature.

[61] An example is provided by the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases Nos. A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45, discussed in the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 23–24, paras. 65–67. The Tribunal envisaged that the damages payable would be those which resulted directly from the breach, on the assumptions: (*a*) that the United States had achieved by other lawful means the result of allowing reinstitution or resumption in its own courts of cases falling outside the Tribunal's jurisdiction; and (*b*) that Iran took reasonable steps to protect itself in the suspended cases. This conclusion does not follow from consideration of factual causality.

29. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[62] But it is clear that there is an element, or complex of elements, over and above that of natural causality, and that this should be reflected in the proposed statement of the general principle of reparation.

30. A further element affecting the scope of reparation is the question of mitigation of damage. Even a wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[63] The point was clearly made in this sense by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[64]

(iii) *Reducing reparation in cases of concurrent causes*

31. An associated issue is the problem of concurrent causes, i.e. of the cases (very frequent in practice) where two separate causes combine to produce the injury. Both are efficient causes of the injury, without which it would not have occurred. For example, in the *United States Diplomatic and Consular Staff in Tehran* case,[65] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[66] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Many other examples could be given.

32. This issue is likewise addressed in the commentary to article 44 rather than in the text. According to the commentary:

> Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases … to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined on the basis of the criteria of normality and predictability. In view of the diversity of possible situations, the Commission has not attempted to find any rigid criteria applicable to all cases or to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State.[67]

33. There are several difficulties with the position expressed in the commentary. The first is that it is not reflected at all in article 44, or generally in part two. Except in the special case of contributory fault (dealt with in article 42, paragraph 2), there is no provision for reparation to be reduced or attenuated because the harm in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State.[68] If the Commission wishes to endorse the principle of attenuation of damage for concurrent causes (other than in cases of contributory fault), it should say so in the articles themselves.

34. The second difficulty, however, is that this principle is not consistent with international practice and the decisions of international tribunals. In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines.[69] This was despite the fact that the Court was well aware that Albania had not itself laid the mines. Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible), but of private individuals, or some natural event such as a flood. Thus in the *United States Diplomatic and Consular Staff in Tehran* case the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[70] Such a conclusion is obvious, since at the international level the United States of America had no opportunity for recourse against the captors. But it should follow in any event from the breach of the obligation.

35. It is true that cases can occur where an identifiable element of harm can properly be allocated to one of sev-

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[62] Atiyah, *An Introduction to the Law of Contract*, p. 466.

[63] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" (S/AC.26/1996/5/Annex) (see footnote 59 above), para. 54. This is acceptable if it means that the costs of reasonable mitigation are a recoverable consequence of the wrongful act, and conversely that harm arising from a failure to mitigate may not be recoverable.

[64] *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 80.

[65] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 29–32.

[66] *I.C.J. Reports 1949* (see footnote 17 above), pp. 17–18, 22–23.

[67] *Yearbook…1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 70, para. (13).

[68] The reduction of compensation in cases of contributory fault, which is envisaged in article 42, paragraph 2, occurs not because the internationally wrongful act of the State is not an efficient cause of the injury, but out of considerations of equity. The default of the victim in contributing to the injury limits the reparation to which it would otherwise be entitled. There is no inference to be drawn for the general question of concurrent causes.

[69] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 250. It should be pointed out, however, that Albania did not appear at this stage, so that possible countervailing factors may not have been put to the Court.

[70] *I.C.J. Reports 1980* (see footnote 65 above), pp. 31–33. See also the Special Rapporteur's first report, *Yearbook … 1998* (footnote 23 above), p. 55, para. 283.

eral concurrently operating causes alone. But unless some part of the harm can be shown to be severable in causal terms from that attributed to the responsible State, the latter should be held responsible for all the consequences (not indirect or remote) of its wrongful conduct. Indeed in the *Zafiro* claim the Tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[71]

36. Thirdly, it should be noted that the approach to concurrent causes proposed in the commentary is inconsistent with the way in which these issues are consistently approached in national law. As Weir concludes, after a thorough review of the comparative experience:

> It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.[72]

37. The case where concurrent acts of several States together cause injury is dealt with in further detail below. For present purposes it is enough to conclude that the notion of a sufficient causal link which is not too remote should be incorporated in the proposed general principle of reparation. The commentary should make it clear that, once it is shown that the harm suffered has been caused by the wrongful act of a State, the State must make reparation therefor. No further qualification is required in terms of any notion of concurrent cause.

(c) *Article 42, paragraphs 3–4*

38. Article 42, paragraph 3, states that reparation must not "result in depriving the population of a State of its own means of subsistence". According to the commentary, this provision was intended to address extreme cases where the demand for reparation would result in destitution for the population of the responsible State, and was evidently aimed at such cases as the massive demands for war reparations made against Germany at the end of the First World War. It notes further that:

> This has, of course, nothing to do with the obligation of cessation, including the return to the injured State, for example, of territory wrongfully seized. But in other contexts … the amounts [of compensation] required, or the terms on which payment is required to be made should not be such as to deprive the population of its own means of subsistence. The language of paragraph 3 … reflects a legal principle of general application.[73]

Not all members of the Commission agreed with the proviso. In particular it was pointed out that "the provision should not apply where the population of the injured State would be similarly disadvantaged by a failure to make full reparation on such grounds".[74] Government comments on paragraph 3 have also been divided.[75]

39. There can be no doubt that, as specified in article 1, paragraph 2, of the International Covenants on Human Rights of 1966, a people must not be deprived of its own means of subsistence. Thus, for example, measures taken in the framework of inter-State relations should not be such as to threaten the starvation of the people of a State. The problem is to see how this principle can apply in the context of the secondary obligation of reparation. As to restitution, the core element of restitution is the return of what was wrongfully taken. It is true that this may require active measures and is not limited to the return of physical items such as persons, property or territory. Nonetheless, the notion of restitution in kind should not be taken too far, nor should it be confused with reparation in the general sense. Thus it is difficult to conceive of cases of restitution which would deprive a people of its own means of subsistence. Indeed if the case is potentially so extreme, rather than depriving that people of their own means of subsistence, restitution would rather require the return to another people of *their* means of subsistence, wrongfully taken.[76]

40. As for satisfaction or guarantees against repetition, they are often symbolic in form, or they involve practical steps such as apologies or acknowledgements of wrongdoing, or perhaps measures such as prosecution of those said to be guilty of the violation. As for damages given by way of satisfaction, if they are not agreed between the parties, in practice they will only be payable on the basis of reasoned decisions by a court, tribunal or other body with jurisdiction over them. There is no history of courts or tribunals making excessive orders or awards in these categories.

41. Thus the real problem, if there is one, reduces itself to issues of monetary compensation for losses arising directly out of an internationally wrongful act.[77] It is

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[71] *D. Earnshaw and Others (Great Britain)* v. *United States* (*Zafiro* case) (1925), UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 164–165.

[72] Weir, "Complex liabilities", p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*) of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958, *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 229).

[73] *Yearbook … 1996*, vol. II (Part Two), commentary to article 42, p. 66, para. 8(*a*).

[74] Ibid., para. 8(*b*). For the debate, see *Yearbook … 1996*, vol. I, 2454th meeting, pp. 153–155.

[75] See paragraph 22 above.

[76] If it is possible that a case of restitution might deprive the people of the responsible State of their own means of subsistence without having an equivalent effect on the people of the injured State, restitution would presumably be excluded by the disproportionality test in article 43 (*c*).

[77] Overhanging the debate is the damaging "precedent" of the Treaty of Versailles settlement and the war-guilt clause. But this was

true that in cases of egregious or systematic breaches such compensation may be very large, as indeed have been the amounts fixed under the heading of compensation by UNCC.[78] But this is rather exceptional,[79] and in any event a distinction has to be drawn between the quantum of compensation, which by definition reflects the actual losses suffered as a result of the breach, and the mode of payment. In extreme circumstances one might envisage the plea of necessity or force majeure as a basis for delaying payments which have become due, a possibility allowed for in the *Russian Indemnity* case.[80] But again, in practice, international financial institutions have developed methods for aggregating and rescheduling sovereign debt, and the amounts actually awarded or agreed to be paid by way of compensation since 1945 are relatively small in relation to the total public finances or public debt of the States concerned.

42. To summarize, there is no history of orders for restitution in the narrow sense, or of the award of damages by way of satisfaction, which have threatened to deprive a people of its own means of subsistence. As to compensatory damages, paragraph 3 seems to confuse questions of the quantum due (a matter by definition related to the losses actually resulting from the wrongful act in question) and questions of the mode of payment. The potential problem of States unable for the time being to make large compensation payments is sufficiently addressed by the recognition that the circumstances precluding wrongfulness in part one, chapter V, of part one apply equally to obligations arising under part two.[81] It is sufficient that this be noted in the commentary.

43. Turning to article 42, paragraph 4, this makes the obvious point that a State may not rely on its internal law in order to avoid its obligation to make reparation for wrongful conduct.[82] There can be no doubt as to the principle, but it is already clearly stated in article 4, which is quite general in its application and accordingly applies to the secondary obligations set out in part two. Again, it will be sufficient to point this out in the commentary.[83]

3. Cessation and related issues

(a) *Current provisions*

44. As adopted on first reading, the draft articles contain two provisions dealing with the related questions of the impact of a breach of an international obligation on its continued performance, and with the cessation of such a breach. These are articles 36, paragraph 2, and 41.[84]

45. Article 36, paragraph 2, is in the form of a savings clause. It provides that:

> The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

The commentary notes that:

> The fact that, as a result of the internationally wrongful act, a new set of relations is established between the author State and the injured State does not mean that the previous relationship disappears *ipso facto*. Even if the author State complies with its secondary obligation, it is not automatically relieved of its duty to perform the obligation it has breached. Paragraph 2 states this rule. It does so in the form of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation.[85]

It is the continuation of an international obligation notwithstanding a breach which is a necessary basis for the occurrence of a continuing wrongful act.[86]

46. Article 41 deals with the cessation of wrongful conduct, presently within the framework of chapter II. It provides that:

> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

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in a dictated peace treaty, and the amounts involved far exceeded anything a tribunal would have awarded for unlawful acts committed by Germany following the outbreak of the war. For the historical debate see, for example, Keynes, *The Economic Consequences of the Peace*; Mantoux, *The Carthaginian Peace or The Economic Consequences of Mr. Keynes*; and especially Kent, *The Spoils of War: The Politics, Economics, and Diplomacy of Reparations 1918–1932*. On the Dawes Plan, see Coing, "Dawes Plan", p. 961.

[78] The Commission has made substantial decisions favouring claimants, but at the same time it has massively reduced the scope of the claims made, and this in a non-adversarial procedure. For example, in its decision of 10 December 1999, the UNCC Governing Council approved payment of 88 Government claims in the E2 category aggregating US$ 290 million. But this was in response to 177 claims aggregating US$ 2.16 billion. Generally on UNCC, see Lillich, ed., *The United Nations Compensation Commission*; d'Argent, "Le fonds et la commission de compensation des Nations Unies"; Stern, "Un système hybride: la procédure de règlement pour la réparation des dommages résultant de l'occupation illicite du Koweït par l'Irak"; Crook, "The United Nations Compensation Commission: a new structure to enforce State responsibility"; Bettauer, "The United Nations Compensation Commission: developments since October 1992"; Frigessi di Rattalma, "Le régime de responsabilité internationale institué par le conseil d'administration de la commission de compensation des Nations Unies"; and Heiskanen and O'Brien, "UN Compensation Commission panel sets precedents on Government claims".

[79] In dealing with compensation claims, courts have often contented themselves with quite modest awards, or even with suggestions for a zero-sum solution embodying other elements of restoration of the legal relationship. See, for example, the case concerning the *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports 1997* (footnote 18 above), p. 81, para. 154 (distinguishing claims for damages from money due in respect of the construction of the Project).

[80] UNRIAA, vol. XI (1912) (Sales No. 61.V.4), p. 443. Though treated there as a matter of force majeure, it was more a case of necessity. The plea was rejected on the facts. The case is referred to in *Yearbook … 1980*, vol. II (Part Two), p. 36, commentary to article 33, para. (7).

[81] See paragraph 7 (*a*), above.

[82] See Mr. Arangio-Ruiz's preliminary report, *Yearbook … 1988* (footnote 21 above), p. 40, para. 125. That principle can of course be qualified by the relevant primary rule, or by a secondary *lex specialis*: see, for example, article 50 of the European Convention of Human Rights (just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made"); see now article 41 as adopted by Protocol No. 11 to the Convention in 1994.

[83] For the proposed formulation of the general principle, see paragraph 119 below.

[84] Both provisions were added at the suggestion of Mr. Arangio-Ruiz. For his detailed examination of the issues, see *Yearbook … 1988* (footnote 21 above), pp. 12–19, paras. 29–52.

[85] *Yearbook … 1993*, vol. II (Part Two), commentary to article 1 [present art. 36], p. 55, para. (5).

[86] For the notion of a "continuing wrongful act", see article 24, paragraph 2 (as provisionally adopted on second reading (*Yearbook … 1999*, vol. I, 2605th meeting, p. 275, para. 4), and the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 32–35, paras. 107–115.

47. The commentary notes that the obligation of cessation might well be ascribed to the normal operation of the relevant primary rule. But it justifies its inclusion in the draft articles on a number of grounds. These include its connection to reparation, especially at the time of the wrongful act, and its practical importance in inter-State relations.[87] It notes that cessation is often the main focus of the controversy produced by conduct in breach of an international obligation. Moreover cessation, though related to restitution as the primary form of reparation, is not subjected to the limitations to which restitution is subject.[88] The commentary refers to the decision of the tribunal in the *"Rainbow Warrior"* arbitration, and in particular to the following passage:

> The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.[89]

48. Article 41 has attracted very few comments from Governments, probably because it seems largely uncontroversial. In the view of Venezuela, the obligation to cease a wrongful conduct appears as "the first necessity".[90] The United Kingdom suggests an addition to the commentary to that provision making it clear that, when a circumstance precludes the wrongfulness of a particular conduct, the State concerned "remains under a duty to act in accordance with its international obligations and is internationally responsible if it fails to do so immediately when the circumstances generating the defence cease to obtain".[91] France proposes the deletion of article 41, the substance of which would be embodied in a new version of article 36, paragraph 1.[92]

(b) *The place of cessation in the draft articles*

49. As the above passage from the *"Rainbow Warrior"* award suggests, the breach of an international obligation raises two immediate issues, apart from the question of reparation. The first is the effect of the responsible State's conduct on the obligation which has been breached; the second is the cessation of the breach, if it is continuing. Both are aspects of the key question which the breach of an international obligation raises: that is, the restoration and future of the legal relationship concerned.

50. The main doubt raised about article 41 is that the cessation of a continuing wrongful act can be seen as a function of the obligation to comply with the primary norm. On that view, it is not a secondary consequence of a breach of an international obligation and it has no place in the draft articles. The Special Rapporteur does not agree with this analysis, for reasons that can be rather summarily stated:

(*a*) The question of cessation can only arise in the event of a breach. What must then occur depends of course on the interpretation of the primary rule, but also on the secondary rules relating to remedies, and it is appropriate that they be dealt with, at least in general terms, in a text dealing with the consequences of an internationally wrongful act;

(*b*) The notion of a continuing wrongful act is already contained in the draft articles, and is a common feature of cases involving State responsibility; its consequences should be spelled out in part two;

(*c*) It is desirable to include a provision corresponding to article 41. Not to do so might imply that a State which offers reparation in some form can excuse itself from continuing compliance with its obligations, whereas it must be a matter for the other parties to the obligation to accept such a proposal;

(*d*) Many responsibility cases are more concerned to establish whether there has been a breach, and to reinstate performance, than they are to extract reparation for past events;

(*e*) There is a close relationship between the concepts of cessation and restitution, and a clear account of that relationship needs to be established in order to formulate the principle of restitution in a satisfactory way;[93]

(*f*) There is no support in Government comments for the deletion of article 41.

(c) *Question of placement and formulation*

51. Article 36, paragraph 2, is of course concerned with the continuation of the obligation rather than the cessation of the wrongful act, which is the subject of article 41. The distinction is both clear and important, and for the reasons given both provisions should be retained. But the Special Rapporteur agrees with the view, expressed for example by France, that the two issues should be brought into relation to each other. It is suggested that both aspects of cessation, as an initial requirement following upon the breach of an international obligation, should be included among the general principles in part two, chapter I.

52. As to the formulation of these provisions, France proposes that they be combined in a single new version of article 36, as follows:

> 1. A State which has committed an internationally wrongful act is bound, with respect to the injured State, to perform the obligation it has breached or to cease any wrongful conduct having a continuing character.
>
> 2. This obligation is without prejudice to the legal consequences of an internationally wrongful act as set out in this part.[94]

Paragraph 1 conflates the two questions presently treated separately in articles 36, paragraph 2, and 41, and thus

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[87] *Yearbook … 1993*, vol. II (Part Two), commentary to article 6 [present art. 41], paras. (4)–(5), pp. 55–56.

[88] Ibid., p. 56, para. (6).

[89] UNRIAA (see footnote 17 above), p. 270, para. 114, cited in *Yearbook … 1993*, vol. II (Part Two), commentary to article 6 [present art. 41], p. 57, para. (13).

[90] *Official Records of the General Assembly* (see footnote 41 above), para. 56.

[91] *Yearbook ... 1998* (see footnote 35 above), p. 144.

[92] Ibid. For the French proposal, see paragraph 52 below.

[93] The relationship is discussed in further detail in relation to article 43 below.

[94] *Yearbook … 1998* (see footnote 35 above), p. 136.

tends to obscure the distinction between them. In the Special Rapporteur's view it is desirable that they should both be treated in a single article, which would provide that the continuation of the obligation breached is (unless otherwise agreed or determined) not affected by the internationally wrongful act, and that the responsible State is bound to cease any continuing act in breach of that obligation.[95] The proposed paragraph 2 would substitute for the former article 36, paragraph 1, but this has a useful introductory function for part two as a whole, and might well be retained in its present positive formulation.

(d) *Assurances and guarantees of non-repetition*

53. Related to this question is that of assurances and guarantees against repetition, currently dealt with in article 46, which provides as follows:

> The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

Evidently if the obligation has ceased following its breach, no assurances or guarantees can be relevant. It seems more appropriate to treat article 46 in the present context—i.e. the continuation and repair of the legal relationship affected by the breach—rather than treating it as an aspect of the secondary obligation of reparation.

54. The commentary to article 46 notes that assurances and guarantees against repetition have often been treated as an aspect of satisfaction. It argues against that approach, on the ground that:

> assurances and guarantees of non-repetition perform a distinct and autonomous function. Unlike other forms of reparation which seek to re-establish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function. They furthermore presuppose a risk of repetition of the wrongful act. Those features make them into a rather exceptional remedy, which … should not be automatically available to every injured State, particularly in the light of the broad meaning of that term under [article 40].[96]

Thus "the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily";[97] the question is not one of reparation but, as it were, a reinforcement of an (*ex hypothesi* continuing) legal relationship. In this sense assurances and guarantees relate to future performance of the obligation, on the footing that it has survived the breach. They might be described as the positive aspect of future performance, where cessation of any continuing wrongful act is its negative aspect (and the continuation in force of the obligation is a necessary assumption of both).

55. The commentary goes on to describe the different forms which assurances and guarantees may take, including for example the repeal of the legislation which allowed the breach to occur.[98] But while the commentary "recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant",[99] the article itself makes no attempt to specify the content of such an obligation, taking refuge in the phrase "where appropriate". This implies that the obligation to provide guarantees and assurances is a weak or even illusory one, in the absence of some third party competent "to determine if the conditions for the granting of … an exceptional remedy are met and also to deny abusive claims which would impair the dignity of the wrongdoing State".[100]

56. With the exception of Germany, the few Governments which have commented on article 46 are generally supportive of it.[101] That does not mean, however, that they share the same view as to its scope and purpose. Argentina considers that States not directly affected by a wrongful act may ask for cessation and guarantees of non-repetition, but not for reparation.[102] The Czech Republic favours a strengthened regime of assurances and guarantees at least "in the case of crimes":

> [T]he possibility of obtaining appropriate assurances or guarantees of non-repetition from the State committing the 'crime' should be, systematically and unconditionally, *de jure*, whereas in the case of 'delicts' the securing of such assurances or guarantees would remain subject to an assessment based on the circumstances of the case.[103]

In a similar vein, Uzbekistan suggests that "article 46 should stipulate what form of assurances the injured State is entitled to obtain".[104] By contrast, Germany questions the existence under customary international law of a right of an injured State to obtain guarantees of non-repetition in all cases.[105]

57. Although article 46 has not attracted much comment by States or in the literature, it raises a number of different issues. The first of these relates to the status of assurances and guarantees of non-repetition in the context of international responsibility. The commentary treats them as a *sui generis* remedy, but the account it gives strongly suggests that they are cognate to cessation rather than

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[95] See paragraph 119 below, for the text of the proposed provision.

[96] *Yearbook … 1993*, vol. II (Part Two), commentary to article 10 *bis* [present art. 46], pp. 81–82, para. (1).

[97] Ibid., p. 82, para. (2).

[98] Ibid., pp. 82–83, para. (4), citing the views of the Human Rights Committee in the *Torres Ramirez* case, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19. In those cases where the very existence of legislation involves a breach of an international obligation, the repeal of the legislation would be an aspect of cessation. In the more common case, the breach is not the result of the legislation, but of its implementation in a given situation. See, for example, WTO, Report of the Panel, United States—Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.46 et seq. In the latter case its repeal may not be actually required, but it may nonetheless constitute an important assurance for the injured State(s). This illustrates the close connection between cessation and assurances of non-repetition.

[99] Ibid., p. 83, para. (5) .

[100] Ibid.

[101] See *Yearbook … 1998* (footnote 35 above), comments made by the Czech Republic (according to which these assurances and guarantees "constitute a potentially critical element of reparation", p. 150), Mongolia (considering the provision to be "highly important", ibid., p. 151) and Argentina (ibid., p. 136).

[102] *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 21st meeting (A/C.6/54/SR.21), para. 26.

[103] *Yearbook ... 1998* (see footnote 35 above), pp. 150–151.

[104] Ibid., p. 151.

[105] Ibid., p. 145.

an aspect of reparation. Both cessation and assurances of non-repetition are concerned with the restoration of confidence in a continuing relationship, although assurances and guarantees are not limited to continuing wrongful acts and entail much greater elements of flexibility.

58. This element of flexibility is reflected in article 46 by the qualifying phrase "where appropriate". But this raises a second question, viz. whether article 46 can properly be formulated as an obligation at all. It may be asked what the consequences of a breach of that obligation could be. For example, could a State which had tendered full reparation for a breach be liable to countermeasures because of its failure to give assurances and guarantees against repetition satisfactory to the injured State? It does not seem very likely. If, despite earlier assurances, there is a repetition of the breach, this may be treated as a circumstance of aggravation, but that could be true in any event. There may thus be a case for expressing article 46 in more flexible terms.

59. Thirdly, there must be serious doubt as to whether any form of words could give much guidance in advance of the assurances or guarantees appropriate in any given case. Therefore, much must depend on the precise circumstances, including the nature of the obligation and of the breach.[106] On balance, however, it is proposed that a modest version of article 46 be inserted in part two, chapter I as a general principle associated with the continuation of the legal relationship affected by the breach.[107]

4. Other legal consequences under customary international law

60. Article 38 provides that:

> The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this part.

This implies that there are other unspecified legal consequences of an internationally wrongful act (apart from those provided for in any applicable *lex specialis*). The question is what they might be. Of course one consequence of an internationally wrongful act might be the termination of the obligation violated, e.g. in case of a "material breach" of a bilateral treaty pursuant to article 60, paragraph 1, of the 1969 Vienna Convention. But this has nothing to do with responsibility, and there is no need for any additional savings clause in this respect.

61. The brief commentary warns that part two "may well not be exhaustive as to the legal consequences of internationally wrongful acts".[108] But the only two examples it gives relate to the validity or termination of treaties. These examples are, first, the invalidity of a treaty procured by an unlawful use of force (1969 Vienna Convention, art. 53) and, secondly, the exclusion of reliance on fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party (1969 Vienna Convention, art. 62, para. 2 (*b*)). The commentary notes that "[t]hese types of legal consequences will not be dealt with in part 2".[109] The reason is that they are not consequences within the field of the draft articles at all.

62. As far as Government comments are concerned, Japan finds the reference to the rules of customary international law rather ambiguous. In its view, it is not clear whether these words are intended to deal with the relationship between State responsibility and other legal consequences in the field of the law of treaties, or between the draft articles and customary international law. In the latter case, Japan questions the relevance of the phrase, given that the draft articles are themselves aimed at codifying the customary rules of international law on State responsibility. In its view, the Commission should specify the customary rules envisaged in the provision.[110] France outlines the conceptual link existing between articles 37–39, which "deal with the relationship between the draft articles and external rules, and emphasize the supplementary nature of this text".[111] Accordingly, it suggests that these three articles be included in the final or introductory provisions of the draft articles.

63. As to articles 37 and 39, the Special Rapporteur agrees with the remarks of France, and proposes that they be transferred to a general concluding section.[112] As to article 38, the position is less clear. The reason articles 37 and 39 should apply to the draft as a whole is that they are equally relevant to part one. This is not true of article 38, which is specifically concerned with the consequences of an internationally wrongful act and therefore with part two. Thus the doubt raised by Japan takes on additional significance. One possibility is that the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in a given case, which would not be specific or explicit enough to be covered by the *lex specialis* exception.

64. A possible candidate is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in the advisory opinion concerning the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*. He said:

> It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument—not to change it.[113]

In the case concerning the *Gabčíkovo-Nagymaros Project*, ICJ held that:

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[106] Cf. the extensive and very specific assurances and guarantees demanded or imposed by the Security Council in the aftermath of the Iraqi invasion of Kuwait. See, for example, resolutions 664 (1990), 686 (1991) and 687 (1991).

[107] For the formulation proposed, see paragraph 119 below.

[108] *Yearbook…1983*, vol. II (Part Two), commentary to article 3 [present art. 38], p. 43, para. (3).

[109] Ibid, para. (1).

[110] *Yearbook … 1999* (see footnote 43 above), p. 108.

[111] *Yearbook … 1998* (see footnote 35 above), p. 137.

[112] See paragraph 8 above.

[113] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46. For discussion of this passage, see Rosenne, *Breach of Treaty*, pp. 96–101.

It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of 'approximate application' because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question.[114]

That "cardinal condition" was not met, in the Court's view, in the circumstances of that case. Moreover, its treatment of the question suggests that this is less an autonomous principle of law than a conclusion generated, within the field of the performance of treaties, by the general principle of law that a State may not rely on the consequences of its own unlawful conduct. As such, and because of its specific character as a guide to interpretation, there is no need to include it in the draft articles, and accordingly no need to determine its scope of application. But it is an illustration of the capacity of general principles of international law to generate consequences in the field of the performance of legal obligations.

65. Within the field of State responsibility, there do not seem to be any other *general* legal consequences of the commission of an internationally wrongful act than those referred to in present part two—viz. cessation, restitution, compensation, satisfaction and the possible liability to countermeasures in the event that a State fails to comply with these secondary obligations. Moreover, it is slightly odd in a text which purports to specify the legal consequences of an internationally wrongful act to reserve a range of unspecified additional legal consequences, especially when no precise example can be given. It is true that no set of draft articles, in whatever form they may eventually be adopted, can freeze the law, and there is a standing possibility of new rules of international law in this field. But this point can be made in the commentary, and the *lex specialis* principle will also apply. On balance there is no strong case for the retention of article 38. If it is to be retained, it is not clear why it should be limited to the rules of customary international law. Rules of international law deriving from other sources might also be relevant. The Special Rapporteur proposes below a reformulation of article 38, which is placed in square brackets to reflect his doubts as to its usefulness.[115]

5. The injured State

(a) *Article 40. Meaning of injured State*

(i) *The preparatory work*

66. Part one of the draft articles as adopted on first reading did not use the term "injured State". The concept was, however, frequently referred to in the commentary, and it was understood that it would be necessary further on in the text to identify the State or States which, because they were injured by the breach, would be entitled to invoke responsibility.[116]

67. The first attempt to formulate the notion was made by Mr. Willem Riphagen in 1984, and took the form of a definition. In support of his approach, he explained that:

> [S]ince the whole of part 2 was supposed to deal with new rights and obligations arising between States as a consequence of an internationally wrongful act committed by one of them, a determination of which State (or States) was (or were) to be considered as the "injured State(s)" should appear at the outset.[117]

His proposal came after an extensive debate on the notion of injured State held within the Commission in preceding years.[118] Excluding the existence of an "international law of tort", the Special Rapporteur had argued that in most cases, the determination of the injured State would not create any particular difficulty. Problems could arise, however,

> when a primary rule of international law is clearly established for the protection of extra-State interests, and where a secondary rule of international law permits or even obliges other States to participate, actively or passively, in the enforcement of a primary rule.[119]

68. Members of the Commission were rather divided on a number of the underlying issues, particularly with regard to the position of States in case of an international crime in the sense of article 19. No one actually opposed the inclusion of a provision dealing with the notion of the "injured State". As to its formulation, however, there was a range of views. Some members of the Commission endorsed the rather detailed approach proposed by the Special Rapporteur, while others suggested either "a general formula flexible enough to cover all cases"[120] or, on the contrary, a more refined provision, drawing a distinction "between directly affected States and other States, particularly in view of the entitlement of those States individually to invoke the legal consequences indicated in the articles that followed".[121]

69. In 1985, the Commission provisionally adopted article 5 of part two with commentary. The drafting followed the structure of the provision proposed by the Special Rapporteur, Mr. Riphagen, but with some

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[114] *I.C.J. Reports 1997* (see footnote 18 above), p. 53, para. 76.

[115] For the formulation proposed, see paragraph 119 below.

[116] See, for example, *Yearbook … 1973*, vol. II, document A/9010/Rev.1, commentary to article 1, pp. 174–176, paras. (5) et seq. Article 33, paragraph 1 (*b*), as adopted on first reading, used the phrase "the State towards which the obligation existed" (implying a purely bilateral approach). See the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), p. 73, para. 290.

[117] *Yearbook … 1984*, vol. II (Part Two), pp. 101–102, para. 355. The following year, Mr. Riphagen renewed his proposition in the form of article 5 of part two of the draft articles, together with a commentary thereto (see Yearbook … 1985, vol. II (Part One), document A/CN.4/389, pp. 5–8).

[118] See *Yearbook … 1982*, vol. II (Part One), document A/CN.4/354 and Add.1 and 2, pp. 36–39, paras. 90–101, and *Yearbook … 1983*, vol. II (Part One), document A/CN.4/366 and Add.1, especially pp. 13–15, paras. 72–78 (where a distinction is drawn between the State having an interest affected and the State "party to the breach"), and pp. 21–23, paras. 112–125 (where the general distinctions and the rights an injured State is entitled to invoke in the different situations are listed). For the debates on the matter before the drafting proposal, see *Yearbook … 1982*, vol. I, 1736th meeting, pp. 230–236, and *Yearbook … 1983*, vol. I, 1772nd, 1777th and 1780th meetings.

[119] *Yearbook … 1983*, vol. II (Part One) (see footnote 118 above), p. 21, para. 114.

[120] *Yearbook … 1984*, vol. II (Part Two), p. 103, para. 367. The point was, for example, lucidly made by Mr. Balanda:

> "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).

[121] *Yearbook … 1984*, vol. II (Part Two), p. 103, para. 367.

modifications.[122] Most were of a rather minor character, but one substantial change raised criticism within the Commission. As one member put it:

> [T]he Special Rapporteur's original language, defining an "injured State" in terms of the breach of an obligation by the author State, had been replaced by a less satisfactory formulation in terms of the infringement of a right. In normal circumstances, the breach of an obligation by one State involved an infringement of the right of another State, but that was not always the case.[123]

70. Despite the level of detail adopted in what is the longest article of the entire text, article 5 was not intended to be exhaustive. Introducing the provision in the plenary, the Chairman of the Drafting Committee pointed out that:

> The purpose of article 5 was neither to define primary rules of international law, nor to provide an exhaustive list of situations in which a State could claim to be injured. It provided a general rule in paragraph 1, an indicative list in paragraph 2 and dealt with the rather special case of international crimes in paragraph 3.[124]

71. In the course of the debate, questions were raised as to the approach of the proposed article, and from a range of viewpoints. Sir Ian Sinclair was unconvinced "that the concept of the injured State could be dispensed with in the case of a breach of an obligation *erga omnes* and that every State without exception could be regarded as having an equal legal interest in the matter".[125] Mr. Ushakov expressed similar concerns, even with respect to international crimes: he did not share the view "that an international crime necessarily injured all States within the international community, since some of them would be injured directly, while others would not. Indeed, in some instances, no State was actually injured; it was rather the international community of States as such that was affected".[126] Since one of his examples was the case of aggression, he must have been talking about States other than the primary target. Obviously for every act of aggression there is a victim State; indeed it was the possible disparity between the interests of the victim State and those of third States which Sir Ian Sinclair had noted.[127] Questions were also raised as to the permissible range of responses where all or many States were deemed "injured" by the breach of a multilateral obligation. According to Mr. Lacleta Muñoz, "[w]hen the internationally wrongful act affected the collective interests of all the States parties, the response should be collective. Moreover, the article should indicate what those collective interests were".[128] The Special Rapporteur's defence of his proposal was rather indirect. Article 5 was, in his view, "a key article", which could not be a simple reference to primary rules outside the draft, given the need for precision.[129] On the other hand, "[a]rticle 5 (*e*), by referring to 'all other States' as being injured States in connection with international crimes, did not mean that all those States were injured to the same degree or that each of them could take any action it saw fit".[130] The point was echoed by the Chairman of the Drafting Committee, who noted that:

> The Drafting Committee had considered the question whether, in the case of an international crime, all injured States should have the same right of response, or whether the response should be graduated according to the seriousness of the infringement of the right or interest in each case. It had been thought that, if that question was to be dealt with, the proper place to do so would be in the articles defining the legal consequences of international crimes.[131]

But the Commission did not return to the issue in drafting articles 51–53. Moreover, the question arises more generally with respect to breaches where all or many States are deemed "injured", whether or not they are classified as "international crimes".

72. On other points, Mr. Reuter queried the distinction drawn in the text between injuries based on treaty and on general international law: "if … some legal rules created subjective rights, would it not be advisable to draft a paragraph to that effect which did not distinguish between customary and written rules?"[132] One member even cast doubt on the basic assumption of article 40 that some injuries could be shared by all or many States. Mr. Ushakov, speaking against paragraph 3, noted that "[r]ights and obligations *erga omnes* certainly existed in general international law, but relations between States were, in the last analysis, always of a bilateral nature".[133]

(ii) *Article 40 and its commentary*

73. As adopted on first reading, article 40 provides as follows:

Article 40. Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part one, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(*a*) If the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(*b*) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(*c*) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

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[122] See *Yearbook … 1985*, vol. II (Part Two), pp. 25–27. In 1996, that provision was adopted on first reading by the Commission as article 40 (*Yearbook … 1996*, vol. II (Part Two), p. 62).

[123] *Yearbook … 1985*, vol. I, 1929th meeting, p. 311, para. 59 (Sir Ian Sinclair).

[124] Ibid., p. 308, para. 27 (Mr. Calero-Rodrigues).

[125] *Yearbook … 1983*, vol. I, 1777th meeting, p. 130, para. 28; see also *Yearbook … 1984*, vol. I, 1865th meeting, pp. 303–304, paras. 4–5. Mr. Malek agreed, ibid., 1866th meeting, p. 310, para. 13.

[126] *Yearbook … 1984*, vol. I, 1861st meeting, p. 277, para. 4.

[127] He made the point again in the debate on the Drafting Committee's proposed article 5, *Yearbook … 1985*, vol. I, 1929th meeting, p. 311, para. 47; see also Mr. Roukounas, ibid., 1930th meeting, p. 312, para. 7, and *contra*, Mr. Flitan, ibid., p. 313, para. 10.

[128] *Yearbook … 1984*, vol. I, 1867th meeting, p. 316, para. 17.

[129] Ibid., p. 317, para. 26.

[130] Ibid., para. 28.

[131] *Yearbook … 1985*, vol. I, 1929th meeting, p. 309, para. 43 (Mr. Calero-Rodrigues).

[132] *Yearbook … 1984*, vol. I, 1861st meeting, p. 278, para. 11.

[133] *Yearbook … 1985*, vol. I, 1929th meeting, p. 310, para. 47. The remark is significant, given the importance of Soviet doctrine in relation to article 19.

(*d*) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(*e*) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) The right has been created or is established in its favour;

(ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(*f*) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime, all other States.

74. The commentary to article 40[134] notes that the question which State is responsible for an internationally wrongful act is answered in principle by part one of the draft articles, which defines an internationally wrongful act

solely in terms of obligations, not of rights. This was done on the assumption that to each and every obligation corresponds *per definitionem* a right of at least one other State.[135]

Likewise, in his second report on State responsibility, Mr. Roberto Ago had postulated that there was always "a correlation between a legal obligation on the one hand and a subjective right on the other". According to this view, it was "perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others".[136] This "exact" equivalence is expressed in a few crucial words in article 40, paragraph 1.[137] Thereafter part two of the draft articles speaks of the rights of "the" injured State, rather than the obligations of the State responsible for internationally wrongful conduct (hereinafter referred to as the responsible State).

75. Article 40 thus operates as the hinge of the entire draft, the connecting element between the treatment of obligations in part one and the treatment of rights in part two. Paragraph 1 having announced the exact correlation of obligations and rights, paragraph 2 then goes on to identify, in a non-exclusive way, cases where a State or States may be considered to have a right which is the correlative of an obligation breached. These cases vary from the dyadic right-duty relationship of a bilateral treaty or a judgement of an international court, to cases where the right arises under a rule of general international law or a multilateral treaty and all or many of the States bound by the rule or party to the treaty may be considered "injured". It also stipulates that in the case of "international crimes", *all* other States are injured and have a right to act.

76. As the commentary makes clear, the long and awkward catalogue in paragraph 2 is presumptive only. A particular treaty or rule may itself stipulate the entities (States or other persons) entitled to invoke responsibility for breach, on either an inclusive or an exclusive basis. In accordance with the *lex specialis* principle, such a stipulation will prevail.[138] But it is uncommon for a multilateral treaty to provide its own set of standing rules, and even less common for rules of general international law to do so. In most cases, the identification of the "injured State" in article 40 will govern by default.

(iii) *Comments of Governments on article 40*

77. Article 40 has attracted numerous comments by Governments. They express detailed and diverse opinions, but none questions the need for a provision in the draft articles dealing with the notion of injured States. Singapore, for example, describes the process of identifying the injured State as "vital in the allocation of certain privileges … [and] to legitimizing subsequent acts which would otherwise be wrongful".[139] Several Governments express the concern that the consequences of an internationally wrongful act are too broadly available. According to Austria, for example, the concept embodied in article 40 "has merits to the extent to which States are directly affected in their rights by violations of international law".[140] These doubts lead some Governments to question whether the element of actual loss or damage should not be the main requirement in the definition of an injured State. Consistently with its approach to article 1 of the draft, France considers that article 40 should "make express reference to the material or moral damage suffered by a State as a result of an internationally wrongful act of another State", but does not reject the idea "that a State can suffer legal injury solely as a result of a breach of a commitment made to it" if the injury is "of a special nature".[141] Other

[134] Adopted in 1985 (see *Yearbook … 1985*, vol. II (Part Two), pp. 25–27), the commentary to article 40 [formerly art. 5] was not reviewed when the draft articles were adopted on first reading in 1996. The only change was a footnote to paragraph (3), noting that:

> "The term 'crime' is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term."

(*Yearbook … 1996*, vol. II (Part Two), p. 63)

[135] *Yearbook … 1985*, vol. II (Part Two), commentary to article 5 [present art. 40], p. 25, para. (2).

[136] *Yearbook … 1970*, vol. II, document A/CN.4/233, p. 192, para. 46.

[137] Curiously, however, article 40, paragraph 1, with its use of the conditional "if", apparently contemplates that an act which infringes the right of a State might not be wrongful. This might simply be a drafting lapse, or it might have been intended to cover cases where a right is infringed, but the wrongfulness of the act is precluded under part one, chapter V.

[138] *Yearbook … 1985*, vol. II (Part Two), commentary to article 5 [present art. 40], p. 26, paras. (5)–(6).

[139] *Yearbook … 1998* (see footnote 35 above), p. 139; and p. 141 (the United Kingdom having "no comment on the greater part of draft article 40". Uzbekistan suggested that the provision "be transferred to part two, chapter II" (ibid., p. 141). See also A/CN.4/496 (footnote 3 above), p. 19, para. 122.

[140] *Yearbook … 1998* (see footnote 35 above), p. 138. Thus Austria wonders whether the concept of injured State is workable where there is no directly affected State (referring, inter alia, to human rights violations).

[141] Ibid. France accordingly proposes another formulation for article 40 (ibid., p. 143). In a similar vein, Japan finds it "more appropriate

(*Continued on next page.*)

Governments strongly oppose that view, on the assumption that the non-inclusion of damage as an element of a wrongful act does not entitle all States to invoke the responsibility of the wrongdoing State. On the contrary, "[o]nly the State or States whose subjective right has been injured may do so, i.e. those in respect of which an obligation has been breached".[142] Although in a slightly different form, that issue reappears as an important point in the discussion of article 40, paragraphs 2–3, which have been subject to much comment and criticism.

78. It is true that some States support the general approach taken by the Commission on first reading. Germany, for example, points out that "the nature of the 'primary' rules of international law and the circle of States participating in their formation are relevant to the indication of the State or States 'injured' by the breach of an obligation under such 'primary rules'".[143] But the majority of Governments commenting on draft article 40 express serious concerns as to the wording and content of paragraph 2 (*e*) and (*f*), and paragraph 3. A first issue relates to the "absurd results" to which these provisions could lead if they were to establish "a competitive or cumulative competence of States to invoke legal consequences of a violation".[144] Support has thus been given to the proposed distinction[145] between States specifically injured by an internationally wrongful act and States having a legal interest in the performance of the obligation.[146] The former would have the right to seek reparation in their own right, whereas the latter could only claim the cessation of the wrongful conduct and for reparation to be made to the specifically injured State.[147] Moreover, in the opinion of the United Kingdom, the Commission should consider whether "the right of States to consider themselves 'injured' … should be modified if the State principally injured has indicated that it has decided freely to waive its rights arising from the breach or if the State consents to the 'breach'".[148]

79. A number of other issues have been raised in respect of paragraph 2 (*e*) and (*f*). They can be summarized as follows:

(*a*) The combined reference to multilateral treaties and customary international law seems problematic. For some Governments, it would be preferable to deal with the two sources in separate provisions;[149] for others, mention should also be made either of bilateral custom or obligations arising from unilateral acts.[150]

(*b*) As to paragraph 2 (*e*) (ii), several Governments are concerned by its inconsistency or "possible overlap … with article 60 of the 1969 Vienna Convention",[151] the provisions of which appear "narrower".[152] Hence the United Kingdom strongly favours the approach embodied in article 60 of the Convention which, compared to the vague criterion in article 40, "has the effect of limiting the concept of the injured State to those States that are materially affected".[153] More broadly, some Governments point out that the standing of injured States in case of breach of a multilateral treaty obligation should first be governed by the treaty itself and, as appropriate, by the law of treaties.[154]

(*c*) As to paragraph 2 (*e*) (iii), some Governments call for a clarification, dealing especially with the invocation of reparation by States parties that have not actually been harmed by the breach.[155]

(*d*) As to paragraph 2 (*f*), France deems it "completely inappropriate to allow States to intervene so in situations which are not of direct concern to them",[156] while other Governments consider that a clarification of the term "collective interests", or of the kind of treaties covered, is needed.[157]

80. As far as paragraph 3 is concerned, Governments have expressed differing views. Some are of the opinion that, in the case of crimes also, different categories

(*Footnote 141 continued.*)

that an injured State suffering no tangible damage to its interests is, in principle, entitled only to request the wrongdoing State to cease its internationally wrongful act" (*Yearbook … 1999* (see footnote 43 above), p. 108). See *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 23rd meeting (A/C.6/54/SR.23), para. 67 (Bulgaria) and ibid., 26th meeting (A/C.6/54/SR.26), para. 42 (Burkina Faso) (the latter suggesting that the definition should also include the "element of causality between the injury and the act"). See also A/CN.4/504 (footnote 3 above), p. 18, para. 62.

[142] Italy (*Yearbook … 1998* (see footnote 35 above), p. 104); see also *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 23rd meeting (A/C.6/54/SR.23), para. 54 (Venezuela) and A/CN.4/504 (footnote 3 above), para. 62.

[143] *Yearbook … 1998* (see footnote 35 above), p. 139. See also Italy, which endorses the conceptions reflected in article 40 (ibid., pp. 118–119).

[144] Ibid., p. 138, Austria. For the United States, these provisions reflect "unacceptable and overbroad conceptions of injury" (ibid., p. 142).

[145] See *Yearbook … 1999*, vol. II (Part Two), p. 18, para. 29 (*a*).

[146] See A/CN.4/504 (footnote 3 above), para. 64. The distinction has, however, been criticized as serving no useful purpose given the uncertainty of the concept of States having a legal interest; see *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 22nd meeting (A/C.6/54/SR.22), para. 4 (Denmark, on behalf of the Nordic countries).

[147] A/CN.4/504 (see footnote 3 above), para. 64. See also Austria (*Yearbook … 1998* (footnote 35 above), p. 141).

[148] *Yearbook … 1998* (see footnote 35 above), p. 142.

[149] A/CN.4/496 (see footnote 3 above), para. 123. Singapore considers it a condition for invocation of responsibility under customary international law that there exist a "sufficient nexus between the violator and the State claiming status as an injured State" (*Yearbook … 1998* (footnote 35 above), p. 139).

[150] A/CN.4/504 (see footnote 3 above), para. 66. There was also support for an illustrative rather than an exhaustive list (ibid.).

[151] *Yearbook … 1998* (footnote 35 above), p. 141.

[152] Ibid., United Kingdom.

[153] Ibid., p. 142. See also the proposition of the United States (ibid.).

[154] Ibid., United States; see also *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 23rd meeting (A/C.6/54/SR.23), para. 58 (Israel).

[155] United States (*Yearbook … 1998* (footnote 35 above), p. 142), Japan (*Yearbook … 1999* (footnote 43 above), p. 108); see also *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 23rd meeting (A/C.6/54/SR.23), para. 41 (Australia, suggesting that reparation in such cases be "limited to assurances and guarantees of non-repetition").

[156] *Yearbook … 1998* (footnote 35 above), p. 141.

[157] Ibid., p. 142, United States; and Japan (*Yearbook … 1999* (see footnote 43 above), p. 108); see also *Official Records of the General Assembly, Fifty-fourth Session, Sixth Committee*, 23rd meeting (A/C.6/54/SR.23), para. 42 (Australia).

of injured States should be made, "leading to different 'rights of injured States'".[158] Thus the United States is concerned by the "disruptive results" to which paragraph 3 could lead. In its opinion, the fact that States are all individually rather than collectively injured by a crime in the meaning of article 19, could give rise to "multiple claims for reparation … [and] result in inadequate compensation for those States that can indeed identify injury".[159] Other Governments, however, support the approach taken by the Commission on first reading and consider in particular that, when a crime in the sense of article 19 is committed, every State is injured and can invoke the responsibility of the wrongdoing State.[160] Switzerland makes the helpful point that, "to the extent that the concept of 'crime' overlaps with a violation of the peremptory norms of international law", all States can be considered as injured, notwithstanding the qualification of the wrongful act as a crime; accordingly, the criminalization of certain types of conduct is unnecessary "[i]n order to attach especially severe consequences" to them.[161]

81. Many of these criticisms of article 40 are echoed in the literature.[162]

(b) *Some preliminary issues*

82. Before turning to the possible ways in which these concerns may be resolved, it is necessary to analyse article 40 in more detail. Four issues may be mentioned.

(i) *The identification of legal interest and subjective right*

83. An initial question is the identification for all purposes of responsibility with the subjective rights of an injured State or States. This was rooted in earlier theories of State responsibility (especially Anzilotti's), based on the paradigm of bilateral relations as characteristic of international law. At the time of his second report[163] (issued in the same year as the Court's dictum in the *Barcelona Traction* case[164]), Mr. Ago, Special Rapporteur, had only just begun to formulate the idea of responsibility to the international community as a whole. For this purpose it matters little whether the language of article 19 ("international crimes") is used or that of the Court itself when it referred to an obligation held towards the international community as a whole (*erga omnes*).[165] In either case, there is a problem in the immediate identification of that responsibility with the "subjective" rights of particular States.

84. The term "subjective" may be used here only to make the point that the "secondary" legal relations arising from a breach of an international obligation are, necessarily, legal relations between the author of the breach and other persons or entities. There is no such thing as "responsibility in the air"; responsibility is always responsibility to persons, and is in that sense "subjective".[166] But this does not mean that obligations of a collective or communitarian character are reduced forthwith to bilateral relations. In discussing the strict correlation between obligation and rights, implicit reliance was laid on the work of Hohfeld and his "jural correlatives".[167] But Hohfeld stressed the variety of legal relations, and was certainly not concerned to reduce legal relations to a single form. In the field of international relations there is no longer (if there ever was) any a priori reason to reduce all relations of responsibility to the form of a bilateral right-duty relation of two States, as under a bilateral treaty.

85. For example, Ethiopia and Liberia were not themselves the beneficiaries of the obligation they invoked in the *South West Africa* case.[168] The beneficiaries were the people of South West Africa itself; it was their "subjective" right to have the Territory administered on their behalf and in their interest which was at stake.[169] Ethiopia

[158] Germany, distinguishing between the right to call for cessation and resumed performance of the obligation on the one hand, and the right to claim reparation on the other hand (*Yearbook … 1998* (footnote 35 above), p. 143); see also A/CN.4/496 (footnote 3 above), para. 123 (referring as a criterion for the distinction to "the proximity of a State to the breach").

[159] *Yearbook … 1998* (footnote 35 above), p. 144. The United States nonetheless points out that, even if a State is principally affected, "widespread injuries might be suffered by a number of States" (ibid.).

[160] Ibid, pp. 118–119 (Italy). See also A/CN.4/504 (footnote 3 above), para. 65. For the Czech Republic, paragraph 3 "is certainly not insignificant, and it has important consequences in terms of both reparation and countermeasures" (*Yearbook … 1998* (footnote 35 above), p. 143).

[161] *Yearbook … 1998* (footnote 35 above), p. 143.

[162] See, for example, Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status"; Hutchinson, "Solidarity and breaches of multilateral treaties"; Kawasaki, "The notion of 'injured State' in the law of international responsibility of States: the ILC's draft article 5 of part two on State responsibility (3 parts)"; Simma, "Bilateralism and community interest in the law of State responsibility"; Charney, "Third State remedies in international law"; Vadapalas, "L'intérêt pour agir en responsabilité internationale"; Frowein, "Reactions by not directly affected States to breaches of public international law"; Simma, "From bilateralism to community interest in international law"; Annacker, "Part two of the International Law Commission's draft articles on State responsibility"; de Hoogh, op. cit.; Perrin, "La détermination de l'État lésé: les régimes dissociables et les régimes indissociables"; Ragazzi, *The concept of international obligations* erga omnes; Bederman, "Article 40(2)(E) & (F) of the ILC draft articles on State responsibility: standing of injured States under customary international law and multilateral treaties"; Kawasaki, "The 'injured State' in the international law of State responsibility"; and Crawford, "The standing of States: a critique of article 40 of the ILC's draft articles on State responsibility".

[163] *Yearbook … 1970*, vol. II, p. 177, document A/CN.4/233.

[164] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

[165] For the reasons given in his first report, *Yearbook … 1998* (see footnote 23 above), the Special Rapporteur prefers the use of the Court's terminology of obligations to the international community as a whole. This is certainly the case in the context of article 40, which is concerned with the right to invoke responsibility rather than for the consequences of doing so (ibid., p. 24, para. 98).

[166] In the Special Rapporteur's view, the possible confusion between a very unusual sense of the term "subjective" and its more usual sense is a sufficient reason for avoiding it altogether. In its ordinary sense, there can be no "non-subjective" obligation or right; the term is therefore unnecessary as well as potentially misleading. See his second report, *Yearbook … 1999* (footnote 8 above), p. 10, para. 6, and to similar effect, de Hoogh, op. cit., p. 20.

[167] Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*.

[168] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

[169] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding*

(*Continued on next page.*)

and Liberia claimed an adjectival or procedural right, to seek to ensure that South Africa complied with its obligations to the people of the Territory. There is no analytical reason for disallowing such a legal relation,[170] and Hohfeld would have had no difficulty in fitting it into his scheme.[171] A legal system which seeks to reduce the legal relations between South Africa, the people of the Territory and the two applicant States to a bilateral form is deficient. Yet this is what article 40 appears to do, with its "exact" equivalents.[172]

(ii) *The treatment of human rights obligations*

86. A second question involves the treatment of human rights obligations. Under article 40, paragraph (2) (*e*) (iii), every State bound by a human rights obligation is injured by its breach.[173] Indeed, on the face of it every State is considered as injured even by an individual and comparatively minor breach of the fundamental right of one person (not its national). According to the commentary,

> it is clear that not every one of the rights enumerated in these instruments, nor every single act or omission attributable to a State which could be considered as incompatible with the respect of such rights … must necessarily be qualified as giving rise to the application of the present provision.[174]

But this protestation is not reflected in the text of paragraph (2) (*e*) (iii). Nor is any attempt made (e.g. by reference to the notion of systematic or gross breaches) to distinguish between cases where all States are injured and those where the individual beneficiary of the human right is injured and States parties to the human rights obligation have a general interest in compliance.

87. Even in the case of well-attested, gross or systematic violations of human rights, it is suggested that a distinction should still be drawn between the rights of the victims and the responses of States. Otherwise the effect of article 40, paragraph (2) (*e*) (iii), is to translate human rights into States' rights, and this seems no more justified when one is dealing with systematic violations than with individual ones. It may be that third States are considered as having more extensive rights to intervene or to respond to systematic breaches of human rights than they might have in cases of individual breach, though the International Covenants of 1966 do not say so.[175] But even if the rights of third States are more extensive, they do not seem to change in character. The States concerned may be representing the victims, but they are not to be identified with them, and they do not become the right-holders because they are recognized as having a legal interest in the author State's compliance with its human rights obligations.

88. Paragraph (2) (*e*) (iii) also raises the question why human rights are singled out as a category for special treatment. According to the commentary:

> The interests protected by [human rights] provisions are not allocatable to a particular State. Hence the necessity to consider in the first instance every other State party to the multilateral convention, or bound by the relevant rule of customary law, as an injured State.[176]

But just because human rights obligations under multilateral treaties or general international law are not "allocatable" or owed to any particular State does not make it necessary that all States concerned should be considered as obligees, and certainly not "in the first instance". Moreover, human rights obligations are not the only class of international obligations whose performance cannot be considered as affecting any "particular State" considered alone. This is also true of some obligations in such fields as human development, world heritage and environmental protection, which could also have been mentioned in article 40.

89. What does seem to be special about human rights obligations (as compared with these other fields) is that they are specifically formulated in terms of the rights of individuals, whereas, for example, international environmental instruments speak of the obligations of States. By contrast, international law rules relating to the treatment of aliens in the field of diplomatic protection were deliberately articulated as involving the rights of States, as PCIJ stressed in the *Mavrommatis* case.[177] The use of

(*Footnote 169 continued.*)

Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 56, para. 127, the Court emphasized that in the case of South West Africa "the injured entity is a people", and not a State or group of States. Cf. *Yearbook … 1980*, vol. II (Part One), document A/CN.4/330, p. 118, paras. 56–57.

[170] A narrow majority of the Court in 1966 held that the applicant States had no individual legal interests in the due administration of the Mandate, which they could vindicate under the compromissory clause. But the "majority" did not deny that the Mandate *could* have recognized the right of all States Members of the League of Nations to enforce the obligations of the mandatary by proceedings before the Court (see, for example, *I.C.J. Reports 1966* (footnote 168 above), p. 23, para. 16). The result was reached by restrictive interpretation of the compromissory clause. In any event the decision was strongly criticized and must now be read in the light of the Court's dictum in the *Barcelona Traction* case (see footnote 164 above), pp. 32–33.

[171] There are certainly cases (e.g. arts. 45 and 48 of the European Convention on Human Rights; or the successor provision, art. 33 of Protocol No. 11 of the Convention) in which such a general interest has been recognized, without equating the rights of the States taking action to the substantive rights they are seeking to protect.

[172] In the *Barcelona Traction* case itself, the Court noted that "Responsibility is the necessary corollary of a right" (*I.C.J. Reports 1970* (footnote 164 above), p. 33, para. 36). But it did so after first drawing a distinction between the rights of States vis-à-vis other States (e.g. in the field of diplomatic protection) and obligations *erga omnes* which all States have a "legal interest" in protecting. It was not saying that the only cases of responsibility are cases where a State's individual rights are infringed.

[173] As drafted, paragraph 2 (*e*) (iii) applies to any "right … created or … established for the protection of human rights and fundamental freedoms". It is odd to speak about a right established for the protection of a right: though this seems to be merely a drafting problem, it raises further doubts as to the scope of the subparagraph.

[174] *Yearbook … 1985*, vol. II (Part Two), commentary to article 5 [present art. 40], p. 27, para. (22).

[175] Different rules of admissibility apply to inter-State complaints of systematic violations of human rights than to individual ones. See, for example, the judgement of the European Court of Human Rights in *Ireland* v. *United Kingdom* (European Court of Human Rights, Series A*: Judgments and Decisions*, vol. 25, *Judgment of 18 January 1978* (Council of Europe, Strasbourg, 1978), p. 64, para. 159).

[176] *Yearbook … 1985*, vol. II (Part Two), commentary to article 5 [present art. 40], p. 27, para. (20).

[177] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12. The same principle was affirmed by ICJ in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181–182, and also in the *Barcelona Traction* case (see footnote 164 above), pp. 32–33.

the language of human rights in the Charter of the United Nations and in human rights texts since 1948 has involved a considered and consistent change in terminology. It must have legal significance. But it provides no reason for treating human rights obligations as "allocatable" to States "in the first instance".

(iii) *Other cases of injury arising from multilateral legal relations*

90. Apart from "international crimes", two other cases are given in article 40 of the recognition of multilateral rights. One case, not identified in article 40, also calls for consideration.

a. Integral obligations

91. In accordance with article 40, paragraph 2 (*e*) (ii), every State party to a multilateral treaty, or bound by a rule of general international law, is injured by a breach of an "integral obligation".[178] This is defined as a breach which "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties". The commentary says little more than that the paragraph

> deals with a situation of fact recognized as a special one also in the Vienna Convention on the Law of Treaties in so far as multilateral treaties are concerned (see e.g. article 41, paragraph 1 (*b*) (i), article 58, paragraph 1 (*b*) (i), and, in a somewhat different context and wording, article 60, paragraph 2 (*c*)).[179]

But of the three provisions of the 1969 Vienna Convention mentioned in the commentary,[180] only article 60, paragraph 2 (*c*) actually deals with questions which are cognate to responsibility.[181] Article 60, paragraph 2 (*c*), is concerned with any treaty which is "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". This is narrower than draft article 40, paragraph 2 (*e*) (ii). While applying an a priori test of effect upon other States, it applies to the treaty as a whole and not to the particular obligation breached. Probably this difference can be explained by the difference in context. The Vienna Convention is concerned with the treaty instrument as a whole, whereas the draft articles are concerned with particular obligations. Thus there seems to be no difficulty in transposing the notion of integral obligations to the law of State responsibility, and correspondingly no difficulty in treating each State as individually injured by a breach of an integral obligation.

b. Obligations *erga omnes partes*

92. In addition, article 40, paragraph 2 (*f*), defines as injured all other States parties to a multilateral treaty "[i]f the right infringed … has been expressly stipulated in that treaty for the protection of the collective interests of the States parties". These may be referred to as obligations *erga omnes partes*. They concern obligations in the performance of which all the States parties are recognized as having a common interest, over and above any individual interest that may exist in a given case. The commentary gives as an example "the concept of a 'common heritage of mankind', as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction".[182] This suggests that the requirement of express stipulation is to be interpreted with some flexibility. Nonetheless, the commentary notes that "in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application", and it is textually limited in two ways, first to express stipulations, and second to such stipulations in multilateral treaties.[183] As to the first, there is a wide diversity of modern multilateral treaties concerned to vindicate collective interests, and to require an express stipulation seems too narrow. As to the second, the draft articles proceed on the basis that obligations under treaties and under general international law are to be treated as equivalent,[184]

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[178] The notion of "integral" obligations was developed by Sir Gerald Fitzmaurice as Special Rapporteur on the law of treaties. See *Yearbook ... 1957*, vol. II, document A/CN.4/107, p. 54, para. 124, and also Sachariew, loc. cit., p. 281.

[179] *Yearbook … 1985*, vol. II (Part Two), commentary to article 5 [present art. 40], pp. 26–27, para. (19).

[180] Article 41, paragraph 1 (*b*), is concerned with the modification *inter se* of a multilateral treaty by only some of its parties. Such a modification is permissible if it is not prohibited by the treaty and "does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations". The test of permissibility here depends on whether the particular modification in fact affects the position of the other parties to the Vienna Convention. It is not an a priori test, and it is not limited to modifications which "necessarily affect" the other parties. Rather it extends to those modifications which in fact affect them in the particular case. There is no requirement that it affect *all* the other parties: a modification which affected some or perhaps any of them would be excluded. Article 58, paragraph 1 (*b*), is concerned with the suspension of operation of a multilateral treaty between only some of its parties: quite properly it applies the same test as does article 41 of the Convention for modifications *inter se*.

[181] Article 60, paragraph 2, provides as follows:

> "2. A material breach of a multilateral treaty by one of the parties entitles:
>
> "(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State; or
>
> (ii) as between all the parties;
>
> "(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>
> "(*c*) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty."

These provisions are subject to a contrary provision in the treaty itself (art. 60, para. 4), and do not apply to certain cases such as humanitarian treaties which should be kept in full force irrespective of breaches (art. 60, para. 5). The term "specially affected" is not defined, and the commentary to article 60 does not take matters further. See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, p. 255, para. (7). In the *Namibia* case the Court expressed the view that article 60 was "in many respects" declaratory of existing international law (*I.C.J. Reports 1971* (footnote 169 above), p. 47, para. 94).

[182] *Yearbook … 1985*, vol. II (Part Two), commentary to article 5 [present art. 40], p. 27, para. (23).

[183] Ibid., para. (24). This is said, however, not to "exclude the development of customary rules of international law to the same effect" (ibid., para. (25)).

[184] See draft article 16, as adopted by the Drafting Committee, *Yearbook … 1999*, vol. 1, 2605th meeting, p. 275, para. 4; and the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 13–15, paras. 16–26.

and it may well be the case that general international law parallels and reinforces a multilateral treaty provision in the public interest. Moreover, there is no reason to limit the category of "protection of collective interests" to the collective interests of States, narrowly conceived. Human rights treaties are plainly (even if not always explicitly) designed to protect a general common interest. Article 40, paragraph 2 (*e*) (iii), is therefore better regarded as cognate to article 2 (*f*).[185]

c. Specially affected States

93. While recognizing the possibility that all States, or a broad group of States, may be legally interested in the performance of an obligation, article 40, paragraph 2, conspicuously fails to recognize the case of a State or States "specially affected" by a breach. In this respect it fails to follow the logic of article 60, paragraph 2, of the 1969 Vienna Convention. It would be odd if a State specially affected by a breach was entitled to suspend the underlying obligation but not to insist on its performance. Indeed the suspension of the obligation may actually be *convenient* so far as the State in breach is concerned. Even if it does not release that State from secondary obligations already accrued,[186] it will have the effect of releasing it from any obligation of cessation (so far as relations with the suspending State are concerned), and of any legal consequences of what would otherwise be a continuing wrongful act. Suspension of treaty relations is no substitute for an adequate regime of State responsibility.

(iv) *Consequences of identifying multiple "injured States"*

94. Under article 40, all "injured States" are apparently treated in exactly the same way. Each State injured by an internationally wrongful act is entitled to seek cessation and reparation[187] and to take countermeasures if cessation and reparation are not provided.[188] This may be appropriate where the "subjective" or individual rights of States are concerned. A State whose right has been breached is entitled to protest, to insist on restitution or (even where restitution may be possible) to decide that it would prefer compensation. It may insist on the vindication of its right or decide in the circumstances to overlook it and waive the breach. But the position where the obligation is a multilateral one may well be different. For example, the particular beneficiary of a substantive obligation (e.g. the individual whose right has been violated contrary to a human rights obligation, the people whose right to self-determination has been denied or even the State actually harmed by a breach of an obligation *erga omnes*) may validly prefer compensation to restitution. By what right could others, even with a recognized legal interest in compliance, countermand that preference?

95. Again there is a contrast with article 60, paragraph 2, of the 1969 Vienna Convention, which is at pains to define the steps that "specially affected" or "integrally affected" States can take against the responsible State. These steps affect only the relations of the affected State vis-à-vis the responsible State, and allow only suspension of treaty relations. More drastic measures require the unanimous agreement of the other States parties.

(v) *Conclusion on article 40*

96. As the present account shows, those aspects of article 40 which relate to multilateral obligations, including obligations *erga omnes*, have never been thoroughly considered. In particular, the Commission never returned to consider that definition in the light of the consequences dealt with further on in part two. In the view of the Special Rapporteur, many of the criticisms of article 40, made by members during its drafting, by Governments since its adoption, as well as in the literature, are justified. Article 40 is defective in a number of respects:

(*a*) In its premature conversion from the language of obligation (the key concept in part one) to the language of right;

(*b*) In its apparent assumption that all responsibility relations are to be assimilated to classical bilateral right-duty relations (an assumption contradicted by ICJ in the *Barcelona Traction* case[189]), or alternatively in its failure to spell out the ways in which multilateral responsibility relations differ from bilateral ones;

(*c*) In the equation of all categories of injured State, with all apparently having the same independent rights;

(*d*) In particular, in its failure to distinguish between States "specially affected" by a breach of a multilateral obligation and States not so affected;[190]

(*e*) In its erratic treatment of multilateral obligations (for example, the unexplained distinction between treaty and non-treaty obligations, the unjustified assumption that regimes of common interest can only be created by multilateral treaties through express stipulations, and in singling out human rights for special treatment in vague and overly broad terms which conflict or overlap with other provisions of the definition);

(*f*) In the circuitous and prolix drafting of paragraph 2, which overshadows the basic point in paragraph 1.

As it stands, it is doubtful whether article 40 provides a suitable basis for the codification and progressive development of the legal consequences of State responsibility.

(c) *Options for the reformulation of article 40*

97. The primary statement in modern international law of the idea of legal injury and of standing to protest an injury is that of ICJ in the *Barcelona Traction* case. The Court there drew a distinction between rights arising in

[185] As a general matter, human rights obligations are either obligations *erga omnes partes* or obligations *erga omnes*, depending on their universality and significance.

[186] See the 1969 Vienna Convention, art. 72, para. 1.

[187] See articles 41–42.

[188] See article 47. The only (indirect) qualification is provided by article 49, with its requirement that countermeasures "shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State".

[189] See footnote 164 above.

[190] See the 1969 Vienna Convention, art. 60, para. 2 (*b*).

a bilateral context (that of diplomatic protection) and legal interests of the international community in respect of certain essential obligations. The crucial passage is as follows:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> …
>
> Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so.[191]

The distinction between individual rights of States and the legal interests of several or all States is drawn very clearly. Moreover, this "essential distinction" was not without significance for that case. Although Belgian nationals were the shareholders in the Canadian company (and to that extent Belgium might be thought "specially affected" by Spain's action), in the circumstances Spain owed an obligation only to Canada as the State of nationality of the corporation, and Belgium therefore had no right to invoke responsibility.[192] It can be inferred from this passage that, had an obligation *erga omnes* been involved, the result could have been different.

98. If there is an essential distinction for the purposes of State responsibility between breaches of bilateral obligations and breaches of multilateral obligations (in particular, obligations *erga omnes*), it is necessary to treat them separately in any discussion of article 40.

(i) *Article 40 and bilateral obligations*

99. A bilateral international obligation is one to which there are only two parties (obligee and obligor). Now it is possible that one of those parties, the obligor, is not a State; it might be an international organization or some other "subject" of international law. Despite the general character of part one, dealing with all obligations of States, part two does not deal with all the secondary rights and permissible responses of persons or groups which are not States. There is thus a discrepancy between the scope of part one and of part two, but as noted above,[193] this is not a reason for limiting the scope of part one. It may be, however, that a savings clause should be inserted in part two which adverts to the different scope of that part and which avoids any inference that might be drawn, *a contrario*, from the detailed treatment of States as obligors in parts two and two bis. The following provision is suggested:

> "This [part] is without prejudice to any rights, arising from the commission of an internationally wrongful act by a State, which accrue to any person or entity other than a State."

100. Turning to the case of the strictly bilateral obligation as between one State and another, the first point to be made is that bilateral obligations can arise from a variety of sources, including general international law, bilateral or multilateral treaties or unilateral acts. For example, it seems that the legal relations that arise from the Vienna Convention on Diplomatic Relations (and equivalent rules of general international law) are essentially bilateral in character. These provisions give rise to obligations between the particular sending State and the particular receiving State. The same is true of the general international law rules and standards of diplomatic protection, as the Court made clear in *Barcelona Traction* (see paragraph 97 above).

101. For the purposes of the draft articles, however, not merely is it unnecessary to specify in which cases particular multilateral treaties or rules of international law produce bilateral obligations; to do so would be inconsistent with the underlying distinction between primary and secondary obligations, on which the draft articles are founded. It is not the function of the draft articles to specify the form or content of individual primary obligations. Thus it is sufficient for present purposes to acknowledge the existence of both bilateral and multilateral obligations, leaving the application of that distinction to other forums.

102. On that basis the treatment of bilateral obligations is a relatively simple matter. In the case of such obligations:

(*a*) Only the State which is the obligor is "injured" by a breach;

(*b*) That State can validly consent to conduct which would otherwise be a breach,[194] or waive its consequences;

(*c*) That State can elect to receive compensation rather than restitution, or can be satisfied with assurances as to the future in lieu of any form of reparation;

(*d*) That State can take countermeasures in respect of the breach, subject to the general conditions for countermeasures set out in the draft articles.

103. As a matter of formulation, present article 40, paragraph 2, devotes no less than four paragraphs to situations which essentially involve bilateral obligations. These are set out in subparagraphs (*a*)–(*d*).[195] It is suggested that this catalogue is unnecessary and undesirable. It is not the function of the draft articles to say when a State is the (only) beneficiary or obligor of an international obligation, since this depends on the terms and interpretation of that obligation. All the "bilateral" situations dealt with

[191] *I.C.J. Reports 1970* (see footnote 164 above), p. 32, paras. 33 and 35.

[192] The Court noted the existence of exceptional cases where a State other than the State of nationality would have the right (ibid., pp. 38–40). In such a case, Spain might have had parallel bilateral obligations to different States, each of which could exercise the "correlative rights of protection" individually.

[193] See paragraph 7 above.

[194] See draft article 29 (as adopted by the Drafting Committee), *Yearbook … 1999*, vol. I, 2605th meeting, p. 275, para. 4; and the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 60–64, paras. 232–243.

[195] See paragraph 73 above.

in article 40, paragraph 2, can be subsumed in a simple formulation, which might read as follows:

> "For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if the obligation breached is owed to it [individually]."

The term "individually" evidently raises a question. On the one hand, it seems to be useful to distinguish the case of obligations owed collectively to a group of States or to the international community as a whole. On the other hand, this should not obscure the possibility that State A may at the same time owe the same obligation bilaterally (or more properly, an obligation with the same content) to one or many third States. For example, a receiving State may owe identical obligations to a large number of sending States in the field of diplomatic or consular immunities. But the possibility of parallel and identical bilateral obligations of one State towards others can be explained in the commentary; hence the term "individually" might well be retained.

104. It may be objected that all States have an interest of a general character in compliance with international law and in the continuation of institutions and arrangements (such as diplomatic immunity) which have been built up over the years. As ICJ said in the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the conduct of the Islamic Republic of Iran in participating in the detention of the diplomatic and consular personnel:

> [I]n recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[196]

Thus it can be argued that, even though particular obligations may be bilateral, the more general interest of States in compliance with international law should be recognized in some way. However, outside the field of "integral" obligations, or obligations *erga omnes partes*, as explained above, it is doubtful that States have a right or even a legally protected interest, for the purposes of State responsibility, in the legal relations of third States *inter se*.

105. No doubt there is room for some element of solidarity, even in purely bilateral contexts. In diplomatic practice it is not unusual for third States to take note of an evident breach and to remind the responsible State of their concerns. It seems, however, that this will not amount to the invocation of State responsibility by a third State, and that it does not need to be regulated in the draft articles. It should be sufficient for the commentary to reflect that the definition of "injured State" is concerned with the invocation of responsibility, and does not affect informal diplomatic exchanges with third States for the purpose of expressing concern and assisting in the resolution of conflicts.[197]

(ii) *Article 40 and multilateral obligations*

a. Types of multilateral obligations

106. In delimiting the notion of "injured State" for the purposes of responsibility, the essential problem evidently concerns multilateral obligations. These are obligations owed not individually to a particular State but to a collective, a group of States, or even to the international community as a whole. Again it is not necessary to say which particular obligations are multilateral in this sense. It is sufficient to affirm that the category exists. But it may be helpful to acknowledge the existence of some further subcategories or types of multilateral obligations. Three cases may be distinguished:

(a) *Obligations to the international community as a whole (*erga omnes*).* The first is the case where an obligation is owed to the international community as a whole, with the consequence that all States in the world have a legal interest in compliance with the obligation. This is the obligation *erga omnes* referred to by ICJ in *Barcelona Traction*.[198] From the Court's reference to the international community as a whole, and from the character of the examples it gave, it can be inferred that the core cases of obligations *erga omnes* are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (e.g. in the field of human rights). They are thus virtually coextensive with peremptory obligations (arising under norms of *jus cogens*). For if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole;

(b) *Obligations owed to all the parties to a particular regime (*erga omnes partes*).* The second is the case of the international regime in the maintenance and implementation of which all the States parties have a common legal interest. It may be referred to as an obligation *erga omnes partes.* It includes, in particular, those obligations which are expressed (or necessarily implied) to relate to matters of the common interest of the parties.[199] Examples of such obligations arise in the fields of the environment (for

[196] *I.C.J. Reports 1980* (see footnote 65 above), pp. 42–43, para. 92.

[197] The phrase "informal diplomatic exchanges" is taken from article 27 of the Convention on the settlement of investment disputes between States and nationals of other States. The context there (though bilateral) is different: the State concerned, having waived its right of diplomatic protection under article 27, paragraph (1), nonetheless retains an interest in facilitating a resolution of the dispute. However, the language seems appropriate for the situation of third States also.

[198] See paragraph 97 above.

[199] Integral obligations, as defined in article 60, paragraph 2 (*c*) of the 1969 Vienna Convention, are a subcategory of obligations *erga omnes partes*. In the case of an integral obligation any breach undermines the position of all the other States parties, to an extent that justifies treating each State party as individually injured.

example, in relation to biodiversity or global warming) and disarmament (for example, a regional nuclear-free-zone treaty or a test-ban treaty). In such cases, although it is conceivable that one or a few States might be specially affected by a breach, this is unlikely, and is anyway without prejudice to the general interest in the subject matter which is shared by all the States parties collectively. As a matter of principle there is no reason to exclude from the scope of obligations *erga omnes partes* obligations arising under general international law.[200] Nor is there any reason to require that regimes created by multilateral treaty should recognize the collective interest in express terms. It is sufficient if they clearly do so as a matter of the interpretation of the provisions in question. Thus, for example, it would include obligations arising under a regional human rights treaty, where compliance is recognized as a legal interest of all the States parties.[201] This category includes the case referred to in draft article 40, paragraph 2 (*e*) (iii), as well as subparagraph (*f*);

(c) *Obligations to which some or many States are parties, but in respect of which particular States or groups of States are recognized as legally interested*. In cases of multilateral obligations, whether or not they are held *erga omnes*, it may be that particular States or subgroups of States are recognized as having a specific legal interest in compliance. In the first place the existence of a legal interest would be a question of interpretation or application of the relevant primary rules. However, it seems a reasonable inference from article 60, paragraph 2 (*b*), of the 1969 Vienna Convention to hold that a State "specially affected" by a breach of a multilateral obligation ought to be entitled to invoke the responsibility of the State concerned in respect of that breach.

It should be stressed again that these subcategories are not mutually exclusive in the following sense: one State may be directly and specifically affected by the breach of an obligation *erga omnes* (e.g. the victim of an unlawful armed attack) or of an obligation *erga omnes partes* (e.g. the State whose vessel is denied the right of transit through an international waterway). Thus it is possible for a State to be "injured"—for its legal interests to be affected—in a number of different ways in respect of the same breach.

107. Thus the schema shown in table 1 below would reflect the position for the purposes of article 40 or its equivalent. The schema does not take into account the concept sought to be reflected in article 19, a concept which could be paraphrased as that of an egregious breach of an obligation *erga omnes*. But for the purposes of article 40 or any equivalent, that concept is not necessary.[202] It is already the case that all States are entitled to invoke responsibility in respect of a breach of an obligation *erga omnes*, and *for this purpose* there is no need for the additional requirement that the breach be "gross", "systematic" or "egregious". The question whether any further such requirement is needed in terms of the *consequences* of responsibility, however, remains and will be discussed below.[203]

[200] See paragraph 92 above.

[201] For example, the right of transit through the Kiel Canal which was the subject of dispute in *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*.

[202] As Switzerland observes (para. 80 above).

[203] See paragraph 115 below.

Table 1

States entitled to invoke responsibility in respect of multilateral obligations

Category of multilateral obligation	*States entitled to invoke responsibility*	*Extent of application*
Obligation *erga omnes*	All States	Applies to obligations *erga omnes* in the sense explained by ICJ in the *Barcelona Traction* case
Obligation *erga omnes partes*	All States parties	Applies to legal regimes involving the public interest of all States parties, including in particular integral obligations (cf. art. 40, para. 2 (*e*) (ii)–(iii), and (*f*))
Multilateral obligatio generally	Unless otherwise provided, any State "specially affected by the breach" or regarded as having a "special interest"	Applies to all obligations which are multilateral in provenance and to which a specially affected State is a party; does not apply in legal contexts (e.g. diplomatic protection) recognized as pertaining specifically to the relations of two States *inter se*

b. Permissible responses by "injured States"

108. It will be clear from the foregoing discussion that there is a distinction between the primary victim of the breach of a multilateral obligation and other States, party to the obligation, which may have a legal interest in its performance. It is true that in some cases of multilateral obligations there may be no particular obligee or beneficiary. This is probably true, for example, for the obligations of States parties not to emit excess CFCs into the atmosphere.[204] This is a purely solidary obligation, and there will never be a demonstrable connection with any particular breach and the impact on any particular State party. But there are other multilateral obligations where there is, clearly, a primary obligee. For example, self-determination is in the first place a right of the people in question. But it is an obligation *erga omnes* of States, in particular of those States responsible for the administration of Non-Self-Governing Territories.[205] The obligation not to use force against the territorial integrity or political independence of another State is an obligation *erga omnes*, but the particular victim is the State against which the armed force is used. Other examples could be given, of cases where the primary obligee is a State as well as where it is not.

109. Where one State is a particular victim of a breach, the position of "interested" States must be to some extent ancillary or secondary. For example, if that State validly consents to conduct that would otherwise constitute a breach of a multilateral obligation, that consent precludes wrongfulness.[206] Other States have a legal interest in compliance, and as a consequence they will have a legitimate concern to ensure that consent was validly given (e.g. without coercion or other vitiating factors). But their own consent would not preclude wrongfulness, any more than the consent of Ethiopia and Liberia could have precluded the wrongfulness of South Africa's conduct vis-à-vis the people of the mandated Territory. Similarly in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the victim (the State subjected to the armed attack).[207] Yet the rules relating to the use of force give rise to obligations *erga omnes*. This suggests the need to distinguish between a particular State which is the victim of the breach of a multilateral obligation and those States, not themselves victims, which have a legal interest in compliance with the obligation because it is owed to them as well. The latter group will not have the same rights as the former, and the simple equation of the two in the present version of article 40 is unsatisfactory.

110. Thus, in addition to distinguishing between the States entitled to rely on or invoke a multilateral responsibility, it may be necessary to differentiate between the different forms of action that can be taken by individual States which share with others a legal interest in compliance. Just because there is a common group of States legally entitled to invoke responsibility, the forms in which individual States can do so may have to be differentiated, and the question is how this is to be achieved. If they are not differentiated, the possibility will arise, for example, of one injured State electing to receive compensation in lieu of restitution while another insists on restitution; or of a third State insisting on taking countermeasures which the primary victim of the breach wishes to avoid for fear of aggravating the conflict or preventing a negotiated settlement. Many Governments commented on the potential for confusion and conflict which a purely individual and parallel system of invoking responsibility could produce.[208]

111. It is helpful to take the groups of States which could be classified as "legally interested" or "injured" in accordance with table 1. It is suggested that the State which is a victim of the breach of the multilateral obligation ought to be able to seek both cessation and reparation in all aspects, and should be able to take proportionate countermeasures if these are denied. That State ought also to be entitled validly to elect to receive compensation rather than restitution in kind, for example, in cases where the breach has made future performance of no value to it. In effect its position is assimilated to that of the injured State in a bilateral context (the State holder of a subjective right) so far as the invocation of responsibility is concerned. By analogy with article 60, paragraph 2, of the 1969 Vienna Convention, "specially affected" States should also be treated in this way: their own position will have been particularly affected by the breach of an international obligation, and to that extent it is reasonable to extend to them the same range of rights in regard to cessation and reparation.[209]

112. In most cases there will only be one or a few States that are specifically injured in this sense, and questions of coordination between them are accordingly less difficult than they are when a large group of States, or all States, are deemed to be injured. It is suggested that no legal requirement of coordination or joint action should be imposed, any more than it is imposed on States specially affected, or States beneficiaries of an integral obligation, under article 60, paragraph 2, of the 1969 Vienna Convention. Coordination of response may be desirable, but since each State is by definition affected in terms of its own legal and factual situation, it ought to be free to that extent to respond to the breach.

113. The position of the broader class of States legally interested in a breach of an obligation *erga omnes* or *erga omnes partes* raises somewhat different considerations. In the first place, there seems to be no difficulty or possibility of conflict in recognizing to all such States the right to protest at an internationally wrongful act and to call for its cessation, if it is continuing. These are, as it were, the

[204] See the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer.

[205] As ICJ affirmed in *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

[206] See footnote 194 above.

[207] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 105, para. 199.

[208] See paragraphs 77–80 above.

[209] The two States are not in all respects in the same legal position. An injured State in a bilateral context can waive the breach entirely, and may well be entitled to terminate the underlying legal relations; a "specially affected" State may not be able to do so, even though it can waive the consequences of the breach so far as it is concerned.

minimum consequences of internationally wrongful conduct. In addition, it seems appropriate that all such States should be able to insist on restitution, assuming that restitution is possible and that it has not been validly waived by the State which is the primary victim of the wrongful act. On the other hand, it is not clear that those States, merely because they are recognized as having a legal interest in the performance of the obligation, should be able to seek compensation or take countermeasures on their own account.[210]

114. In particular, both the analogy of article 60, paragraph 2, of the 1969 Vienna Convention, and the analogy of collective self-defence suggest the need for some regime of "collective countermeasures" in cases where States are acting in some collective interest rather than on account of any particular injury to themselves. Under article 60, paragraph 2, States which are not specially affected by a breach of a multilateral treaty (not involving an integral obligation) cannot individually take action to suspend or terminate the treaty; they can only do so collectively. It will be a matter for consideration in relation to part two bis, to what extent States may take countermeasures in the collective interest. To the extent that they may do so, the principle of proportionality should presumably apply collectively to the action taken by all of them. In cases where a State is the primary obligee (and in conformity with the Court's approach to collective self-defence in the *Military and Paramilitary Activities in and against Nicaragua* case[211]), countermeasures could only be taken at the request of that State. This may be contrasted with the existing provisions of part two, which allow each individual State to take countermeasures in the collective interest without regard to the position of the victim, of any other "injured State" or of the cumulative effect of such countermeasures on the target State. It may be that, in case of a breach of a multilateral obligation where there is no specially affected State, all other States parties will be able to call for cessation and for restitution, but that further collective measures would require the authorization of a competent international organization, or would have to be agreed between the States concerned.[212] But whatever solutions may be adopted in the framework of part two bis, it seems clear that the first step is to distinguish between the different groups of injured and interested States. The proposed reconsideration of article 40 will not answer all the questions raised by part two. But at least it should allow the right questions to be asked.

115. If article 40 is reconsidered along these lines, a further question will arise. This is whether the changes outlined here sufficiently respond to those cases where all States in the world are faced with the egregious breach of certain fundamental obligations (e.g. genocide or aggression). One problem, which article 19 clearly did not resolve, is that the seriousness of the breach of an obligation does not necessarily equate with the fundamental character of the obligation itself. There can, for example, be isolated acts of torture which do not warrant exceptional treatment, whereas it is difficult to conceive of a minor case of genocide.[213] There seems to be a good case for allowing countermeasures to be taken in response to egregious breaches of multilateral obligations, without imposing the requirement of unanimity among the "injured States". Otherwise, the more universal the obligation breached (e.g. at the level of an obligation *erga omnes*), the more difficult it would be to meet the requirements for countermeasures, since there would be a larger number of States whose agreement to those measures would be required. Exactly where the threshold should be set for countermeasures to be taken by individual States, acting not in their own but in the collective interest, is a difficult question. There is an issue of "due process" so far as concerns the target State, since at the time collective countermeasures are taken, its responsibility for the breach may be merely asserted, not demonstrated, and issues of fact and possible justifications are likely to have been raised and left unresolved. Some formula such as a "gross and reliably attested breach" is called for.

116. When the Commission first began to explore the notion of "injured State", the Special Rapporteur, Mr. Riphagen, commented that "the more serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach".[214] Since then, there has been some additional practice and some relevant case law, but the legal materials are still sparse. Nonetheless, table 2 below is suggested as a defensible scheme. If adopted in some form, it would allow the draft articles to reflect fundamental common concerns of States (especially breaches of obligations *erga omnes* of a peremptory character), while avoiding the undue licensing of individual responses to breaches by third States.

(iii) *Issues of drafting and placement*

117. In the first instance the Special Rapporteur seeks the guidance of the Commission on the proposed reconsideration of article 40, at the level of principle. The issues are evidently fundamental to the whole of parts two and two bis. However, to assist in the discussion of the issues of principle, a draft article in lieu of existing article 40 is proposed below (without prejudice to its eventual location in the text). That proposal establishes the categories referred to in table 1, but does not deal with the consequences of those categories, which will be a matter for chapters II and III and for part two bis.

[210] In the *S.S. "Wimbledon"* case (a case of an obligation *erga omnes partes*), France sought reparation in respect of its own losses, whereas the three other States were concerned to establish the principle in dispute (i.e. their primary concern was cessation) (see footnote 201 above).

[211] See footnote 207 above.

[212] Questions as to the permissible extent of countermeasures are discussed further on in the present report.

[213] Apart from the prohibition of genocide, the prohibition of aggression is probably the only norm mentioned in article 19, paragraph 3, where every breach is, as it were, per se egregious. But the primary prohibition is that in Article 2, paragraph 4, of the Charter of the United Nations, which is not limited to aggression, and the definition of "aggression" remains unresolved. According to the General Assembly's Definition of Aggression, a judgement of the seriousness of the illegality has to be made in each case on an apparently ad hoc basis (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, art. 2).

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

Table 2

Extent to which differently affected States may invoke the legal consequences of the responsibility of a State

	Bilateral obligations	*Multilateral obligations*[a]		
	Injured State	*"Specially affected" State*[b]	*Obligation* erga omnes partes[c]	*Obligation* erga omnes
Cessation (and assurances and guarantees)[d]	Yes	Yes	Yes	Yes
Restitution	Yes	Yes	On behalf of the victim/specially affected State; otherwise by agreement between the States parties	On behalf of the victim/specially affected State; otherwise by agreement between the States parties
Compensation and satisfaction	Yes	Yes	On behalf of the victim/specially affected State; otherwise by agreement between the States parties	On behalf of the victim/specially affected State; otherwise by agreement between the States parties
Counter-measures (under conditions in articles 47–50)	Yes	Yes	On behalf of the victim/specially affected State; otherwise by agreement between the States parties	On behalf of the victim/specially affected State; otherwise by agreement between all States; but individually in case of well-attested gross breaches

[a] Note that the same State may be injured or affected in different ways by the same breach, the categories being cumulative. See paragraph 106 above.

[b] As explained in paragraph 106 above, this category includes: (*a*) States identified as the primary beneficiaries of the obligation or the primary victim of its breach (draft art. 40, para. 2 (*e*) (i)); and (*b*) other States specially affected by a breach of a multilateral obligation to which they are party (1969 Vienna Convention, art. 60, para. 2 (*b*)).

[c] This includes the case where, as a matter of interpretation, a particular obligation is owed equally to all States parties. The cases covered by draft article 40, paragraph 2 (***e***) (iii), and (*f*), are examples.

[d] This includes, as a minimum, the right to a declaration by a competent court or tribunal in respect of the breach.

118. Two questions arise at this stage:

(a) *A unitary concept of "injured State"?* The first is whether the draft articles should at least formally retain a unitary concept of "injured State", covering all the categories of injury and legal interest referred to in tables 1 and 2, or whether they should distinguish between "injured States" and States with a legal interest which are not themselves specifically affected by the breach. For the purposes of the discussion, the distinction is reflected in the language of the proposed article 40 bis;

(b) *Location of proposed article.* The second question is whether that article belongs in part two, chapter I, or elsewhere. This depends on whether it is possible and desirable to express the secondary obligations, specified in more detail in later articles of part two, without reference to the concept of "injured State". It has already been concluded that the basic principles of cessation and reparation which are now to be stated in chapter I, should be expressed in terms of the obligations of the responsible State. In the Special Rapporteur's view, it would be desirable to express the remaining articles in part two in the same way, in effect as forms which the basic obligation of reparation may take depending on the circumstances. This would allow the proposed article to be located in part two bis as the key aspect of the invocation of responsibility. Indeed its location there might be thought to be implicit in the recognition that different States are differently affected or concerned, from a legal point of view, by the breach of an international obligation, and that the range of permissible responses must likewise vary.

6. Conclusions as to part two, chapter I

119. For these reasons, part two, chapter I, should be formulated as follows:

"PART TWO

"LEGAL CONSEQUENCES OF AN INTERNATIONALLY WRONGFUL ACT OF A STATE

"CHAPTER I

"GENERAL PRINCIPLES

"Article 36. Content of international responsibility

"The international responsibility of a State which arises from an internationally wrongful act in accordance with the provisions of part one entails legal consequences as set out in this part.

"Article 36 bis. Cessation

"1. The legal consequences of an internationally wrongful act under these articles do not affect the continued duty of the State concerned to perform the international obligation.

"2. The State which has committed an internationally wrongful act is under an obligation:

"(*a*) Where it is engaged in a continuing wrongful act, to cease that act forthwith;

"(*b*) To offer appropriate assurances and guarantees of non-repetition.

"Article 37 bis. Reparation

"1. A State which has committed an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act.

"2. Full reparation shall eliminate the consequences of the internationally wrongful act by way of restitution in kind, compensation and satisfaction, either singly or in combination, in accordance with the provisions of the following articles.

"[Article 38.[215] Other consequences of an internationally wrongful act

"The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this part.]

[215] For the reasons stated in paragraph 65, the Special Rapporteur doubts the value of this provision; hence it is placed in square brackets.

"Article 40 bis[216] 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 omnes*), or to a group of States of which it is one, and the breach of the obligation:

"(i) Specially 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."

B. Chapter II. The forms of reparation

1. GENERAL CONSIDERATIONS

120. Chapter II is presently entitled "Rights of the injured State and obligations of the State which has committed an internationally wrongful act". A shorter and simpler title would be "The forms of reparation". This has several other advantages. It avoids the implication that the rights of "injured States" are in all cases the strict correlative of the obligations of the responsible State.[217] It is also consistent with the view that the responsible State has (apart from cessation) a single general obligation consequent upon the commission of an internationally wrongful act— that is, to make full reparation. The forms which reparation will take depend on the circumstances, and these are dealt with successively in chapter II, and in the proposed part two bis, dealing with the implementation of responsibility.

[216] These formulations of injury and legal interest will need to be followed through in later articles in terms of the different secondary consequences of the responsibility of a State for an internationally wrongful act. This may best be done in a separate part dealing with the right to invoke State responsibility, and the placement of article 40 bis in accordingly provisional.

[217] See paragraph 84 above.

121. Chapter II as adopted on first reading identified two general principles (cessation and reparation) which it is now proposed be included as such in chapter I, and four forms of reparation, viz. restitution, compensation, satisfaction, and assurances and guarantees against repetition (regarded however as *sui generis*). For reasons already given, it is better to treat assurances and guarantees as an aspect of cessation and future performance, since like cessation but unlike reparation they assume the continuation of the legal relationship breached.[218] That leaves three major forms of reparation. Mr. Arangio-Ruiz, Special Rapporteur, had also proposed a separate article dealing with interest; this was subsumed by the Commission in a fleeting reference in article 44 (Compensation). In addition, chapter II should deal with the question of contributory fault, previously included in article 42, paragraph 2.[219]

122. Apart from the general remark that part two should be reorganized "in order to take into account the choices made in Part One",[220] there have not been specific comments by Governments on the conception and structure of part two.

123. Having regard to the provisions proposed to be transferred to part two, chapter I, it seems that chapter II could therefore consist of provisions dealing with the following issues:

(*a*) Restitution in kind (existing art. 43);

(*b*) Compensation (existing art. 44);

(*c*) Satisfaction (existing art. 45);

(*d*) Interest (referred to in article 44, but no actual article);

(*e*) Mitigation of responsibility (present art. 42, para. 2).

A number of additional questions arise. These include, for example, the choice of modes of reparation by a victim/injured State, the effect of settlement of a claim of responsibility, and a possible rule against double recovery. These will be discussed in the context of the proposed part two bis on the implementation of responsibility.

2. Restitution

(a) *Existing article 43*

124. Article 43 provides:

Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(*a*) Is not materially impossible;

(*b*) Would not involve a breach of an obligation arising from a peremptory norm of general international law;

(*c*) Would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(*d*) Would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Chapter II proceeds on the assumption that restitution in kind (hereinafter referred to simply as restitution) is the primary form of reparation. Article 43 defines restitution rather broadly as "the re-establishment of the situation which existed before the wrongful act was committed", and goes on to spell out four exceptional cases where restitution is not required. It is not stated in so many words, but the intention was to allow the injured State to elect to receive compensation or satisfaction rather than restitution: this is achieved by expressing restitution as a right or entitlement of the injured State. However this fails to deal with the problem of a plurality of injured States, or with the (admittedly rare) case where the injured State does not have such an option. This might be so, for example, in situations involving detention of persons or unlawful seizure of territory.

125. The commentary to article 43 describes restitution as "the first of the methods of reparation available to a State injured by an internationally wrongful act".[221] It notes that the term "restitution" is sometimes used to mean, in effect, full reparation, but prefers the narrower and more orthodox meaning of "the establishment or re-establishment of the situation that would exist, or would have existed if the wrongful act had not been committed". Thus in order to achieve restitution one has only to ask a factual question—what was the status quo ante?—and not the more abstract or theoretical question—what would the situation have been if the wrongful act had not been committed?[222]

126. The commentary goes on to affirm in strong terms the "logical and temporal primacy of restitution in kind" over reparation by equivalent, i.e. compensation. At the same time it notes that the injured State will frequently elect to receive compensation rather than restitution, and that compensation is in fact "the most frequent form of reparation". This flexibility in practice must be acknowledged, but it also has to be reconciled with the affirmation that restitution is the primary form of reparation.[223] According to the commentary, the principal vehicle for achieving such a reconciliation appears to be by the injured State seeking or accepting compensation rather than restitution.[224] The commentary does not, however, discuss what the situation would be if there were several injured States which disagreed about whether to insist on restitution. Nor does it explicitly provide for any choice; this is done implicitly by treating restitution as a right of the injured State, which it may or may not invoke. But (quite apart from the problems associated with a plural-

[218] See paragraph 54 above.

[219] See paragraphs 19 and 33 above.

[220] A/CN.4/496 (see footnote 3 above), p. 15, para. 108.

[221] *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 62, para. (1).

[222] Ibid., para. (2).

[223] Ibid., pp. 62–63, para. (3).

[224] Ibid., p. 63, para. (4).

ity of injured States) there may be situations where the injured State is not entitled to waive restitution. For example the Government of a State invaded and annexed contrary to the rules relating to the use of force would hardly be entitled to accept compensation rather than the withdrawal of the occupying forces, and similar considerations would apply where the internationally wrongful act took the form of the forcible detention of persons. It may be that on a proper analysis such situations do not involve restitution in the strict sense so much as cessation of a continuing wrongful act, and that the particular emphasis on "restitution" in such cases arises from the law of performance rather than the law of reparation. It seems clear that non-performance cannot be excused in cases where a continuing wrongful act is a breach of a peremptory norm of general international law (e.g. in the case of the unlawful occupation of a State). The same would apply in case of a continuing breach of a non-derogable human rights obligation (e.g. as between States parties to a human rights treaty). But the implications of these limits for restitution in the proper sense of the term have not been explored in the commentary, nor for that matter in the literature.

127. The commentary does discuss a different issue, viz. the distinction sometimes drawn between material restitution (e.g. the return of persons, property or territory) and juridical restitution (e.g. the annulment of laws). There are many examples in State practice of both kinds. Iraq's withdrawal from Kuwait following the invasion of 1990 is an example of partial material restitution, but it was also accompanied by forms of legal restitution, including the annulment of the Iraqi decree proclaiming Kuwait a province of Iraq. Combined forms of restitution may also be negotiated on a without prejudice basis as part of the settlement of a dispute, without any admission of responsibility: for example the dispute concerning the seizure by Canada of the Spanish fishing vessel, the *Estai*, led to a complex settlement.[225] Given the tendency for different types of measure (legal and factual) to be combined in restitution, the commentary concludes that there is no need for a formal distinction between "material" and "juridical" restitution to be made in the article itself.[226] Nor is it necessary for the article to deal explicitly with the question of restitution made on the international legal plane, e.g. by the annulment of an international claim to jurisdiction or territory. In the context of dispute settlement, such measures may well be achieved by the grant of a declaration as to the true legal position, even if this is formally binding only on the parties to the proceedings. Despite the terms of article 59 of the ICJ Statute, the practical effect of such a declaration may well be to establish the sovereignty of the State concerned over its territory, or its jurisdiction over maritime resources, on a more general basis.[227] Such a legal status is sometimes said to be "opposable *erga omnes*", but this is not to be confused with the question of obligations *erga omnes*, as discussed earlier in this report.[228] The commentary concludes that

> all that international law—and international bodies—are normally fit or enabled to do with regard to *internal* legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, as the case may be, invalidation or annulment of internal legal acts on the part of the author State itself. As regards the question whether it is possible for an international tribunal to directly annul international legal rules, acts, transactions or situations, for the purpose of reparation in the form of restitution in kind, the Commission is inclined to answer it in the affirmative but observes that since the effects of decisions of international tribunals are normally confined to the parties, any act or situation the effects of which extend beyond the bilateral relations between the parties could not be modified or annulled except by the States themselves, unless the relevant instruments provided otherwise.[229]

128. The commentary goes on to discuss and justify the four exceptions to restitution provided for in article 43 as adopted on first reading:

(*a*) As to impossibility of restitution, this may be total or partial, and

> derives from the fact that the nature of the event and of its injurious effects have rendered *restitutio* physically impossible. Such may be the case either because the object to be restored has perished, because it has irremediably deteriorated or because the relevant state of affairs has undergone a factual alteration rendering physical *restitutio* impossible;[230]

(*b*) The second "exception" relates to hypothetical situations where restitution would involve a breach of a peremptory norm of general international law, although no example of such a situation is offered (or can readily be conceived). The commentary limits such cases of "legal impossibility" to breaches of peremptory norms, where the resulting legal situation will evidently concern all States and not only those immediately involved. It distinguishes cases where restitution may affect the rights of third States

> if the State which should provide *restitutio* could only do so by infringing one of its international obligations towards a "third" State, this does not really affect the responsibility relationship between the wrongdoing State and the injured State entitled to claim *restitutio* to the injured State on the one hand and the "third" State on the other hand.[231]

This is of course true: State A may be responsible to State B for action taken in conjunction with State C, even if the action takes the form of the conclusion of a bilateral treaty. But the issue is not responsibility, it is the form that reparation should take, and the completion of a legal act by the responsible State may make it impossible for that State to provide restitution. It may be that such cases are better subsumed under the rubric of impossibility. For example, in *Costa Rica* v. *Nicaragua*,[232] the conclusion of a treaty between Nicaragua and a third State (the United

[225] See *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 444–446, para. 21. The settlement between Canada and the European Union provided, inter alia, for the release of the vessel and its master, the return of the bond, and the repeal of the Canadian regulations applying to European Community ships fishing for Greenland halibut in the NAFO regulatory area. In addition the parties agreed on the provisional application of new conservation and enforcement measures. Evidently the arrangements between Canada and the European Union in that case did not fully resolve the dispute: Spain continued the proceedings it had commenced before ICJ, which held, however, that it lacked jurisdiction over them.

[226] *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 64, paras. (7)–(8).

[227] As, for example, in *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22.

[228] See paragraphs 97 and 106 above.

[229] *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 65, para. (9).

[230] Ibid., p. 66, para. (11).

[231] Ibid., para. (12).

[232] "Judicial decisions involving questions of international law", *American Journal of International Law*, vol. 11 (1917), pp. 181–229.

States) was held by the Central American Court of Justice to be a breach by Nicaragua of a prior treaty commitment by Nicaragua to Costa Rica. Assuming the validity of the later agreement, its termination was not something which lay exclusively within the power of Nicaragua. In the event the Central American Court declined to pronounce on the validity of the later treaty, and confined itself to giving declaratory relief.[233] The commentary goes on to point out that a State cannot properly resist the giving of restitution by appealing to the concept of domestic jurisdiction:[234] this seems self-evident, since if restitution is required by international law in some respect, the matter in question ceases, by definition, to fall exclusively within the domestic jurisdiction of the responsible State;[235]

(*c*) The third exception concerns cases where to insist on restitution as distinct from compensation would be disproportionate in the circumstances. According to the commentary, this exception is

> based on equity and reasonableness and seeks to achieve an equitable balance between the *onus** to be sustained by the author State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation.[236]

In support the commentary cites the *Forests of Central Rhodopia* case, but this is, again, more a case of impossibility or impracticality than excessive burden,[237] and anyway does not seem to have been a case of manifest disproportionality. So far as article 43 (*c*) is concerned, however, the commentary goes on to insist that only "a grave disproportionality between the burden which this mode of reparation would impose on [the responsible] State and the benefit which the injured State would derive therefrom" can justify a refusal to make restitution;[238]

(*d*) The fourth exception to restitution involves another "catastrophic" scenario, not unlike the contingency, envisaged in article 42, paragraph 3, as adopted on first reading, that full reparation may deprive a people of its own means of subsistence.[239] According to article 43 (*d*) , and its commentary, the responsible State need not make restitution if that would "seriously jeopardize its political independence and economic stability whereas failure to obtain restitution in kind would not have a comparable impact on the injured State". Again no actual examples are cited: the case envisaged is said to be "very exceptional ... and may be of more retrospective than current relevance".[240] The commentary goes on to discuss issues of compensation for land nationalization programmes, noting that general nationalization for a public purpose and on a non-discriminatory basis is lawful, and that the question of compensation for nationalization is governed by the relevant primary rule: correspondingly, in those cases where the failure to pay compensation was an internationally wrongful act, reparation for such failure would involve the payment of money, including interest, and not the return of the property in question.[241]

129. Government comments on article 43 express doubts as to some of the exceptions it provides but do not question its general appropriateness. Although it emphasizes "the priority of compensation over restitution in practice", the United States acknowledges that "[r]estitution in kind has long been an important remedy in international law and plays a singular role in the cases where a wrongdoing State has illegally seized territory or historically or culturally valuable property".[242] France proposes to substitute the phrase "re-establishment of the pre-existing situation" for "restitution in kind", on the ground that the latter might suggest "simple restitution of an object or a person".[243] In common with other Governments, it challenges some of the exceptions stated in subparagraphs (*a*)–(*d*), which in its view could undermine the weight of the general principle reflected in the *chapeau*, and unduly favour the responsible State. Consistently with its earlier objections to the concept of *jus cogens*, France considers that subparagraph (*b*) should be deleted; moreover it is in its view difficult to "understand how the restoration of lawfulness could be contrary to a 'peremptory norm'".[244] Subparagraph (*c*) has also been criticized by the United States as enabling the responsible State to avoid restitution when it would be appropriate or preferred; accordingly, that Government calls for a clarification of the phrase "a burden out of all proportion".[245] But its main concerns relate to subparagraph (*d*): this should in its view be deleted. Even though it accepts that that provision "may have relatively

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[233] *Supplement to the American Journal of International Law*, vol. 11 (1917), pp. 3–13.

[234] *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 66, para. (13).

[235] But quite apart from considerations of domestic jurisdiction, there may be cases where the interests of legal security or the rights of third parties make restitution effectively impossible. For example the grant of a government contract to company A, in breach of international rules on public procurement, may nonetheless be legally effective to create contractual rights for company A. In such cases restitution (in the sense of the regranting of the contract) may be excluded.

[236] Commentary to article 43, para. (14).

[237] *Forests of Central Rhodopia (Merits)*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (29 March 1933), cited in *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 67, para. (15). The arbitrator in that case cited a number of reasons for the conclusion that compensation was the only practical form of reparation: the fact that the claimant was not solely entitled to engage in forestry operations, but that no claims had been brought by the other persons associated with it in the operation, the fact that the forests were not in the same condition as at the time of taking, and the difficulty of determining whether restitution would actually prove possible without detailed inquiry into their present condition, as well as the fact that restitution might affect the rights of third persons granted since the taking (ibid., p. 1432). The case supports a broad understanding of the "impossibility" of granting restitution.

[238] *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 67, para. (16).

[239] See paragraphs 38–42 above.

[240] *Yearbook … 1993*, vol. II (Part Two), commentary to article 7 [present art. 43], p. 67, para. (17).

[241] In recent years, policy reversals in respect of earlier land nationalization programmes and the trend towards privatization have led to measures of restitution of land and other property to their former owners in a number of countries. These programmes have their own specific features and do not, for the most part, involve restitution in the sense of article 43.

[242] *Yearbook … 1998* (footnote 35 above), p. 147.

[243] Ibid., pp. 146–147; the same modification should be applied to article 44, paragraph 1 (ibid., p. 148). For Uzbekistan, an addition should be made to the *chapeau* of the article, providing in substance that, "if restitution of objects having individual characteristics is not possible, objects of the same kind or nearly identical objects may, by agreement, be substituted for them" (ibid., p. 147).

[244] Ibid., p. 147.

[245] Ibid. By contrast, France seems implicitly to support that provision (ibid.).

limited practical effect given the priority of compensation over restitution in practice", the United States opposes the inclusion of broad concepts "left undefined and without an established basis in international practice", and which are "likely to have effects beyond the narrow provision of draft article 43".[246] Japan considers that "the words 'seriously jeopardize the … economic stability'" should be clarified, in order to pre-empt abuses by the wrongdoing State: the deletion of the paragraph, however, would be a solution of last resort as there is, in its view, a need for such a provision in the draft articles.[247]

(b) *Cessation, restitution and compensation: questions of classification and priority*

130. That restitution is recognized as a principal form of reparation in international law cannot be doubted, and certainly no Government has questioned it. A more difficult issue concerns the relations between, on the one hand, cessation and restitution, and on the other, restitution and compensation. The distinction between cessation and restitution involves more a question of a distinction in principle: as has been seen, cessation may give rise to a continuing and (in some cases) non-derogable obligation, even when return to the status quo ante is hardly possible. As to the relation between restitution and compensation, the distinction between them is clear enough: restitution involves a return to the status quo ante, i.e. a form of restitution *in specie*, whereas compensation is the provision of money or other value as a substitute for restitution. The problem here is rather whether it is possible to maintain a principle of the priority of restitution, in the face of the general predominance of compensation in the practice of States and of tribunals. The two questions need to be dealt with separately.

(i) *Cessation and restitution*

131. The question of cessation—which may be described as the restitution of performance—has already been discussed.[248] For the reasons given, cessation should be considered alongside reparation as one of the two general consequences of the commission of an internationally wrongful act. But the distinction between them is not always clear.

132. For example in the *"Rainbow Warrior"* arbitration, New Zealand sought the return of the two agents to detention on the island of Hao, since (as the Tribunal held) the circumstances relied on by France to justify their continued removal either did not exist or were no longer operative. According to New Zealand, France was thus obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The Tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was thus no question of cessation.[249] The question might still be asked: assuming the correctness of this view as a matter of the interpretation of the primary obligation, what was New Zealand's entitlement as a matter of restitution? It is not the case that restitution is only available when the obligation breached is still in force (even though that is true for cessation). The Tribunal avoided answering the question, holding that New Zealand's request was only for cessation. But New Zealand, while it had expressly renounced any demand for compensation, sought the return of the two agents to the island, and apparently did so under the form of restitution even if (as happened) the Tribunal were to hold that questions of cessation of wrongful conduct no longer arose.

133. Evidently the Tribunal was concerned above all to bring a long-running dispute to an end in a manner broadly acceptable to both parties. Limited by the *non ultra petita* rule and by New Zealand's refusal to accept compensation in lieu of performance, the Tribunal was not anxious to consider arguments about performance under the guise of restitution. But it may be inferred that the status quo ante for the two agents—their presence under military custody on the island—was of no value to New Zealand if there was no continuing obligation on the part of France to keep them there. The return of the two agents to the island would have been an empty formality.

134. Two lessons may be drawn from this episode. First, while it may be appropriate (as France itself proposes[250]) to define restitution as the "re-establishment of the pre-existing situation" as distinct from the mere return of persons, property or territory, a return to the status quo ante may be of little or no value if the obligation breached does not remain in force. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not (or not alone) competent to release it from such performance. Both positively and negatively, the distinction in theory between cessation and restitution may have important consequences in terms of the obligations of the States concerned and the remedial options open to them. The second lesson is of a more general character: in practice, dispute settlement bodies act flexibly in their interpretation of the positions of States parties, and in selecting one remedy over another. It seems that no set of rules dealing with the consequences of internationally wrongful acts can exclude such flexibility, no matter how categorical a preference may be stated for one form of reparation over another.

(ii) *Restitution and compensation*

135. This second point is equally applicable to the question of the relation between restitution and compensation. Article 43 is the first of the specific forms of reparation dealt with in chapter II. Article 44 goes on to deal with compensation, but only "if and to the extent that the damage is not made good by restitution in kind". It is clear that the Commission intended thereby to lay down a firm principle as to the priority of restitution over compensation. This was consistent with the views of the then Special Rapporteur, Mr. Arangio-Ruiz, who noted that

[246] Ibid.; see also France (ibid.); and A/CN.4/504 (footnote 3 above), p. 19, para. 70, for a similar view.

[247] *Yearbook … 1999* (see footnote 43 above), p. 108.

[248] See paragraphs 44–52 above.

[249] UNRIAA (footnote 17 above), cited in paragraph 47 above.

[250] Para. 129 above.

"restitution in kind comes foremost, before any other form of reparation *lato sensu*, and particularly before reparation by equivalent".[251] Under this approach, the injured State may insist on restitution, and has a right to restitution unless one of the exceptions specified in article 43 applies. The approach has, however, been criticised as too rigid and as inconsistent with practice, both by a number of Governments and by some writers.[252] It also contrasts with the approach taken to restitution under some national legal systems.[253]

136. In the case concerning the *Great Belt*,[254] Finland sought the indication of interim measures of protection to prevent the construction of a bridge across the Great Belt which, it alleged, would impede passage of drill ships and oil rigs, contrary to its rights of free transit under a range of treaties. In response, Denmark argued, inter alia, that even if the construction of the bridge might violate Finland's rights of transit, this would only happen occasionally and only in relation to a tiny fraction of ships using the strait. Since Finland's rights could be adequately protected by financial and other means, an order for restitution would be "excessively onerous"[255] for Denmark. And if Finland had no right to insist on the non-construction of the bridge, *a fortiori* it had no right to provisional measures.

137. ICJ declined to indicate provisional measures. Since passage would not actually be impeded for three years or more, during which time the case could be decided on the merits, there was no demonstrated urgency. But it did not accept Denmark's argument as to the impossibility of restitution. Noting that action taken by a party during the course of litigation could not be allowed to affect the rights of the other party, it said:

> [W]hereas the Court is not at present called upon to determine the character of any decision which it might make on the merits; whereas in principle however if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled.[256]

138. In the *Consular Relations* case,[257] Paraguay sought and was granted provisional measures in an attempt to prevent the execution of Angel Breard, one of its nationals who had been convicted for murder. Paraguay's claim arose from the admitted failure of the United States to notify Paraguay of Breard's arrest, in breach of the notification requirement in article 36, paragraph 1 (*b*), of the Vienna Convention on Consular Relations. The United States argued that no question of restitution could arise under the Convention; all Paraguay was entitled to was an apology and assurances against repetition, and these it had been given. In particular it argued that "the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable".[258] Paraguay by contrast argued for complete restitution: "any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and … the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him."[259]

139. Again ICJ declined to enter into the issue of the relationship between the right claimed and the remedy of restitution. For the majority, it was sufficient that Breard's "execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims".[260]

140. Rather similar issues arose in a further death penalty case involving a failure of consular notification, the *LaGrand* case.[261] In this case too, ICJ, acting *ex parte* under article 75, paragraph 1, of its Rules, indicated interim measures.[262] The case remains *sub judice*.

141. These cases concerned applications for provisional measures, where a balance has to be struck between the protection of the rights asserted (but not yet established) by the applicant State and respect for the position of the respondent State, *ex hypothesi* not yet held to have been acting unlawfully (at all or in the relevant respect). But there is a distinction between them. In the *Great Belt* case, the right sought to be protected was precisely the right which would be the subject of the merits phase, viz. the right of unimpeded passage through the Great Belt for completed rigs. In that context ICJ refused to exclude the possibility that restitution might be the appropriate remedy (even if it were to involve, hypothetically, the cancellation or substantial modification of the bridge project).[263] In the death penalty cases, the relationship between the breach

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[251] Preliminary report, *Yearbook … 1988* (see footnote 21 above), p. 38, para. 114, with references to earlier literature. Later he referred to "the purely statistical prevalence of reparation by equivalent … coupled with the logical primacy of restitution in kind" (ibid., p. 41, para. 131).

[252] See especially Gray, "The choice between restitution and compensation".

[253] Historically, common law systems applied the sole remedy of damages in civil cases not involving the return of property, subject only to special exceptions for specific performance and other remedies in equity. The situation is, however, changing to some extent, with the increased availability of these remedies and the development of the law of restitution. On specific performance see, for example, *Cooperative Insurance Society Ltd.* v. *Argyll Stores (Holdings) Ltd.*, *The Law Reports Appeal Cases*, vol. 1 (1998). On restitution see, for example, *Kleinwort Benson Ltd.* v. *Glasgow City Council*, *Law Reports Appeal Cases* (1999), p. 153.

[254] *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991*, *I.C.J. Reports 1991*, p. 12.

[255] Ibid., p. 19, para. 31.

[256] Ibid. Judge Broms interpreted this passage of the Order as rejecting the "Danish theory", in accordance with which Finland had no right to restitution in kind even if it succeeded on the merits (ibid., p. 38).

[257] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248.

[258] Ibid., p. 254, para. 18.

[259] Ibid., p. 256, para. 30.

[260] Ibid., p. 257, para. 37. Judge Oda disagreed, although voting with the Court "for humanitarian reasons" (ibid., p. 262). President Schwebel stressed the importance of the principle of compliance with treaties: "An apology and Federal provision for avoidance of future such lapses does not assist the accused, who Paraguay alleges was or may have been prejudiced by lack of consular access, a question which is for the merits." (Ibid., p. 259.)

[261] *La Grand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9.

[262] It may be noted that in both cases the executions proceeded notwithstanding the orders. See "Agora: *Breard*", *American Journal of International Law*, vol. 92, No. 4 (October 1998), p. 666. The *Breard* case was subsequently withdrawn at the request of Paraguay.

[263] Denmark's obligation to allow transit through the Great Belt (whatever its extent) was a continuing one, so that the removal of any

of the obligation of consular notification and the conviction of the accused person was indirect and contingent. It could well have been the case that the subsequent trial was entirely proper and fair and the failure of notification had no effect on the conviction. The United States had jurisdiction to try the accused for a capital offence, and was not a party to any instrument precluding the imposition of the death penalty. Only if a sufficient causal connection could be established between the United States' failure to notify and the outcome of the trial could the question of restitution arise at all. By the time of the trial, prior notification *as such* had become impossible, since the time for performance had passed and no later performance could substitute for it.

142. Thus what constitutes restitution depends, to some extent at least, on the content of the primary obligation which has been breached. In cases not involving the simple return of persons, property or territory of, or belonging to, the injured State (restitution in the narrow sense), the notion of return to the status quo ante has to be applied having regard to the respective rights and competences of the States concerned. This is of particular significance where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases, if it is available at all, cannot be allowed to give the injured State after the event more than it would have been entitled to if the obligation had been performed. In other words, the notion of the "status quo ante" is a relative one, and if the respondent State could and would lawfully have achieved the same or effectively the same result without a breach of the obligation, the notion of a *general* return to the earlier situation may be excluded.[264]

143. In the opinion of the Special Rapporteur, these qualifications and understandings of the principle of restitution can be accommodated by the careful formulation of article 43 and of the exceptions set out in it, and by appropriate explanations in the commentary. The question is whether, on this basis, the principle of the primacy of restitution should be retained. On balance it should be. It is true that the authority usually relied on for that primacy—the *Chorzów Factory* case[265]—does not actually decide the point, since by the time of the decision Germany sought only compensation and not the return of the property. It is also true that courts and tribunals have been reticent about the award of full-scale restitution, and that the decision perhaps most associated with the idea of restitution—the decision of Sole Arbitrator Dupuy in the *Texaco* arbitration[266] has been widely criticised[267] and has not been followed in later mixed arbitrations.[268] But these were, precisely, mixed arbitrations, where the right of eminent domain of the responsible State (and its sovereignty over its natural resources) has to be balanced against the obligations it has assumed for the protection of those resources, whether by treaty or otherwise. In the context of State to State relations, restitution plays a vital role in principle, especially because of its close relation to the question of the performance of international obligations. A second reason for preserving the principle is that there is little call from Governments to abandon it. Despite doubts expressed by one or two Governments,[269] article 43 as adopted on first reading, which does express a qualified priority for restitution, has been generally well received. Indeed most of the comments that have been made are directed at reducing the number and scope of the exceptions to the principle, rather than overturning it. And thirdly, the abandonment of the principle would require the Commission to formulate, against the background of a legal presumption in favour of compensation, those cases where restitution is exceptionally required. The United States notes that restitution is particularly significant in cases involving "illegally seized territory or historically or culturally valuable property",[270] but it is certainly not limited to such cases. Moreover expressing the point in the form of an exception might tend to imply that, in cases not covered, States may, after the event, purchase the freedom not to respect their international obligations. The principle of the priority of restitution should be retained, subject to defined exceptions.

(c) *Exceptions to restitution*

144. The four exceptions to restitution formulated in article 43 were described above:[271]

(a) *Material impossibility.* There can be no doubt that restitution is not required where it has become "materially" (i.e. practically, *matériellement*) impossible, a qualification recognized both in the *Chorzów Factory* dictum,[272] by the Tribunal in the *Forests of Central Rhodopia* case,[273] and in the literature. Nor is it doubted in the comments of Governments;

(b) *Breach of a peremptory norm.* There is likewise no doubt that restitution cannot be required if it involves a breach of a peremptory norm (i.e. a norm of *jus cogens*).

unlawful obstruction would have involved cessation as much as restitution. See paragraphs 45 and 134, as well as footnote 254, above.

[264] This does not, however, exclude the possibility that the earlier procedure may still be able to be effectively replicated, if circumstances have not changed to such an extent that such replication would be meaningless or disproportionately onerous. These elements are incorporated in national legal rules about restitution under the rubric of doctrines such as reliance and bona fide change of position. Such factors were taken into account, implicitly at least, in the ICJ consideration of issues of restitution in the case concerning the *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports 1997* (see footnote 18 above).

[265] Cited above in paragraph 24.

[266] *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, pp. 507–508, para. 109.

[267] See, for example, World Bank, *Legal Framework for the Treatment of Foreign Investment*, p. 140. For a balanced account, see Higgins, "The taking of property by the State: recent developments in international law", pp. 314–321.

[268] *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic* (see footnote 15 above), p. 200. See also the earlier decision, *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic* (1974), ILR, vol. 53, p. 354.

[269] See paragraph 129 above.

[270] *Yearbook … 1998* (footnote 35 above), p. 147.

[271] See paragraph 128 above.

[272] PCIJ (see footnote 49 above) ("if this is not possible"); see also paragraph 24 above.

[273] See paragraph 128 and footnote 237 above.

The difficulty is rather, as France observes,[274] to think of realistic examples. One possibility might be the situation raised by the *Northern Cameroons* case.[275] Cameroon there argued that the administration of the Northern Cameroons in administrative union with the colony of Nigeria, and the subsequent separate holding of a plebiscite for the Northern Cameroons, was a breach of the Trusteeship Agreement. But that Agreement had been terminated with the approval of the General Assembly, giving effect to the expression of the wishes of the people. To have sought to reverse that decision by seeking restitution could, correspondingly, itself have failed to respect their wishes. No doubt aware of these and other difficulties, Cameroon sought only declaratory relief, which the Court declined to give on the grounds that the decision could have no legal effect so far as the respondent State, the United Kingdom, was concerned. No question of a breach of a peremptory norm was raised or considered.[276] In the Special Rapporteur's view, the situation dealt within article 43 (*b*) is covered already by article 29 bis. As noted already, the circumstances precluding wrongfulness (among them, conflict with a peremptory norm of general international law) apply equally to the secondary obligations dealt within part two, including the obligation of restitution.[277] Thus article 43 (*b*) is unnecessary and can be deleted;[278]

(c) *Restitution disproportionately onerous.* In accordance with article 43 (*c*), restitution need not be provided if the benefit to the injured State of obtaining restitution (as distinct from compensation) is substantially outweighed by the burden for the responsible State of providing it. This might have applied, for example, in the *Great Belt* case[279] if the bridge had actually been built before the issue of the right of passage had been raised by Finland. Where the cost to the responsible State of dismantling a structure is entirely disproportionate to the benefits for the injured State or States of doing so, restitution should not be required. The United States, while not opposing subparagraph (*c*), calls for further clarification of the phrase "a burden out of all proportion to the benefit which the injured State would gain". But as with other expressions of the principle of proportionality, it is difficult to be more precise in the text itself.[280] One useful clarification might be to stress that the notion of proportionality here is not only concerned with cost and expense but that the significance of the gravity or otherwise of the breach, relative to the difficulty of restoring the status quo ante, must also be taken into account. It seems sufficient to spell this out in the commentary;

(d) *Disproportionate jeopardy to the political independence or economic stability of the responsible State.* A number of States are strongly critical of this fourth exception, of which again no good examples are given. The general question of reparation which threatens to deprive a people of their means of subsistence (art. 42, para. 3, as adopted on first reading) has already been discussed,[281] and the point made that restitution in its ordinary sense involves the return of territory, persons or property wrongfully seized or detained, or more generally a return to a situation before the breach: it is difficult to see how such a return could have the effect of jeopardizing the political independence or economic stability of the State responsible for the breach. In any event, if restitution plausibly and disproportionately threatens the political independence or economic stability of the responsible State, the requirements of the third exception (subpara. (*c*) above) will surely have been satisfied. For these reasons, subparagraph (*d*) is likewise unnecessary.

(d) *The formulation of article 43*

145. As to the formulation of the article, France criticises the use of the term "restitution in kind" in article 44 on the ground that it is not limited to return of stolen property or territory. But the meaning of the phrase is generally understood and accepted, and a definition essentially in terms of the "re-establishment of the pre-existing situation" is provided. Secondly, in its original formulation article 43 (*c*) balanced the cost to the responsible State against the benefit of the injured State of obtaining restitution. But there may of course be several or even many States (or other entities) injured by the same act, and the interests of all of them should be considered in the equation. Subparagraph (*c*) should be formulated accordingly.

146. In the Special Rapporteur's view, article 43 can read as follows:

"Restitution

"A State which has committed an internationally wrongful act is obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

"(*a*) Is not materially impossible; …

"(*c*) Would not involve a burden out of all proportion to the benefit which those injured by the act would gain from obtaining restitution instead of compensation."

[274] See paragraph 129 above.

[275] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15.

[276] Historically, cases concerning the seizure of slave ships and other actions to suppress the slave trade raised issues of international legality (see, for example, *Le Louis* (1817), *The English Reports* (Edinburgh, Green, 1923), vol. CLXV, p. 1464; *Buron* v. *Denman, Esq.* (1848), ibid., vol. CLIV, p. 450; Rubin, *Ethics and Authority in International Law*, pp. 97 et seq. But at least since the General Act of the Conference at Berlin in 1885, no question of the return of former slaves by way of restitution could be contemplated. In the *Adolf Eichmann* case, Argentina withdrew its demand for the restitution of Eichmann, charged with war crimes and crimes against humanity: see Security Council resolution 138 (1960); and the Argentina-Israel joint communiqué of 3 August 1960, reprinted in the *Attorney-General of the Government of Israel* v. *Adolf Eichmann* case, ILR, vol. 36, p. 59, para. 40.

[277] See paragraph 7 (*a*) above. For article 29 bis, see *Yearbook …1999*, vol. II (Part Two), pp. 75–77, paras. 306–318.

[278] A more significant case is that of continuing wrongful acts in breach of a peremptory norm (e.g. a continuing case of genocide or other crime against humanity). Such cases concern cessation and performance, not restitution (see paragraph 126 above).

[279] See paragraphs 136–137 above.

[280] See generally Greig, "Reciprocity, proportionality and the law of treaties", p. 398.

[281] See paragraphs 38–42 above.

3. Compensation

(a) *Existing article 44*

147. Article 44 provides:

Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

148. Despite the formal priority given to restitution by article 43, the commentary to article 44 acknowledges that "[c]ompensation is the main and central remedy resorted to following an internationally wrongful act".[282] Monetary compensation differs from payments tendered or awarded by way of satisfaction in that its function is purely compensatory; it is intended to represent, as far as may be, the damage suffered by the injured State as a result of the breach. But despite the large number of decided cases before arbitral tribunals in which issues of the assessment of compensation have been faced, the commentary declines to go into detail in article 44, on the basis that "the rules on compensation were bound to be relatively general and flexible".[283] The commentary does discuss questions of causation, including the influence of multiple causes,[284] but on the central issue of the assessment of compensation it confines itself to such general statements as "compensation is the appropriate remedy for 'economically assessable damage' that is to say damage which is susceptible of being evaluated in economic terms",[285] including for moral and material damage.[286] Compensation is thought of as confined to monetary payments,[287] although there is no reason why it could not also take the form, as agreed, of other forms of value.

149. The commentary goes on to discuss the award of interest and loss of profits. Interest is dealt with below as a separate category.[288] Loss of profits is discussed at length, but rather inconclusively. The commentary notes that:

> [C]ompensation for *lucrum cessans* is less widely accepted in the literature and in practice than is reparation for *damnum emergens*. If loss of profits is to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest *and** be notionally employed in earning profits at one and the same time … The essential aim is to avoid 'double recovery' in all forms of reparation.[289]

After a review of relevant case law (including divergent decisions of the Iran-United States Claims Tribunal in cases involving expropriation of property), the commentary concludes that:

> In view of the divergences of opinion which exist with regard to compensation for *lucrum cessans*, the Commission has come to the conclusion that it would be extremely difficult to arrive in this respect at specific rules commanding a large measure of support … The state of the law on all these questions is … not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them. It has therefore felt it preferable to leave it to the States involved or to any third party involved in the settlement of the dispute to determine in each case whether compensation for loss of profits should be paid.[290]

In the event, article 44, paragraph 2, says only that compensation "may include … where appropriate, loss of profits", an endorsement as lukewarm as can be imagined.

150. Government comments on article 44 raise a number of important questions. The first is whether a more detailed provision is needed. Some Governments are of the view that, given the complexity and importance of the issues involved, further guidance on the standard of compensation under customary international law would be welcome—in particular so far as concerns "the assessment of pecuniary damage", including interest and loss of profits.[291] France criticises the "overly concise" drafting of article 44 (all the more so if compared to the detailed treatment of articles 45–46) and advocates a return "to a more analytical version" based on the work done by Mr. Arangio-Ruiz in his second report on State responsibility[292] and on international practice and jurisprudence.[293] By contrast, others stress the need for some flexibility in dealing with specific cases; in their view it is sufficient to set out the general principle of compensation in article 44. They also note that "detailed and comprehensive consideration of the law on reparation and compensation would take considerable time and would delay the completion of the Commission's work".[294]

151. As to the content of that general principle, there is support for the view that in principle the amount of compensation payable is precisely the value the injured State would have received, if restitution had been provided. The United States regards the present drafting of article 44, paragraph 1, as a "long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements". In its view, the fact that compensation is to be provided to the extent that restitu-

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[282] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 67, para. (1).

[283] Ibid., p. 68, para. (3).

[284] Ibid., pp. 68–70, paras. (6)–(13). See paragraphs 27–29 and 31–37 above, for discussion.

[285] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 71, para. (16).

[286] Ibid., para. (17).

[287] Ibid., para. (18), citing Grotius, *De Jure Belli ac Pacis: Libri Tres*, book II, chap. XVII, sect. XXII: "money is the common measure of valuable things".

[288] See paragraphs 195–214 below.

[289] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (27).

[290] Ibid., p. 76, para. (39).

[291] *Yearbook … 1998* (footnote 35 above), p. 147, Denmark on behalf of the Nordic countries; see also A/CN.4/496, pp. 19–20, para. 125 (emphasizing the need for greater legal security) and A/CN.4/504, p. 19, para. 71 (footnote 3 above).

[292] *Yearbook … 1989* (see footnote 21 above).

[293] *Yearbook … 1998* (footnote 35 above), p. 147; see also A/CN.4/496, p. 20, para. 125, and A/CN.4/504, p. 19, para. 71 (taking as an example "the principle whereby damage suffered by a national [is] the measure of damage suffered by the State") (footnote 3 above).

[294] A/CN.4/496 (see footnote 3 above), p. 19, para. 124.

tion is not makes it clear that the amount of compensation due should be equivalent to the value of restitution.[295] By contrast, Japan is concerned by a possible interpretation of paragraph 1, according to which "the wrongdoing State would be able to reject the request made by the injured State for (financial) compensation with the excuse that restitution in kind had not been proved completely impossible". Such a reading of the provision would thus "severely restrict the freedom of the injured State to choose whatever form of full reparation it deems appropriate".[296]

152. Another issue concerns the need to refer to interest and loss of profits in article 44, paragraph 2, and the proper formulation of any such reference. Some Governments consider it unnecessary to specify as a legal obligation the payment of interest and compensation for loss of profits.[297] This is apparently the view adopted by France, which proposes reformulating the paragraph as follows:

> For the purposes of the present article, the compensable damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.[298]

On the other hand, a number of Governments firmly assert that, "to the extent that it represents the actual loss suffered by the claimant, the payment of interest is not an optional matter but an obligation".[299] Accordingly, paragraph 2 should provide that compensation "shall" (rather than "may") include interest.[300] The United States refers to decisions of the Iran-United States Claims Tribunal and UNCC in support of its view that the present drafting of paragraph 2 "goes counter not only to the overwhelming majority of case law on the subject but also undermines the 'full reparation' principle".[301]

153. These comments raise a number of issues as to article 44. One of these, the question of interest, is dealt with separately below.[302] But the main issue raised is whether article 44 should spell out in more detail accepted principles of assessment of compensation, as well as what limitations might be expressed on the assessment of full compensation, to avoid imposing disproportionate burdens on the responsible State.

[295] *Yearbook … 1998* (footnote 35 above), pp. 147–148; the United States particularly refers to the *"Lusitania"* (see footnote 16 above) and *Letelier and Moffitt* (ILM, vol. XXXI (1992)) cases, and notices that that principle "has been applied to wrongful death cases as well".

[296] *Yearbook … 1999* (footnote 43 above), p. 108.

[297] A/CN.4/504 (footnote 3 above), p. 19, para. 71.

[298] *Yearbook … 1998* (footnote 35 above), p. 148.

[299] Ibid., United Kingdom, p. 147; see also A/CN.4/496 (footnote 3 above), p. 20, para. 125 ("the payment of interest should be the basic and general rule for compensation").

[300] *Yearbook … 1998* (footnote 35 above), p. 148, the United States, considering that article 44 would represent "a step backwards in the international law of reparation" in the absence of such a revision. See also A/CN.4/504 (footnote 3 above), p. 19, para. 71, where one Government argues that replacing "may" by "shall" would "deprive the wrongdoing State of an incentive to delay payment of compensation" while another favours the idea that "a sufficient grace period" for the payment of compensation be allowed to the wrongdoing State before fixing the provision of interest. Governments suggesting this substitution do not seem to favour the deletion of the words "where appropriate" before "loss of profits" (see Mongolia, *Yearbook … 1998* (footnote 35 above), p. 147).

[301] *Yearbook … 1998* (footnote 35 above), p. 148.

[302] See paragraphs 195–214 below.

(b) *Assessment of compensation: general principle or detailed criteria?*

154. In his second report, Mr. Arangio-Ruiz discussed "reparation by equivalent" in some detail, proposing two alternative articles, one shorter and one rather more detailed. As its commentary implies, the Commission preferred the shorter version, which became article 44.[303] In consequence, some of the issues discussed by Mr. Arangio-Ruiz in his report—the distinction between moral injury to individuals and to the State, the distinction between lawful and unlawful expropriation, methods of assessing the value of property taken, especially where this is done on a "going concern" basisare only dealt with briefly, if at all, in article 44 and its commentary.

155. There is, evidently, a need for caution in laying down more specific rules relating to compensation. Although a good deal of guidance is available in certain fields (notably diplomatic protection, especially as concerns takings of, or damage to, property), there have been relatively few recent reasoned awards dealing with the assessment of material damage as between State and State (i.e. outside the field of diplomatic protection). Damages have been sought in approximately one third of cases commenced before ICJ, but so far, the Court has only awarded damages in one case—the *Corfu Channel* case.[304] Indeed it has been argued that the Court has shown some aversion to awards of damages as compared with declaratory or other relief. For example in the *Nuclear Tests* case, it held that the case was moot following the French commitment not to conduct further atmospheric tests, notwithstanding an unfulfilled New Zealand demand for compensation.[305] In the case concerning the *Gabčíkovo-Nagymaros Project*, where both parties claimed substantial compensation against the other, the Court first affirmed the classical rules as to reparation and compensation, then went on to suggest that a "zero-sum agreement" for damages (as distinct from financial contributions to the continuing project) would be appropriate. The relevant passage reads:

> It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.
>
> Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's

[303] See Mr. Arangio-Ruiz's second report, *Yearbook … 1989* (footnote 21 above), pp. 8–30, paras. 20–105, and p. 56, for the text of his proposals. For the report of the Drafting Committee see *Yearbook … 1992*, vol. I, pp. 219–220, paras. 39–52. Since 1989, there have been further developments in jurisprudence and practice, summarized, inter alia, by Iovane, op. cit.; Decaux, loc. cit.; as well as in the sources cited below. The general comparative law experience is well summarized by Stoll, "Consequences of liability: remedies".

[304] *I.C.J. Reports 1949* (see footnote 69 above), p. 249. See Gray, op. cit., pp. 77–95, for a somewhat sceptical account of the practice.

[305] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 475–476, paras. 55–58. Cf. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 305, para. 59.

decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.[306]

In both cases, it may be inferred, the Court did not regard issues of compensation (as distinct from a return to legality or the cessation of allegedly wrongful conduct) as being at the heart of the case. But in the *Gabčíkovo-Nagymaros Project* case, in particular, it reaffirmed the established law of reparation, including compensation, in State-to-State cases. Moreover too much should not be read into the absence of awards of compensation by the Court. In some cases States have preferred to settle claims by the payment of damages (on a without prejudice basis) rather than see a case go to judgement on the merits,[307] or even on jurisdiction.[308] In others, the parties have sought to settle questions after an award or judgement on the principle of responsibility, or the case has been discontinued for other reasons.[309] Several pending cases involve, or include, claims for reparation, as well as a number of counter-claims for reparation.[310]

156. Apart from ICJ, other established courts and tribunals are dealing with issues of reparation, including compensation.

(*a*) The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. There are substantial outstanding State-to-State claims for reparation;[311]

(*b*) Human rights courts and other bodies, in particular the European and Inter-American Court of Human Rights, have developed a body of jurisprudence dealing with what article 41 (formerly 50) of the European Convention on Human Rights refers to as "just satisfaction".[312] Hitherto, amounts of compensation or damages awarded or recommended by these bodies have generally been modest, though the practice is developing;[313]

(*c*) ICSID tribunals under the Convention on the settlement of investment disputes between States and nationals of other States have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals of other States. Some of these claims involve direct recourse to international law;[314]

(*d*) The International Tribunal on the Law of the Sea awarded substantial damages in various categories, plus interest, in its first case decided on the merits;[315]

(*e*) UNCC is a non-judicial body established by the Security Council to deal with compensation claims against Iraq arising "directly" from its invasion of Kuwait in 1990.[316] The UNCC mandate is to decide upon the liability of Iraq "under international law",[317] and UNCC has laid down guidelines for the award of compensation which are subject to the approval of the Governing Council (consisting of the members of the Security Council). These guidelines have been applied to the processing of a very large number of claims.[318]

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[306] *I.C.J. Reports 1997* (see footnote 18 above), p. 81, paras. 152–153. See also pages 168–169, para. 34 (Judge Oda).

[307] As in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, and for the Court's order of discontinuance following the settlement, ibid., *Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; case concerning *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement).

[308] As in *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996*, p. 9 (order of discontinuance following settlement).

[309] The case concerning *Military and Paramilitary Activities in and against Nicaragua* was withdrawn after Nicaragua's written pleadings on compensation had been filed (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47 (order of discontinuance)).

[310] Counter-claims have been held admissible in the following cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190; and *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999*, p. 983.

[311] For reviews of the Tribunal's jurisprudence on valuation and compensation see, inter alia, Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, chaps. 5–6 and 12; Brower and Brueschke, *The Iran-United States Claims Tribunal*, chaps. 14–18; Pellonpää, "Compensable claims before the Tribunal: expropriation claims"; and Stewart, "Compensation and valuation issues".

[312] Article 41 (renumbered by Protocol No. 11) provides:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

In the practice of the Court, "satisfaction" has included elements both of compensation and satisfaction in the sense of the draft articles.

[313] See the helpful review by Shelton, op. cit., pp. 214–291. See further paragraph 157 below.

[314] See, for example, *Asian Agricultural Products Limited* v. *Republic of Sri Lanka* (1990), *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245.

[315] *M.V. "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, pp. 65–67, paras. 170–177.

[316] See paragraph 28 above. In addition to the works there cited, see Boelaert-Suominen, "Iraqi war reparations and the laws of war: a discussion of the current work of the United Nations Compensation Commission with specific reference to environmental damage during warfare"; Christenson, "State responsibility and the UN Compensation Commission: compensating victims of crimes of State"; Gattini, "La riparazione dei danni di guerra causati dall'Iraq"; Graefrath, "Iraqi reparations and the Security Council"; and Romano, "Woe to the vanquished? A comparison of the reparations process after World War I (1914–18) and the Gulf war (1990–91)".

[317] Security Council resolution 687 (1991), para. 16.

[318] The UNCC guidelines and decisions are to be found at http://www2.unog.ch/uncc/decision.htm. Of particular relevance for present purposes are the following:

Decision 3 of 18 October 1991, Personal injury and mental pain and anguish (S/AC.26/1991/3);

Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1);

(*Continued on next page.*)

157. Whenever a particular tribunal or other body is established with competence to deal with claims for State responsibility and to award compensation, the question arises whether the resulting decisions form part of a "special regime" for reparation, amounting to a *lex specialis*. There are no doubt, to a greater or lesser degree, elements of a *lex specialis* in the work of the bodies mentioned above (as well as in relation to the WTO dispute settlement mechanism, the focus of which is firmly on cessation rather than reparation[319]). In principle, States are free to establish mechanisms for the settlement of disputes which focus only on certain aspects of the consequences of responsibility, in effect waiving or leaving to one side other aspects. But there is a presumption against the creation of wholly self-contained regimes in the field of reparation, and it is the case that each of the bodies mentioned in the preceding paragraph has been influenced to a greater or lesser degree by the standard of reparation under general international law. Moreover practice in this field is notably dynamic, though it is significant that appeal is still being made to the *Chorzów Factory* principle[320] as well as to the work of this Commission. For example the leading decision of the Inter-American Court of Human Rights on the question of reparation contains the following passage:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.
>
> As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.
>
> …
>
> Article 63 (1) of the American Convention … does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so [the Court] is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it.
>
> This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law.[321]

Similarly in the *Papamichalopoulos* case, the European Court of Human Rights noted that:

> The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession. In this connection, international case-law, of courts or arbitration tribunals, affords the Court a precious source of inspiration; although that case-law concerns more particularly the expropriation of industrial and commercial undertakings, the principles identified in that field are valid for situations such as the one in the instant case.[322]

158. The possibility that decisions of specialist international tribunals on compensation may involve elements of a *lex specialis* is thus no reason for the Commission to resile from the principle of full compensation embodied in article 44. On the other hand, it is a reason for hesitating to spell out in more specific detail the content of that principle, since it is and is likely to continue to be applied in different ways by different bodies and in different contexts. And there are two further reasons for caution:

(*a*) In the first place, much of the controversy over quantification of damages arises in relation to expropriated property, where (except in special cases such as *Chorzów Factory* itself,[323] or *Papamichalopoulos*[324]), the question is the content of the primary obligation of compensation. It is not the Commission's function in relation to the present draft articles to develop the substantive distinction between lawful and unlawful takings, or to specify the content of any primary obligation.[325]

(*Footnote 318 continued.*)

Decision 8 of 24 January 1992, Determination of ceilings for compensation for mental pain and anguish (S/AC.26/1992/8);

Decision 9 of 6 March 1992, Propositions and conclusions on compensation for business losses: types of damages and their valuation (S/AC.26/1992/9);

Decision 11 of 26 June 1992, Eligibility for compensation of members of the Allied Coalition Armed Forces (S/AC.26/1992/11);

Decision 13 of 24 September 1992, Further measures to avoid multiple recovery of compensation by claimants (S/AC.26/1992/13);

Decision 15 of 18 December 1992, Compensation for business losses resulting from Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause (S/AC.26/1992/15);

Decision 16 of 18 December 1992, Awards of interest (S/AC.26/1992/16);

Decision 19 of 24 March 1994, Military costs (S/AC.26/Dec.19 (1994));

Decision 40 of 17 December 1996, Well Blowout Control Claim (S/AC.26/Dec.40 (1996)).

[319] Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct (ibid., art. 22). On the distinction between cessation and reparation for WTO purposes, see, for example, WTO, "Report of the Panel, Australia: subsidies provided to producers and exporters of automotive leather" (WT/DS126/RW and Corr.1) (21 January 2000), para. 6.49.

[320] See footnote 49 above.

[321] Inter-American Court of Human Rights, *Velásquez Rodríguez* v. *Honduras*, Compensatory Damages, Judgment of 21 July 1989, Series C, No. 7, paras. 26–27 and 30–31.

[322] *Papamichalopoulos and Others* v. *Greece*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 330–B, *Judgment of 31 October 1995 (article 50)* (Council of Europe, Strasbourg, 1996), p. 59, para. 36. The Court went on to cite the *Chorzów Factory* dictum (ibid.) (see footnote 49 above). Generally on the development of standards of compensation in the field of human rights, see Shelton, op. cit.; Randelzhofer and Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*; and Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea".

[323] See footnote 49 above.

[324] See footnote 322 above.

[325] On issues of expropriation and the value of income-producing property, see, for example, Erasmus, *Compensation for Expropriation: A Comparative Study*; Norton, "A law of the future or a law of the past? Modern tribunals and the international law of expropriation"; Penrose, Joffe and Stevens, "Nationalisation of foreign-owned property for a public purpose: an economic perspective on appropriate compensation"; Lieblich, "Determinations by international tribunals of the economic value of expropriated enterprises", and "Determining the economic value of expropriated income-producing property in international arbitrations"; Friedland and Wong, "Measuring damages for the deprivation of income-producing assets: ICSID case studies"; Khalilian, "The place of discounted cash flow in international commercial arbitrations: awards by Iran-United States Claims Tribunal"; Chatterjee, "The use of the discounted cash flow method in the assessment of compensa-

(*b*) Secondly, now that the Commission has decided to deal with diplomatic protection as a separate topic (albeit a topic within the general field of responsibility), questions of quantification arising in the context of injury to aliens are more appropriately dealt with as part of that topic.

159. Despite these considerations, it can be argued that, if there do exist clear and more detailed rules in relation to the assessment of compensation that can be stated—either as a matter of pure codification or progressive development—then they should be stated. The difficulty is that it is very unclear whether there are such rules, as distinct from the general principles stated in articles 42 and 44.[326] The decisions reflect the wide variety of factual situations, the influence of particular primary obligations,[327] evaluations of the respective behaviour of the parties (both in terms of the gravity of the breach and their subsequent conduct), and, more generally, a concern to reach an equitable and acceptable outcome. As Aldrich observes, "when [international judges] are making a complex judgment such as one regarding the amount of compensation due for the expropriation of rights … equitable considerations will inevitably be taken into account, whether acknowledged or not".[328] Experience in this and other contexts shows that, while illustrations can be given of the operation of equitable considerations and of proportionality in international law, the attempt to specify them in detail is likely to fail.

160. For these reasons, the Special Rapporteur agrees with the decision taken by the Commission at its forty-fourth session in 1992 to formulate article 44 in general and flexible terms.[329] A number of specific limitations on the principle of full compensation in particular the rule against double recovery and, perhaps, the *non ultra petita* rule can be stated, although these relate more to the invocation of responsibility than to the determination of quantum at the level of principle. They will accordingly be considered below, as will the issue of mitigation of responsibility.[330]

(c) *Limitations on compensation*

161. One question that does need consideration, however, is that of limiting compensation. Legal systems are generally concerned to avoid creating liabilities in an indeterminate amount in respect of an indeterminate class, and the special context of inter-State relations if anything aggravates such concerns. There are no *general* equivalents in international law to the limitation of actions or the limitation of liability which are used in national law for this purpose. The State is not a limited liability corporation, and there is no formal mechanism for dealing with issues of State insolvency. Given the capacity of States to interfere in the life of peoples and in economic relations, and the growth of substantive international law affecting both, the potential for indeterminate liability undoubtedly existseven if it has usually not arisen in practice.[331]

162. The issue of limiting crippling compensation claims has already been discussed in the context of former article 42, paragraph 3, which provides that reparation should not result in depriving a population of its own means of subsistence.[332] For the reasons given, that provision is unnecessary so far as restitution and satisfaction are concerned, but it does merit consideration in the context of compensation, since the rules relating to directness or proximity of damage are not guaranteed to prevent very large amounts being awarded by way of compensation in certain cases.

163. A robust answer to these concerns is that they are exaggerated, that compensation is only payable where loss has actually been suffered as a result (direct, proximate, not too remote) of the internationally wrongful act of a State, and that in such cases there is no justification for requiring the victim(s) to bear the loss. Moreover if States wish to establish limitation of liability regimes in particular fields of ultrahazardous activity (e.g. oil pollution, nuclear accidents) they can always do so. In particular, the consistent outcome of orderly claims procedures (whether they involve lump-sum agreements or mixed claims commissions or tribunals) has been a significant overall reduction of compensation payable compared with amounts claimed.[333] According to this view there is no case for a general provision on the subject.

164. The Special Rapporteur is inclined to agree. It is a matter for the Commission, however, to consider whether article 42, paragraph 3, or some similar provision should be inserted in article 44 to deal with cases of catastrophic and unforeseen liabilities. In any event, the question of mitigation of responsibility and mitigation of damages by reference to the conduct of the injured State do have a place in the draft and are discussed below.[334]

(d) *Conclusion*

165. For these reasons, the Special Rapporteur proposes that article 44 read as follows:

"Compensation

"A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution."

As compared with the version adopted on first reading, certain changes of wording have been made, essentially

tion: comments on the recent World Bank guidelines on the treatment of foreign direct investment"; and Dagan, *Unjust Enrichment: A Study of Private Law and Public Values*, chap. 6 (International law).

[326] As Mr. Arangio-Ruiz also concluded (*Yearbook … 1989* (see footnote 21 above), p. 11, para. 28).

[327] A matter particularly emphasized by Brownlie, op. cit., pp. 222–227.

[328] Aldrich, op. cit., p. 242. The passage quoted refers to the question of assessment of compensation for "rights to lift and sell petroleum products", but it is of more general application.

[329] *Yearbook … 1992*, vol. I, 2288th meeting, p. 220, para. 48.

[330] Paras. 215–222 below.

[331] See, for example, the Chernobyl affair, which did not, however, give rise to any actual claims of responsibility (Woodliffe, "Chernobyl: four years on", pp. 466–468).

[332] See paragraphs 38–42 above.

[333] See footnote 78 above. Similar outcomes can be observed with the earlier mixed tribunals.

[334] See paragraphs 195–214 below.

minor in character. First, consistently with other articles in this part, article 44 is expressed as an obligation of the responsible State. The invocation of that responsibility by the injured State or States will be dealt with in part two *bis*. Evidently each State would only be entitled to invoke the obligation to pay compensation to the extent that it has itself suffered damage, or to the extent that it is duly claiming for damage suffered by its nationals.[335] Secondly, the two paragraphs of former article 44 have been subsumed into a single paragraph, covering all economically assessable damage. There is no need to mention loss of profits as a separate head of damage, especially since any such mention will inevitably have to be qualified (giving rise to the "decodifying" effect which some Governments complained of in the earlier text[336]). Compensation for loss of profits is available in some circumstances and not others, but to attempt to spell these out would contradict the underlying strategy of article 44 as a general statement of principle. The commentary can deal with the different heads of compensable damage (including loss of profits) in a more substantial way. The subject of interest will be dealt with in a separate article.[337]

166. It will be a matter for the Commission to decide whether a more detailed formulation of the principle of compensation is required in the text of article 44, in which case proposals will be made in a further instalment of the present report. The Special Rapporteur would, however, prefer a more discursive treatment in the commentary of the internationally recognized body of compensation rules and principles relating to the measure of damages. Among other things, it will be possible to do this with the necessary degree of flexibility.

4. Satisfaction

(a) *Existing article 45*

167. Article 45 provides:

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(*a*) An apology;

(*b*) Nominal damages;

(*c*) In cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(*d*) In cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

168. According to the commentary, satisfaction is intended to cover "only the non-material damage to the State", otherwise referred to as its "moral injury".[338] Earlier writers expressed this in terms such as "honour" or "dignity": the terms now have a rather archaic quality, although "dignity" survives in article 45, paragraph 3. Paragraph 1, in referring to "satisfaction for the damage, in particular moral damage, caused by that act", is intended to designate "any non-material damage suffered by a State as a result of an internationally wrongful act". This is the subject matter of satisfaction.[339]

169. The commentary notes that satisfaction is a "rather exceptional" remedy, which is not available in every case. This is conveyed by the use of the term "if and to [the] extent necessary to provide full reparation".[340] Paragraph 2 provides a list of measures by way of satisfaction. Thus an apology, which "encompasses regrets, excuses, saluting the flag, etc. ... occupies a significant place in international jurisprudence": even if some of its forms (such as saluting the flag) "seem to have disappeared in recent practice", requests for apologies have increased in frequency and importance.[341] Another form, not mentioned in paragraph 2, is "recognition by an international tribunal of the unlawfulness of the offending State's conduct".[342]

170. Damages "reflecting the gravity of the infringement" are "of an exceptional nature … given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party".[343] Thus in the "*Rainbow Warrior*" case, the Secretary-General of the United Nations decided that France should formally apologise for the breach and pay US$ 7 million to New Zealand; this far exceeded the actual damage suffered and was plainly an award by way of satisfaction.[344] The commentary does not suggest that this mode of satisfaction is limited to "international crimes" as defined in former article 19. Even in relation to "delicts", satisfaction performs a function which, whether or not "afflictive" is expressive of the seriousness of the case and of the injury done, and in this sense is an aspect of full reparation.[345]

171. The sanctioning of responsible officials is also quite frequently sought and granted, but its "extensive application … might result in undue interference in the internal affairs of States. [The Commission] has therefore limited the scope of application of subparagraph (*d*) to

[335] The extent to which a State may claim on behalf of persons or companies injured by the internationally wrongful act of a State will be dealt with in more detail in the topic of diplomatic protection.

[336] See paragraphs 149 and 152 above.

[337] See paragraphs 195–214 below.

[338] *Yearbook … 1993*, vol. II (Part Two), commentary to article 10 [present art. 45], p. 77, para. (4).

[339] Ibid., para. (5).

[340] Ibid., para. (6).

[341] Ibid., pp. 78–79, para. (9).

[342] Ibid., p. 79, para. (10).

[343] Ibid., para. (12).

[344] Ibid., pp. 79–80, para. (13).

[345] Ibid., pp. 80–81, paras. (21)–(24).

criminal conduct whether from officials or private parties and to serious misconduct of officials".[346]

172. More generally it is necessary to impose some limit on the measures that can be sought by way of satisfaction, in the light of earlier abuses, inconsistent with the principle of the equality of States.[347] This is the point of paragraph 3.[348]

173. None of the Governments which have commented on article 45 question its relevance and necessity: all support the view that satisfaction is an important and well-grounded form of reparation in international law.[349] The three paragraphs of the provision have nevertheless been subject to many remarks both of substance and form. As to paragraph 1, the main concern relates to the notion of moral damage. Japan comments that the words "in particular moral damage" are too unclear and should be deleted.[350] On the other hand, both Germany and the United States agree that reparation for moral damage is well established in State practice. But both Governments consider that "moral damage is equivalent to the harm of mental shock and anguish suffered and [that] reparation will regularly consist of monetary compensation": accordingly, the provision on moral damage should in their view be moved to article 44.[351]

174. As to article 45, paragraph 2, the first issue raised by Governments concerns the notion of "punitive damages", alluded to in paragraph 2 (*c*). Several Governments argue that the punitive function of reparation is not supported by State practice or international jurisprudence and propose deleting the related provision in article 45.[352] On the other hand, the Czech Republic believes that the Commission "could reconsider the question of punitive damages in respect of crimes".[353] Given the *sui generis* character of international responsibility, the absence of the notion of punitive damages in some national legal systems is not an insurmountable problem for the Czech Republic. In addition to the fact that punitive damages have been awarded in a few international cases, "it is not as a rule easy to distinguish between real punitive damages, that is, those that go beyond simple reparation, and a 'generous' award of compensation for mental suffering extensively evaluated".[354] Moreover, "[i]ntroducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime for 'crimes' a valuable a priori deterrent function".[355]

175. States have also commented on the other provisions of article 45, paragraph 2. It has, for example, been suggested that "the new forms of 'constructive reparation' recognized in the *Rainbow Warrior* case" could be included in that paragraph.[356] France proposes a number of other modifications. In its view, a new subparagraph could be added "referring to acknowledgement of the existence of an internationally wrongful act by a tribunal"; it would read as follows:

> A declaration of the wrongfulness of the act by a competent international body which is independent of the parties.[357]

France also considers that the phrase "an expression of regret and" should be included before "an apology" in subparagraph (*a*),[358] and that the words "disciplinary or penal action against" should be substituted for "disciplinary action against" in subparagraph (*d*). In respect of that last subparagraph, opinions are rather divided: whereas it has been argued that it "covered a domestic concern regarding disciplinary action against officials which should not be covered in the draft articles".[359] Austria is of the view that it should better reflect recent State practice, and particularly the "growing number of multilateral instruments emphasizing the duty of States to prosecute or extradite individuals for wrongful acts defined in those instruments".[360]

176. Finally, the United States proposes deleting paragraph 3, on the ground that "the term 'dignity' is not defined (and may be extremely difficult to define as a legal principle) and therefore the provision would be susceptible to abuse by States seeking to avoid providing any form of satisfaction".[361]

177. Accordingly the questions raised by article 45 seem to be three, corresponding to its three paragraphs: first, the general character of satisfaction and its relation to "moral damage"; secondly, the exhaustive or non-exhaustive character of the forms of satisfaction given in paragraph 2, as well as certain issues as to the content of the list, and thirdly, the need for and formulation of paragraph 3.

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[346] Ibid., p. 80, para. (15).

[347] The commentary does not give an example of such abuses, but Mr. Arangio-Ruiz in his second report gives two: the joint note presented to the Chinese Government in 1900 following the Boxer uprising, and the demand by the Conference of Ambassadors against Greece in the Tellini affair in 1923 (*Yearbook … 1989* (see footnote 21 above), pp. 37–38, para. 124). Both examples involved collective demands.

[348] *Yearbook … 1993*, vol. II (Part Two), commentary to article 10 [present art. 45], p. 81, para. (25).

[349] Mongolia describes article 45 as "highly important" (*Yearbook … 1998* (footnote 35 above), p. 148).

[350] *Yearbook … 1999* (see footnote 43 above), p. 109 (see also A/CN.4/504 (footnote 3 above), p. 19, para. 72, where it is "suggested that the term 'moral damage' … be defined").

[351] *Yearbook … 1998* (see footnote 35 above), pp. 148–149. Germany draws a distinction between moral damage suffered by nationals of the State and that directly suffered by States: although "less compelling", the latter situation could also justify "monetary compensation as a form of satisfaction for infringements of the dignity of a State" (ibid., p. 149).

[352] Ibid., Germany, Austria (calling for the Commission to study the issue further, given the existence of the concept in some domestic legal systems, p. 149), Switzerland (suggests deleting paragraph 2 (*c*) on another ground, viz. the fact that it deals with issues of compensation, already covered by article 44 (p.150)), United States (ibid.), and Japan (*Yearbook … 1999* (footnote 43 above), p. 109).

[353] *Yearbook … 1998* (see footnote 35 above), p. 150.

[354] Ibid., p. 149 (the Czech Republic questions the relevance in modern international law of the *"Carthage"* (UNRIAA (1913), vol. XI (Sales No. 61.V.4), p. 449) and *"Lusitania"* (see footnote 16 above) cases); see also A/CN.4/504 (footnote 3 above), p. 20, para. 72.

[355] *Yearbook … 1998* (see footnote 35 above), p. 149.

[356] A/CN.4/504 (see footnote 3 above), p. 20, para. 72.

[357] *Yearbook … 1998* (see footnote 35 above), p. 150.

[358] Ibid. Uzbekistan proposes a similar addition as well as the inclusion of the phrase "an expression of special honours to the injured State" (ibid.).

[359] A/CN.4/504 (see footnote 3 above), p. 20, para. 72.

[360] *Yearbook … 1998* (see footnote 35 above), p. 149.

[361] Ibid., p. 150; see also A/CN.4/504 (footnote 3 above), p. 20, para. 72.

(b) *The character of satisfaction as a remedy*

178. There is no doubt that satisfaction for non-material injury caused by one State to another is recognized by international law. The point was made, for example, by the Tribunal in the "*Rainbow Warrior*" arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities. The whole matter is valuably and extensively discussed by Professor Arangio-Ruiz in his second report (1989) … He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as "the special remedy for injury to the State's dignity, honour and prestige" (para. 106).
>
> Satisfaction in this sense can take and has taken various forms. Arangio-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State's conduct …
>
> It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made—although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction.[362]

179. According to the commentary to article 45, satisfaction "is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy, it is also identified by the typical forms it assumes".[363] This is certainly true, but there is a problem in that paragraph 1 does not define satisfaction at all: it uses the term "satisfaction" and then refers in a general way to "damage, in particular moral damage" suffered by the injured State. This raises a number of issues.

180. The first is the term "moral damage", which some States regard as something properly the subject of compensation, particularly when it affects individuals.[364] In Mr. Arangio-Ruiz's original scheme, moral damage suffered by individuals was covered by draft article 8, whereas moral damage suffered by the State was covered by article 10 on satisfaction and guarantees of non-repetition.[365] Though not rejected by the Commission, this distinction was elided when the articles were actually adopted.

181. So far as it concerns individuals, the term "moral damage" (a term itself not known to all legal systems) is generally understood to cover non-material damage such as pain and suffering, loss of loved ones, as well as the affront to one's sensibilities associated with an intrusion on one's person, home or private life. These are clear forms of human loss which (if the act causing them is recognized by the relevant legal system as wrongful) can be compensated for in monetary terms, even though their assessment will always be a conventional and highly approximate matter. By contrast, the notion of "moral damage" so far as it concerns States is less clear. No doubt there are cases of per se injury to States where no actual material loss is suffered— for example, a brief violation of its territorial integrity by aircraft or vessel belonging to another State. But much of what is subsumed under the term "moral damage" for States really involves what might be described as non-material legal injury, the injury involved in the fact of a breach of an obligation, irrespective of its material consequences for the State concerned. To avoid confusion with the notion of moral damage as it concerns individuals, it is proposed to avoid the term "moral damage" in article 45 and to use "non-material injury" ("*préjudice immatériel*") instead.[366] On this basis no more detailed definition of satisfaction seems to be required.

(c) *Specific forms of satisfaction*

182. Turning to the specific forms of satisfaction listed in article 45, paragraph 2, an initial point to note is that the commentary contradicts itself on the question whether the forms of satisfaction listed are or are not exhaustive. According to paragraph (9) of the commentary the list is non-exhaustive, whereas according to paragraph (16), "[t]he opening phrase of paragraph 2 makes it clear that the paragraph provides an exhaustive list of the forms of satisfaction, which may be combined".[367] The point is of significance since the most important form of satisfaction in modern judicial practice, the declaration, is omitted from the list. In fact the *chapeau* of article 45, paragraph 2, uses the word "may", which seems to imply a non-exhaustive list. In the present Special Rapporteur's view it should indeed be non-exhaustive. The appropriate form of satisfaction will depend on the circumstances, and cannot be prescribed in advance.[368]

(i) *Declarations*

183. If the article 45, paragraph 2, list were exhaustive, it is obvious that it would have to include reference to a declaration by a court or tribunal. Indeed such a reference was included in the version of article 45 first proposed by Mr.

[362] See footnote 17 above.

[363] *Yearbook … 1993*, vol. II (Part Two), commentary to article 10 [present art. 45], p. 78, para. (9).

[364] See paragraph 173 above.

[365] See especially his second report, *Yearbook … 1989* (footnote 21 above), art. 8, para. 2, which referred to "any economically assessable damage … including any moral damage sustained by the injured State's nationals", p. 56, para. 191.

[366] The term is recommended in this sense by Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études*, p. 354.

[367] *Yearbook … 1993*, vol. II (Part Two), commentary to article 10 [present art. 45], p. 80. In introducing article 45, the Chairman of the Drafting Committee also expressed the view that paragraph 2 "provided an exhaustive list of the forms of satisfaction" (*Yearbook … 1992*, vol. 1, 2288th meeting, p. 221, para. 57).

[368] In the "*Rainbow Warrior*" arbitration the Tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (UNRIAA (footnote 17 above), p. 274, paras. 126–127). Quite apart from the fact that it was made *ultra petita*, it was appropriate that this take the form of a recommendation, since it could only be implemented by agreement. See further Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du *Rainbow Warrior*".

Arangio-Ruiz,[369] and France proposes an equivalent.[370] Both draw on the classic statement of ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a minesweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.
>
> This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[371]

184. This position has been followed in many subsequent cases, including the *"Rainbow Warrior"* arbitration,[372] to such an extent that declaratory relief can be said to have become the normal, and certainly the first, form of satisfaction in the case of non-material injury to a State.[373] In saying that it is the first, the Special Rapporteur does not imply that it is primary, or that it excludes more stringent forms of satisfaction where these are justified. Declaratory relief, however, comes first in two senses: (*a*) that in some cases it may be a sufficient form of satisfaction (as it was in relation to Operation Retail in *Corfu Channel*); (*b*) that even where it is not sufficient, it is a necessary basis for other forms of satisfaction which may be called for in particular cases. This general applicability of declaratory relief as a form of satisfaction, associated in appropriate cases with an apology or statement of regret, should be recognized in the draft articles, which could usefully distinguish it from the more specific forms of reparation currently listed in article 45, paragraph 2.

185. The difficulty with doing so, however, is that the draft articles are expressed in terms of the legal relations of States, in particular the responsible State, and not in terms of the powers or jurisdiction of tribunals. A State cannot, as it were, grant or offer a declaration in respect of itself; this can only be done by a competent third party. A statement of the breach of an international obligation made by the injured State is a claim; made by the responsible State, it is an acknowledgement. The draft articles should specify what the responsible State should do in consequence of an internationally wrongful act (i.e. its secondary obligations); what it fails to do a competent tribunal would then be entitled to award by way of reparation. Accordingly article 45 should first specify, as a form of satisfaction, the acknowledgement of the breach and, where appropriate, an apology or expression of regret.

(ii) *Nominal, exemplary and punitive damages*

186. Turning to what may be described as the "second tier" of the forms of satisfaction, for the reasons given, these should be formulated in a non-exhaustive way. There are very many other possibilities, including for example, a proper inquiry into the causes of an accident causing harm or injury, a trust fund to manage compensation payments in the interests of the beneficiaries, etc. But something should be said about the two categories that are mentioned in article 45, damages and disciplinary or penal action.

187. Normally, of course, damages are payable by way of compensation for injury or harm suffered, and fall within article 44. Article 45, paragraph 2, presently mentions two other kinds of damage, viz. nominal damages and damages "reflecting the gravity" of a breach. They present very different issues.

188. Nominal damages are awarded in some systems in order to reflect the existence of a breach which has not been shown to have caused the injured party any loss whatever. Nonetheless, there has been a breach and the nominal damages are intended to reflect that they are symbolic, not compensatory. In legal systems where the award of costs follows the event, an award of nominal damages may allow for the award of costs, but in international arbitral and judicial practice it would not do so, since costs are almost always borne by each party and in any event would not depend on whether an award of US$ 1 (€1.0734) had been made. There is also the point that the award of nominal damages was sometimes intended as an *adverse* reflection on the claimant, implying that the claim had no merit and was purely technical.[374] Although there have occasionally been examples of the award of nominal damages by international tribunals, in modern practice these are rare.[375] The present Special Rapporteur doubts the value of nominal damages as a form of satisfaction in modern international law: in particular it is not clear what they could achieve which could not be achieved by appropriate declaratory relief. Assuming that the proposed additional paragraph will be inclusive, he doubts whether nominal damages need to be specifically mentioned.

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[369] The original proposal contained the following paragraph:

> "3. A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction."

(*Yearbook … 1989* (see footnote 21 above), p. 56, para. 191)

[370] See paragraph 175 above.

[371] *I.C.J. Reports 1949* (see footnote 17 above), p. 35, repeated in the operative part (p. 36). This was the only point on which the Court was unanimous.

[372] See paragraph 178 above.

[373] On the primary role of declaratory relief as satisfaction for non-material injury see, for example, Gray, op. cit., pp. 17–18 (arbitral tribunals), 96–107 (PCIJ and ICJ), 127–131 (European Court of Justice) and 155–156 (human rights courts).

[374] See Walker, *The Oxford Companion to Law*, p. 883. Awards such as US$ 500 for 24 hours' imprisonment, or US$ 100 for the brief detention of a vessel, do not constitute nominal damages in this sense, especially having regard to the value of money at the time. See respectively the *Moke* case, decision of 16 August 1871 (Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, p. 3411; and the *Arends* case (1903), UNRIAA, vol. X (Sales No. 1960.V.4), pp. 729–730, as cited by Mr. Arangio-Ruiz, *Yearbook … 1989* (footnote 21 above), p. 35, para. 115.

[375] See Gray, op. cit., pp. 28–29 and references. There seems to have been no case of the award of nominal damages by an international tribunal in a State-to-State case since the Tribunal awarded FF 1 to France in the *Lighthouses* arbitration (*Affaire relative à la concession des phares de l'Empire ottoman* (1956), UNRIAA, vol. XII (Sales No. 63.V.3), p. 216). Nominal damages were awarded by an ICSID tribunal in *AGIP SpA* v. *Government of the People's Republic of the Congo* (1979), *ICSID Reports* (Cambridge, Grotius, 1993), p. 329 (FF 3 in respect of *lucrum cessans*, which seems a contradiction in terms); and by the European Court of Human Rights in the *Engel and others* case, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 22, *Judgment of 23 November 1976* (Council of Europe, Strasbourg, 1977), p. 69 (a "token indemnity" of *f.* 100). In both these cases substantial sums were awarded under other heads. In other cases tribunals have denied that the award of notional sums added anything to a declaration of a breach (*"The Carthage"*, UNRIAA (see footnote 354 above), pp. 460–461; and *"The Manouba"*, ibid., p. 475).

189. The award of substantial damages by way of satisfaction, even in the absence of any proof of material loss, is another matter, and circumstances can readily be envisaged where this would be appropriate.[376] By "substantial damages" is meant any damages not purely nominal or symbolic, even if they are not large. Article 45, paragraph 2 (*c*) envisages "[i]n cases of gross infringement of the rights of the injured State, [the payment of] damages reflecting the gravity of the infringement". It seems that it did not envisage the payment of any other than nominal damages by way of satisfaction in cases not involving gross infringements: in other words, either trivial amounts of damages can be awarded under the rubric of satisfaction, or very large amounts, but nothing in between. Whether this limitation is appropriate depends, in part at least, on whether paragraph 2 (*c*) is really concerned with punitive damages properly so-called, or whether it focuses on what some national legal systems describe as "aggravated" or "exemplary" damages.

190. Mr. Arangio-Ruiz's second report was clear on the point. His proposed article 10 referred to "nominal or punitive damages", although the report itself rather refers to "afflictive damages".[377] In the present Special Rapporteur's view, if there are to be punitive damages properly so-called, they should be called punitive damages, and they should be available—if at all—only in rare cases of manifest and egregious breach. It may be that the language of subparagraph (*c*) is equivocal in this respect, but the intention is clear. According to the Chairman of the Drafting Committee, that subparagraph was intended to deal

> with what was known in the common law as "exemplary damages", in other words, damages on an increased scale awarded to the injured party over and above the actual loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. The purpose of that type of remedy was to set an example. The Drafting Committee had not used the term "exemplary damages" because the term did not seem to have an equivalent in other languages. It had decided instead to spell out the content of the concept … The words "in cases of gross infringement" w[ere] intended to … [set] a high threshold for availability of that type of satisfaction.[378]

By clear inference the Committee (whose approach the Commission endorsed) rejected the concept of punitive damages for the purposes of article 45.[379] To that extent the present Special Rapporteur fully agrees with the position taken in 1992. There is no authority and very little justification for the award of punitive damages properly so-called, in cases of State responsibility, in the absence of some special regime for their imposition.[380] Whether such a regime can and should be established is a matter for consideration in discussing articles 19 and 51–53.

191. The question is therefore whether damages should be payable by way of satisfaction for non-pecuniary injury to States, in cases not involving "gross infringement". There are certainly examples in the past of tribunal awards, and of agreed settlements, where modest but not nominal sums have been paid for non-pecuniary injury, and the Special Rapporteur can see no reason to exclude such cases a priori. He therefore proposes to delete the phrase "in cases of gross infringement" in present subparagraph (*c*).

(iii) *Disciplinary or other action against individuals*

192. Disciplinary or penal action is a further specific form of satisfaction mentioned in article 45, paragraph 2, which may be appropriate in special cases. Although the Drafting Committee in adopting the paragraph expressed the view that these would be "rare",[381] in practice they have occurred, although it may not always be clear whether prosecution of criminal conduct was sought by way of satisfaction or as an aspect of performance of some primary obligation. It is consistent with established conceptions of satisfaction to include this category in serious cases, but the Special Rapporteur agrees with the suggestion of France that the phrase "disciplinary or penal action" is to be preferred to "disciplinary action … or punishment".[382] Consistently with the separation of powers, the executive government of the State cannot properly do more than undertake that a serious case be duly submitted to its prosecution authorities for the purposes of investigation and prosecution; it certainly cannot guarantee the punishment of persons not yet convicted of any crime.

(d) *Limitations upon satisfaction: article 45, paragraph 3*

193. One Government proposes the deletion of paragraph 3,[383] on the grounds inter alia that the notion of "dignity" is too vague to be the basis of a legal restriction. There is some point to the objection as a matter of expression; on the other hand there has been a history of excessive demands made under the guise of "satisfaction",[384] and some limitation seems to be required. It is proposed that demands by way of satisfaction should be limited to measures "proportionate to the injury in question"; in addition they should not take a form which is humiliating to the State concerned.

(e) *Conclusion on article 45*

194. For these reasons the Special Rapporteur proposes the following version of article 45:

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[376] Such damages were awarded to Canada in *S.S. "I'm Alone"* (1935), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609, and to New Zealand in the Secretary-General's award in *"Rainbow Warrior"* (1986) (see footnote 17 above), p. 224.

[377] *Yearbook … 1989* (see footnote 21 above), p. 56, para. 191, and also pp. 40–41, paras. 136–144.

[378] *Yearbook … 1992*, vol. I, 2288th meeting, p. 221, para. 57.

[379] The availability of punitive damages is not one of the special consequences of "international crimes" in part two, chapter IV, either, as the present Special Rapporteur has pointed out in his first report (*Yearbook … 1998* (see footnote 23 above), p. 11, para. 51).

[380] See the cases cited in the first report (ibid.), pp. 14–15, para. 57. See further Wittich, "Awe of the gods and fear of the priests: punitive damages and the law of State responsibility"; and Jørgensen, "A reappraisal of punitive damages in international law".

[381] *Yearbook … 1992*, vol. I, 2288th meeting, p. 221, para. 59.

[382] *Yearbook … 1998* (see footnote 35 above), p. 150.

[383] See paragraph 176 above.

[384] See, for example, paragraph 172 above. These excessive demands themselves used the unsatisfactory and subjective language of the "dignity" of the injured State.

"Satisfaction

"1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

"2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

"3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, inter alia:

"[(*a*) Nominal damages;]

"(*b*) Damages reflecting the gravity of the injury;

"(*c*) Where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

"4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State."

5. Interest

(a) *The question of interest in the draft articles*

195. Article 44, paragraph 2, deals fleetingly with interest. It says only that "compensation … may include interest". The commentary to article 44, paragraph 2, is a little more expansive, reflecting the more substantial treatment given to the issue by Mr. Arangio-Ruiz in his second report.[385] There he had supported a general rule of entitlement to interest, covering the time from which the claim arose until the time of actual payment, and not limited to claims for a liquidated sum. Furthermore, in his view, "compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State".[386] On the other hand his proposed article 9 on interest did not state any general rule of entitlement to simple (as distinct from compound) interest, and was limited to specifying the period of time to be covered by interest due "for loss of profits … on a sum of money".[387] This implied that interest payments were limited to liquidated claims, and even, perhaps, to claims for loss of profits (although this may have been a matter of expression only). If the basic principle is, however, that an injured State is entitled to interest on a claim to the extent necessary to ensure full reparation, it is not clear how such limitations can be justified a priori.

196. In the first reading debate, the discrepancy between the argument in favour of interest in the report and proposed article 9 was pointed out, and concerns were expressed as to the acceptability of a detailed treatment of the issues covered.[388] The Drafting Committee deleted the article, on the ground that "it would be extremely difficult to arrive at specific rules on such issues that would command a large measure of support". In its view, it was sufficient "to state a general principle, couched in quite flexible terms, and leave it to the judge or the third party involved in the settlement of the dispute to determine in each case whether interest … should be paid".[389]

197. Article 44, paragraph 2, is certainly drafted in "quite flexible" terms; the difficulty with it is that it states no "general principle" of any kind, but merely refers to a possibility. According to the commentary, the language was intended to make it "clear that there is no automatic entitlement to the payment of interest and no presumption in favour of the injured State",[390] although it notes that State practice "seems to be in support of awarding interest in addition to the principal amount of compensation".[391] The Drafting Committee evidently sought to draw a distinction in the language of paragraph 2 between the award of interest and of damages for loss of profit. Since the latter is only available "where appropriate", the inference is that interest should be more generally available.[392] But the inference is neither strong nor persuasive; all the article says is that compensation "may" include interest. However the commentary is on stronger ground in expressing the view "that the determination of *dies a quo* and *dies ad quem* in the calculation of interest, the choice of the interest rate and the allocation of compound interest are questions to be solved on a case-by-case basis".[393]

198. As noted in paragraph 152 above, some Governments supported the rather reticent treatment of the topic of interest in article 44, paragraph 2; others were strongly critical, noting that it tended to destabilize the established

[385] *Yearbook … 1989* (see footnote 21 above), pp. 23–30, paras. 77–105.

[386] Ibid., p. 30, para. 105.

[387] Ibid., p. 56, para. 191. His proposed article read:

"1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

"(*a*) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

"(*b*) shall run until the day of effective payment.

"2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result."

[388] *Yearbook … 1990*, vol. I, 2169th meeting, pp. 149–50, paras. 10–11; p. 153, paras. 29–30; 2170th meeting, p. 156, para. 10; 2171st meeting, p. 158, para. 10; p. 161, para. 31; pp. 166–167, paras. 69–71; 2172nd meeting, p. 169, para. 13; p. 172, para. 33; p. 175, para. 62; 2173rd meeting, p. 177, para. 11; pp. 178–179, para. 23; p. 183, para. 60; p. 184, para. 69; 2174th meeting, p. 187, para. 11; pp. 188–189, para. 23; p. 190, para. 34; pp. 190–191, para. 42; p. 193, para. 64; and 2175th meeting, p. 199, para. 36. To judge from the debate, the Commission would have been willing to accept a proposal focusing on the *general* entitlement to interest as necessary to provide full reparation, but was concerned that proposed article 9 "dealt with only a secondary problem", on which there was a divergence of practice (ibid., 2170th meeting, p. 156, para. 10) (Mr. Tomuschat); cf. 2171st meeting, p. 158, para. 10 (Mr. Ogiso: "too detailed rules on such issues as the rate of interest and compound interest, on which international law was not clear").

[389] *Yearbook … 1992*, vol. I, 2288th meeting, p. 220, para. 48.

[390] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (24).

[391] Ibid., para. (25).

[392] *Yearbook … 1992*, vol. I, 2288th meeting, p. 220, para. 49 (Mr. Yankov, Chairman of the Drafting Committee).

[393] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (26).

principle that interest should be awarded where necessary to compensate an injured party for loss arising from an internationally wrongful act. In this context it should be noted that neither the Special Rapporteur nor any member of the Commission in the first reading debate denied that principle; indeed almost all who spoke on the subject specifically supported it.

(b) *The role of interest in relation to reparation*[394]

199. Having regard to the comments made by Governments and to other criticisms of the draft articles, two questions arise. The first is the actual role of awards of interest as an aspect of reparation for an internationally wrongful act; the second is whether it is desirable to include a provision concerning interest in the draft articles.

(i) *A general principle?*

200. Turning to the first question, Mr. Arangio-Ruiz's second report[395] contains a useful review of precedents and doctrine. The existence of at least a general rule favouring the award of interest where necessary to achieve full reparation is also supported by more recent jurisprudence.

201. It should be noted that on the first (as it turned out, the only) occasion on which PCIJ actually quantified the compensation due for an international wrong, it included an award of interest. In the *S.S. "Wimbledon"* case, the Court awarded simple interest at 6 per cent as from the date of judgement, apparently on the basis that interest was only payable "from the moment when the amount of the sum due has been fixed and the obligation to pay has been established".[396] Although compensation was quantified by reference to the actual costs of diversion of the French ship, this was a public-law claim for breach of a treaty.[397] In the *Corfu Channel* case,[398] another State-to-State claim, no question of interest was raised.

202. Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and in cases of inter-State claims properly so-called.[399] In this respect the experience of the Iran-United States Claims Tribunal is worth noting.[400] In *The Islamic Republic of Iran* v. *The United States of America* (case A/19), the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise … of the discretion accorded to them in deciding each particular case".[401] On the issue of principle the Tribunal said:

> Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by Article V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment"… Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[402]

The Tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[403] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[404]

203. Decision 16 of the UNCC Governing Council deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[405]

Again we see the combination of a decision in principle in favour of interest where necessary to compensate a claimant, with flexibility in terms of the application of that principle; at the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

204. Awards of interest are also sometimes made, or at least envisaged, by human rights courts and tribunals, even though the compensation practice of these bodies is

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[394] On interest as a matter of general international law, see, for example, Brownlie, op. cit., pp. 227–229; Barker, *The Valuation of Income-Producing Property in International Law*, chap. 7 and works there cited. On the comparative and private international law experience, see, for example, Hunter and Triebel, "Awarding interest in international arbitration"; Gotanda, "Awarding interest in international arbitration" and *Supplemental Damages in Private International Law*, chaps. 2–3.

[395] *Yearbook … 1989* (see footnote 21 above).

[396] *S.S. "Wimbledon"* (see footnote 201 above), p. 32. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans" (ibid.).

[397] PCIJ also envisaged interest as payable in the *Chorzów Factory* case (see footnote 49 above). No award was actually made since the amount of compensation was subsequently agreed between the parties.

[398] *I.C.J. Reports 1949* (see footnote 69 above), p. 244.

[399] In its first case on assessment of compensation, the International Tribunal on the Law of the Sea awarded interest at different rates in respect of different categories of loss (*M.V. "Saiga" (No. 2)* (see footnote 315 above), p. 66, para. 173).

[400] See Aldrich, op. cit., pp. 474–479; and Brower and Brueschke, op. cit., chap. 18.

[401] *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 16, p. 290. As Aldrich, op. cit., pp. 475–476, points out, the practice of the three Chambers has not been entirely uniform.

[402] *Iran-United States Claims Tribunal Reports* (see footnote 401 above), pp. 289–290.

[403] See Brower and Brueschke, op. cit., pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[404] See Aldrich, op. cit., pp. 476–477. And see the detailed analysis of Chamber Three (Virally, Brower, Ansari) in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone, Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 11, pp. 26–31.

[405] S/AC.26/1992/16 (see footnote 318 above).

relatively conservative and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time, i.e. it takes the form of moratory interest.[406]

205. In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[407]

206. Although the trend is towards greater availability of interest as an aspect of full reparation, even proponents of awards of interest admit that there is no uniform approach, internationally, to questions of quantification and assessment of the amount of interest actually awarded.[408] Thus, according to Gotanda:

> Among international tribunals, there exists no uniform approach for awarding interest. As a result, interest awards have varied greatly. There has been little agreement on the circumstances warranting the payment of interest, and the rates at which interest has been awarded have varied from 3% to 20%.[409]

(ii) The question of compound interest

207. An aspect of the question of interest is the possible award of compound interest. At least as a matter of progressive development, Mr. Arangio Ruiz favoured the award of compound interest "whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State".[410] The Commission did not, however, retain his proposal to that effect, and the commentary says only that questions of compound interest are "to be solved on a case-by-case basis".[411]

208. In fact the general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R. J. Reynolds Tobacco Company* v. *The Government of the Islamic Republic of Iran, Iranian Tobacco Company*, the Tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable" ... Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.[412]

Consistent with this approach the Tribunal has read down contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[413]

209. The preponderance of authority thus continues to support the view expressed by the arbitrator, Max Huber, in the *British Claims in the Spanish Zone of Morocco* case:

> [A]rbitration case-law in regard to compensation to be awarded by one State to another for damage sustained by the latter State's nationals on the former State's territory other—after all a particularly rich case-law—is unanimous … in dismissing compound interest. In the circumstances, particularly strong and quite special arguments need to be advanced to accept this type of interest.[414]

The same is equally true for compound interest in respect of State-to-State claims.

210. Nonetheless several authors (notably Mann) have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[415] This view has also been supported by an ICSID tribunal in the *Compañía del Desarrollo de Santa Elena S. A.* v. *Republic of Costa Rica* case:

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[406] See, for example, the *Velásquez Rodríguez* v. *Honduras* case (footnote 321 above), para. 57. The European Court of Human Rights now adopts a similar approach: see, e.g., the *Papamichalopoulos* case (footnote 322 above), pp. 60–61, para. 39. In that case interest was payable only in respect of the pecuniary damage awarded. See further Shelton, op. cit., pp. 270–272.

[407] Barker, op. cit., pp. 209 and 237–238. See, for example, the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the People's Republic of China Government concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987)) (London, HM Stationery Office) in respect of claims arising in 1949.

[408] It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example payment of interest is prohibited by the Iranian Constitution (principles 43 and 49), but the Council of the Guardians of the Constitution has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (see Gotanda, op. cit., pp. 39–40, with references).

[409] Gotanda, op. cit., p. 13 (references omitted).

[410] *Yearbook … 1989* (see footnote 21 above), p. 30, para. 105.

[411] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 73, para. (26).

[412] Case No. 35 (1984), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1986), vol. 7, pp. 191–192, citing Whiteman, *Damages in International Law*, p. 1997.

[413] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran* (1986), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 13, p. 235. See also Aldrich, op. cit., pp. 477–478.

[414] UNRIAA (1924), vol. II (Sales No. 1949.V.1), p. 650, cited by Mr. Arangio-Ruiz, *Yearbook …1989* (see footnote 21 above), pp. 29–30, para. 101. The report cites several later cases in which awards of compound interest were made or at least not ruled out in principle. A more recent example is the *Aminoil* arbitration, where the interest awarded was compounded for a period without any reason being given. This accounted for 15 per cent of the total final award (Barker, op. cit., p. 233, footnote 119). See *Government of Kuwait* v. *American Independent Oil Company (Aminoil)* (1982), ILR, vol. 66, p. 613 (Reuter, Hamed Sultan and Sir Gerald Fitzmaurice).

[415] Mann, "Compound interest as an item of damage in international law", p. 383. With characteristic enthusiasm, Mann argues that this proposition "should not only be English law, but should be accepted wherever damages are allowed and should, therefore, be treated as a general principle of law" (ibid.). See also Gotanda, loc. cit., p. 61, proposing quarterly compounding (again, *de lege ferenda*).

[W]hile simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.

In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.

In the instant case, an award of simple interest would not be justified, given that … for almost twenty-two years, [the Claimant] has been unable either to use the Property for the tourism development it had in mind when it bought Santa Elena or to sell the Property. On the other hand, full compound interest would not do justice to the facts of the case, since [the Claimant], while bearing the burden of maintaining the property, has remained in possession of it and has been able to use and exploit it to a limited extent.[416]

In fact the Tribunal awarded a lump sum by way of compensation for property affected by measures taken 23 years earlier. Moratory interest was awarded on a simple interest basis after a short grace period to pay.

211. To summarize, although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could result in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed.

(iii) *Issues of interest rate and the period of account*

212. The third question relates to the actual calculation of interest: this raises a complex of issues concerning the starting date (date of breach, date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). As noted already, there is no uniformity at present in the treatment of these issues. In practice the circumstances of each case and the conduct of the parties strongly affect the outcome. Although Mr. Arangio-Ruiz's proposed article 9[417] took the date of the breach as the starting date for calculation of the interest term, there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run.[418] In any event, the failure to make a timely claim for payment is relevant in deciding whether or not to allow interest. As to moratory (post-award) interest, some cases allow a grace period for payment (of the order of six weeks up to three months), before interest begins to run, others do not. There is much wisdom in the Iran-United States Claim Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[419] On the other hand the present anarchical state of the decisions and of practice suggests that it may be useful to establish a presumption which would apply unless the parties otherwise agree or there are specific considerations pointing the other way.

(c) *A provision on interest?*

213. The Special Rapporteur agrees with the criticism that article 44, paragraph 2, as currently formulated does not reflect present international law with respect to compensatory interest. In principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent necessary to ensure full reparation.[420] Though an aspect of compensation, this entitlement is treated in practice as a separate element of damages, and this alone suggests that it should be reflected as a separate article in chapter II. The article should not be limited (as Mr. Arangio-Ruiz's proposal was apparently limited) to amounts awarded by way of loss of profits. In the present state of the authorities, it is, however, too much to suggest that there is any entitlement to compound interest. The commentary should note that in special circumstances an award of compound interest may be made, to the extent necessary to provide full reparation. The commentary should also make it clear that the proposed article deals only with compensatory interest. The power of a court or tribunal to award moratory (post-judgement) interest is better regarded as a matter of its procedure, and is thus outside the scope of the draft articles.

214. Accordingly the Special Rapporteur proposes the following article 45 bis:

"Interest

"1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

"2. Unless otherwise agreed or decided, interest runs from the date when compensation should have been paid until the date the obligation to pay compensation is satisfied."

[416] Case No. ARB/96/1 (Fortier, Lauterpacht, Weil) (see footnote 20 above), p. 202, paras. 103–105.

[417] *Yearbook … 1989* (see footnote 21 above), p. 56, para. 191.

[418] The date of formal demand was taken as the relevant date by PCIJ in the *Russian Indemnity* case (footnote 80 above), p. 442, by analogy from the general position in European municipal law systems.

[419] See paragraph 202 and footnote 401 above.

[420] Thus interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote 375 above), pp. 252–253.

6. Mitigation of responsibility

215. Turning from the question of the extent of responsibility to its mitigation, two questions arise. One, dealt with in article 42, paragraph 2, as adopted on first reading, concerns cases where the State invoking responsibility has itself materially contributed to the loss suffered. The second concerns cases where, although that loss may be attributable to the responsible State, the former State has failed to take steps reasonably available to it to mitigate its loss.

(a) *Contributory fault*

216. What is now article 42, paragraph 2, deals with contributory fault and mitigation.[421] It is not appropriate to place it, alongside article 42, paragraph 1, as a general principle in chapter I, but it does need to be dealt with as a qualification to the forms of reparation in chapter II.

217. Article 42, paragraph 2, provides as follows:

> In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:
>
> (*a*) The injured State; or
>
> (*b*) A national of that State on whose behalf the claim is brought; which contributed to the damage.

218. What is now article 42, paragraph 2, was originally proposed by Mr. Arangio-Ruiz specifically in the context of reparation by equivalent, i.e. compensation. One of his alternatives contained a provision allowing for compensation to be reduced in the case of concurrent causes "including possibly the contributory negligence of the injured State".[422] The Drafting Committee rejected his theory of concurrent causes, but maintained the specific provision dealing with contributory fault, on the ground that it was equitable that this be taken into account in determining the form and extent of the obligation of reparation.[423]

219. The commentary to article 42, paragraph 2, notes that contributory fault "is widely recognized both in doctrine and in practice as relevant to the determination of reparation".[424] This is particularly so in the context of compensation, but it is also relevant to other forms of reparation and even possibly to the choice between them.[425] It notes that "the phrase 'the negligence or the wilful act or omission ... which contributed to the damage' is borrowed from article VI, paragraph 1, of the Convention on International Liability for Damage caused by Space Objects".[426]

220. Those Governments which have specifically commented on article 42, paragraph 2,[427] do not expressly call for its deletion but are generally concerned by the drafting and the underlying conceptions of the provision. While it agrees that the factors taken into account in article 42, paragraph 2, "are not themselves controversial", the United Kingdom wonders why negligence and wilful conduct are singled out; other elements, such as "[t]he nature of the rule that has been violated and of the interest that it is intended to protect" also deserve "express mention". In view of the fact that the provision applies to reparation and not merely to compensation, the United Kingdom is "concerned that this reference to what appears to be a doctrine of contributory fault or negligence is attempting to settle as a general principle of State responsibility a question that is properly an aspect of particular substantive rules of international law".[428] The United States also questions the intent of article 42, paragraph 2. In its view, it is unclear whether the provision embodies "a concept of contributory negligence, which under a common law approach might completely negate the responsibility of the wrongdoer, or whether it foresees some partial deviation from the 'full reparation' standard".[429] For the United States, the former concept would be unacceptable. As to the adoption of a "comparative fault principle", the United States considers that it would introduce in the draft articles an "imprecise" standard, not established in the existing law of State responsibility and "susceptible to abuse by wrongdoing States".[430] At the same time, the "United States appreciates the difficulties posed by the circumstance where an injured State or national bears some responsibility for the *extent* of his damages"[431] and acknowledges that an injured State "might in some circumstances be under a duty to mitigate its damages, analogous to the rules of contract law".[432] France suggests that paragraph 2 (*b*) should be limited to the case of diplomatic protection and should thus read "a national of the State exercising diplomatic protection".[433]

221. It may be admitted that article 42, paragraph 2, has some element of progressive development, especially in the context of State-to-State obligations (as distinct from diplomatic protection). On the other hand, it is reasonable that the conduct of the injured State be taken into account in assessing the form and extent of reparation due, and in practice it is taken into account in a variety of ways. The Special Rapporteur proposes that the paragraph be maintained as a separate article dealing with mitigation of responsibility. That title would help to allay the

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[421] The subject has not been much discussed in the literature, but see Bederman, "Contributory fault and State responsibility"; and Salmon, "La place de la faute de la victime dans le droit de la responsabilité internationale".

[422] *Yearbook … 1989* (see footnote 21 above), draft art. 8, para. 5, p. 56, and for the discussion, see pages 15–16 (ibid.).

[423] See *Yearbook … 1992*, vol. I, 2288th meeting, p. 217, paras. 20–26.

[424] *Yearbook … 1993*, vol. II (Part Two), commentary to article 6 *bis* [present art. 42], p. 59, para. (7), with references to authorities).

[425] Ibid., pp. 59–60, para. (7).

[426] Ibid. Under article VI, paragraph 1, of the Convention, the launching State is exonerated from liability for damage "to the extent that [it] establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents". Quite apart from the burden of proof, this represents a stricter standard of exoneration than article 42, paragraph 2, albeit in the context of a regime of strict liability for an ultrahazardous activity.

[427] For the summary of comments by Governments on article 42, see paragraph 22 above.

[428] *Yearbook … 1998* (see footnote 35 above), p. 145.

[429] Ibid., p. 146.

[430] Ibid. See also A/CN.4/496 (footnote 3 above), p. 19, para. 125, and the comments by Japan, according to which article 42, paragraph 2, should clearly provide that "a contribution to damage … does not automatically release the wrongdoing State from its obligation to make full reparation" (*Yearbook … 1999* (see footnote 43 above), p. 108).

[431] *Yearbook … 1998* (see footnote 35 above), p. 146.

[432] Ibid., footnote 3.

[433] Ibid., p. 145.

fears expressed by one Government that the conduct of the victim could negate the responsibility of the perpetrator entirely. The only situation in which this would be so would be where the loss in question could not be attributed at all to the conduct of the responsible State, but was entirely due to the intervening act of the "victim", or of a third party. That situation can occur, but it is covered by the general requirement of proximate cause and not by the present provision.

(b) *Mitigation of damage*

222. A related issue, already briefly discussed,[434]

is the so-called duty of an injured State to mitigate its damage. As ICJ pointed out in the case concerning the *Gabčíkovo-Nagymaros Project*, this is not an independent obligation but a limit on the damages which the injured State could otherwise claim.[435] Although related to the notion of "contributory negligence" or "comparative fault", it is analytically a distinct idea: it is not that the injured party contributes to the damage, rather that measures reasonably available to it which would have reduced the damage were not taken. Especially given concerns about limiting to a reasonable extent the burden of reparation,[436] such a principle should also be included in the proposed article.

7. Summary of conclusions as to part two, chapter II

223. For these reasons, part two, chapter II, should be formulated as follows.

"Chapter II

"THE FORMS OF REPARATION

"Article 43. Restitution

"A State which has committed an internationally wrongful act is obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

"(*a*) Is not materially impossible;

"(*c*) Would not involve a burden out of all proportion to the benefit which those injured by the act would gain from obtaining restitution instead of compensation.

"Article 44. Compensation

"A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution.

"Article 45. Satisfaction

"1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

"2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

"3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, inter alia:

"[(*a*) Nominal damages;]

"(*b*) Damages reflecting the gravity of the injury;

"(*c*) Where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

"4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State.

"Article 45 bis. Interest

"1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

"2. Unless otherwise agreed or decided, interest runs from the date when the principal sum should have been paid until the date the obligation to pay compensation is satisfied.

"Article 46 bis. Mitigation of responsibility

"In determining the form and extent of reparation, account shall be taken of:

"(*a*) The negligence or the wilful act or omission of any State, person or entity on whose behalf the claim is brought and which contributed to the damage;

"(*b*) Whether the injured party has taken measures reasonably available to it to mitigate the damage."

[434] In paragraph 30 above.

[435] *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 80, cited in paragraph 30 above.

[436] See paragraph 161 above.

CHAPTER II

Structure of the remaining parts of the draft articles

224. In earlier sections of the present report, the general principles and forms of reparation were proposed, based largely on the draft articles adopted on first reading, but with modifications in response to later developments and to the comments of Governments. The Commission has also tentatively supported some ideas put forward by the Special Rapporteur for the structure of the remaining parts and chapters.[437] These involve, inter alia:

(*a*) A new part two bis, dealing with the invocation of responsibility, which would include the articles on countermeasures;

(*b*) Possible provisions on the plurality of injured States;

(*c*) Further consideration of the category of serious breaches of obligations to the international community as a whole;

(*d*) Deferring consideration of the form of the draft articles, and of the related question of settlement of disputes (present part three);

(*e*) A new part four, bringing together the various savings clauses and other general provisions.

225. Against this background, the present section of the report considers questions of the invocation of responsibility in what may be described as the "normal" case, i.e. the invocation of responsibility by an injured State (as defined in the proposed article 40 bis, or in a similar way[438]) against a responsible State. The section then considers the question of the invocation of responsibility in cases where there is a plurality of responsible States, or of injured States.

226. In a further section of this report the articles on countermeasures are considered, in terms of both the taking of countermeasures by an injured State and the more complex situation where there are several or many States claiming to take countermeasures; this involves the key remaining issue: what difference it makes if what is at stake is a serious breach of an obligation to the international community as a whole. Finally, the report considers the question of a general part (part four) containing savings clauses and any other general provisions applicable to the draft articles as a whole (including articles 37 and 39 as adopted on first reading).

[437] See paragraphs 5–10 above.

[438] See paragraph 119 above.

CHAPTER III

Invocation of responsibility by an injured State

A. General considerations

227. Proposed part two bis is predicated upon a distinction between the secondary consequences which flow by operation of law from the commission of an internationally wrongful act and the various ways in which those consequences can be brought to bear or (for that matter) waived or reduced. One of the problems with part two as adopted on first reading was that it appeared to conceive of all the corollaries of an internationally wrongful act as arising by operation of law, i.e. as part of the new secondary legal relationship which arises immediately upon the commission of such an act. On this assumption, it was necessary to define those consequences a priori and in terms which apparently allowed for no element of choice or response on the part of other States, or indeed on the part of the responsible State itself. On this assumption, countermeasures are as much a part of the secondary legal relation as reparation. Yet the way the regime of responsibility is worked out in practice will depend upon the subsequent conduct of the parties involved. To take a simple example, in the case of breach of a normal bilateral inter-State obligation, it is open to the injured State in effect to forgive the breach, or to waive the right to invoke its consequences, or to elect to receive compensation rather than restitution, or to focus only on cessation and future performance. A text which defines restitution as the normal consequence of an internationally wrongful act, but fails to make it clear that the injured State in such cases may validly elect to prefer compensation does not reflect international law or practice.

228. Accordingly there are good reasons for distinguishing between the consequences that flow as a matter of law from the commission of an internationally wrongful act (part two) and those further consequences which depend upon the subsequent reactions of the parties, whether they take the form of a refusal to make reparation (leading to the possibility of countermeasures) or of waiver by the injured State (leading to the loss of the right to invoke responsibility), or to various intermediate possibilities. The latter are the subject of part two bis.

229. It is proposed that the title to part two bis should be "The implementation of State responsibility". There is no need for the French term "*mise en œuvre*" to be included in brackets in the English text, although it is a suitable equivalent of the term "implementation" and can be included in the French text.

230. The Special Rapporteur has already foreshadowed that former article 40 (new art. 40 bis) should be placed at the beginning of this part.[439] If, as has been suggested, proposed article 40 bis is subdivided into two or three articles, they should be distributed as appropriate within the part. In what follows, the focus will be on the "injured State" as that term is proposed to be defined in article 40 bis.

231. In the first place, evidently, each injured State on its oWN account is entitled to invoke responsibility.[440] However a number of issues arise as to the modalities of and limits upon such invocation, and these are candidates for inclusion in a first general chapter of this part.[441] They include the following:

(*a*) The right of the injured State to elect the form of reparation (e.g. to prefer compensation to restitution);

(*b*) Minimum formal requirements for the invocation of responsibility (e.g. a demand in writing);

(*c*) Questions associated with the admissibility of claims (e.g. exhaustion of local remedies, nationality of claims);

(*d*) Limits on the rights of the injured State as concerns reparation (e.g. the *non ultra petita* rule, the rule against double recovery);

(*e*) Loss of the right to invoke responsibility.

These are dealt with in turn.

1. The right of the injured State to elect the form of reparation

232. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Chorzów Factory* case,[442] or as Finland eventually chose to do in its settlement of the case concerning the *Great Belt*.[443] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. In the first reading text, the right to elect as between the forms of reparation was accepted. It was reflected in the formula "The injured State has the right …". That formula is not proposed for the various articles which embody the principle of full reparation. For reasons given above, these should be expressed in terms of the obligation(s) of the responsible State.[444] But in any event it is desirable to spell out the right of election expressly, the more so since the position of third States interested in (but not specifically injured by) the breach will be affected by any valid election of one remedy rather than another by an injured State.

233. The question whether there are any limitations on the right of election of the injured State has already been referred to.[445] There are certainly cases where a State could not, as it were, pocket the compensation and walk away from an unresolved situation, especially one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. However, such situations on analysis seem to concern questions of cessation, or of the continuing performance of obligations, and not questions of reparation properly so called. Reparation is concerned with the wiping out of *past* injury and harm. Insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations. These refinements can, however, be reflected in the language of the text and referred to in the commentary. By analogy with article 29 (Consent), it is sufficient to refer to a "valid" election by an injured State in favour of one of the forms of reparation rather than another, leaving the conditions of validity to be determined by general international law. Under the draft articles, such an election should be given effect.

2. Formal requirements for the invocation of responsibility

234. Although the secondary legal relationship of responsibility may arise by operation of law on the commission of an internationally wrongful act, in practice it is necessary for any other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation, through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or extinctive prescription.

235. There is an analogy with article 65 of the 1969 Vienna Convention, which provides that:

> 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

[439] See paragraphs 9 and 117–119 above.

[440] See paragraphs 102 and 107 above. See paragraphs 279–281 below for consideration of cases where responsibility is invoked by more than one injured State in respect of the same act.

[441] The 1969 Vienna Convention deals with analogous issues separately in relation to each particular subject. For example, the procedure regarding reservations is dealt with in article 23, following the articles dealing with the formulation of reservations and their legal effect. Part V, section 1, brings together a number of provisions dealing with the invocation of grounds for invalidity, suspension or termination of a treaty (see, for example, articles 44 (Separability of treaty provisions) and 45 (Loss of a right to invoke a ground for invalidating … a treaty)). Further issues of procedure are dealt with in section 4 of the same part, and section 5 deals with the consequences of such invocation.

[442] See paragraph 23 and footnote 47 above.

[443] See paragraphs 136–137 and footnote 254 above; and for the terms of the settlement, Koskenniemi, "L'affaire du passage par le Grand-Belt", especially pp. 940–947.

[444] See paragraphs 25–26 above.

[445] See paragraph 134 above.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

236. Care needs to be taken not to overformalize the procedure, or to imply that the normal consequence of the non-performance of an obligation is the lodging of a statement of claim. In many cases quiet diplomacy may be more effective in ensuring performance, and even reparation. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

237. It is not the function of the draft articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. Moreover, ICJ has sometimes been satisfied with rather informal modes of invocation. For example, in the case concerning *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because "it ha[d] not been submitted within a reasonable time".[446] That raised two issues: first, when the claim had actually been submitted; secondly, whether the lapse of time before its submission (or, indeed, the subsequent lapse of time before Nauru had done anything effective to pursue its claim) was fatal. The Court dismissed the objection. It referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to "press reports" that the claim had been mentioned by the Nauruan Head Chief on the day of declaring independence, as well as, inferentially, in subsequent correspondence and discussions with Australian ministers. However the Court also noted that:

It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position".[447]

The Court summarized the communications between the parties as follows:

The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time.[448]

It seems from this passage that the Court did not attach much significance to formalities. It was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence. But despite its flexibility and its reliance on the context provided by the relations between the two States concerned, the Court does seem to have had regard to the fact that the claimant State had effectively notified the respondent State of the claim.

238. In the Special Rapporteur's view, this approach is correct as a matter of principle. There must be at least some minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State is aware of the allegation and in a position to respond to it (e.g. by ceasing the breach and offering some appropriate form of reparation). No doubt the precise form the claim takes will depend on the circumstances. But the draft articles should at least require that a State invoking responsibility should give notice thereof to the responsible State. In doing so, it would be normal to specify what conduct on its part is required by way of cessation of any continuing wrongful act, and what form any reparation sought should take. In addition, since the normal mode of inter-State communication is in writing, it seems appropriate to require that the notice of claim be in writing.[449]

3. Certain questions as to the admissibility of claims

239. If a State having protested at a breach is not satisfied by any response made by the responsible State, it is entitled to invoke the responsibility of that State by seeking such measures of cessation, reparation, etc. as are provided for in part two. Presumably the draft articles should say so, by analogy with articles 23, paragraphs 2–4, and 65, of the 1969 Vienna Convention. The question is whether any provision in part two bis should address issues of the admissibility of claims of responsibility.

240. In general the draft articles are not concerned with questions of the jurisdiction of international courts and tribunals, or of the conditions for the admissibility of cases. Rather they define the conditions for establishing the international responsibility of States, and for the invocation of that responsibility by States. Thus it is not the function of the draft articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as *lis alibi pendens* or *electa una via* as they may affect the jurisdiction of one international tribunal over another.[450] By

[446] *I.C.J. Reports 1992* (see footnote 307 above), p. 253, para. 31.

[447] Ibid., p. 254, para. 35.

[448] Ibid., pp. 254–255, para. 36.

[449] See the 1969 Vienna Convention, arts. 23 (reservations, express acceptances of reservations and objections to reservations "must be formulated in writing"), and 67 (notification of invalidity, termination or withdrawal from a treaty must be in writing).

[450] For a discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale: étude des notions fondamentales de procédure et des moyens de leur mise en œuvre*; Fitzmaurice, *The Law and Procedure of the International Court of Justice*, especially vol. II, chap. VII,

(*Continued on next page.*)

contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character: they are conditions for invoking the responsibility of a State in the first place. The most obvious examples are the requirements of exhaustion of local remedies and nationality of claims.

(a) *Exhaustion of local remedies (art. 22)*

241. The exhaustion of local remedies rule was already embodied as article 22, adopted on first reading, and it was discussed by the Commission at its fifty-first session in 1999 on the basis of the Special Rapporteur's second report.[451] As adopted on first reading, article 22 embodied what has been termed the "substantive" understanding of the exhaustion of local remedies, according to which, in any case in which the exhaustion of local remedies applies, the breach does not occur until local remedies have been exhausted. But there are certainly cases in which this is not so: for example, an individual victim of police torture has to exhaust local remedies, but torture is a breach both of human rights and of the minimum standard of treatment of aliens. The Special Rapporteur had proposed that, in lieu of article 22, a savings clause should be inserted either at the end of part one, chapter III, or in the proposed part two bis, reserving cases covered by the exhaustion of local remedies rule.[452] On further consideration he believes that the appropriate place for such a clause is part two bis. The savings clause should be in quite general terms: it should cover any case to which the exhaustion of local remedies rule applies, whether under a treaty or under general international law. Correspondingly it should not be limited, as former article 22 was limited, to cases of diplomatic protection, i.e. to cases "concerning the treatment to be accorded … to foreign nationals or corporations".[453] It is not necessary to define in any detail in the draft articles the modalities of the application of the rule. Nor is it necessary to deal with such questions as: (*a*) whether the rule applies to injuries inflicted outside the territory of the respondent State; (*b*) whether it applies to injuries inflicted, for example, in commercial or economic fields (*iure gestionis*), on foreign States and their organs; (*c*) whether particular remedies are to be considered as "available" for this purpose; and (*d*) what amounts to exhaustion. In the context of the work on the topic of diplomatic protection, such matters will no doubt be dealt with in more detail.

(b) *Nationality of claims*

242. A second possible ground of inadmissibility which could be included in part two bis is the nationality of claims. Again it should be noted that the detailed elaboration of the nationality of claims rule is a matter for the topic of diplomatic protection. But since the nationality of claims rule is a general condition for the invocation of responsibility, and is not only concerned with the jurisdiction or admissibility of claims before judicial bodies, it seems desirable to treat it in a similar way to the rule of exhaustion of local remedies. A simple provision to that effect is accordingly proposed.[454]

4. Limits on the recovery of reparation

243. Limitations applicable to the principle of full reparation should be embodied in part two, which defines the obligations of the responsible State in that regard, and which takes into account such issues as contributory fault. Within the context of the invocation of responsibility, however, certain additional limitations may exist. Two matters should be mentioned.

(a) *The* non ultra petita *principle*

244. International courts and tribunals quite frequently apply, or at least refer to, the *non ultra petita* principle, that is, the principle that a State will not be awarded by way of reparation more than it has actually claimed. For example, in the *Corfu Channel* case, the United Kingdom claimed £700,087 for the replacement value of the destroyer *"Saumarez"*, sunk by mines. The ICJ experts assessed the true replacement cost at a slightly higher figure (£716,780). The Court awarded the lower figure, stating that "[i]t cannot award more than the amount claimed in the submissions of the United Kingdom Government".[455] The Court has applied such a principle in a range of cases, sometimes accounting for it as a function of the procedural rules associated with the formal submissions of the parties,[456] sometimes regarding it as inherent in the judicial process.[457]

(*Footnote 450 continued.*)

pp. 427–575; and Rosenne, *The Law and Practice of the International Court, 1920-1996*, vol. II, *Jurisdiction*.

[451] *Yearbook … 1999* (see footnote 8 above), pp. 39–41, paras. 138–150, and for an account of the discussion, see *Yearbook … 1999*, vol. II (Part Two), pp. 67–68, paras. 223–243.

[452] For the proposed text, see the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), p. 43, para. 158.

[453] Ibid. Under article 41, paragraph 1 (*c*) of the International Covenant on Civil and Political Rights, inter-State communications concerning breaches of human rights may only be dealt with by the Human Rights Committee "after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law". See also the Optional Protocol to the Covenant, art. 2, and the equivalent provisions of the regional human rights conventions.

[454] For the text of the provision, see paragraph 284 below.

[455] *I.C.J. Reports 1949* (see footnote 69 above), p. 249. By contrast the Court awarded the full claim for repairs for the second damaged ship, the *"Volage"*, notwithstanding that the experts' assessment was slightly lower (ibid).

[456] As in the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402 (referring to "the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions"). In fact the Statute of the Court focuses on the "claim" of the applicant State (see especially Article 53). It is the Rules of Court which treat the formal submissions as embodying and limiting this claim (arts. 49, 60, para. 2, 79, para. 2, 95, para. 1; similarly for counter-claims: art. 80, para. 2).

[457] As in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, pp. 207–208, para. 87.

245. The rule that the claim of an injured State imposes a limit upon the form and quantum of reparation that can be awarded is supported also by arbitral jurisprudence. For example, in the *British Claims in the Spanish Zone of Morocco* case, there was a British demand for compound interest at 7 per cent; Spain's position was that only simple interest at 5 per cent was payable. The Rapporteur, Max Huber, stated:

> The rate of 5 per cent would certainly be too low. By contrast one could well envisage in certain cases a rate higher than 7 per cent. That being so, one must nevertheless respect the judicial principle according to which it is impermissible to go beyond the claims of the parties. Despite the special character of the inquiry with which he has been entrusted, the Rapporteur considers … that as far as possible he should take account of the principles governing judicial procedure. That is why he adopts a rate of 7 per cent as the maximum as well as the minimum.[458]

To say the least, this was a rather mechanical application of the principle. The United Kingdom had sought a rate of 7 per cent compounded, and to separate the interest rate from the method of its calculation seems quite unjustified. A higher rate of interest calculated as simple interest would not have been beyond the scope of the amounts actually sought by the United Kingdom as interest.[459]

246. It is established that the *non ultra petita* principle represents, as it were, an outer limit to the final award or decision open to a court or tribunal, and does not limit the grounds of its decision within that limit. Thus ICJ has always asserted the freedom not merely to choose on which grounds it will decide a case, but also to characterize the essence of the applicant State's claim.[460] Difficulties can, however, arise where a party seeks to circumscribe its claims or submissions with a view to limiting the Tribunal, for example, to restitution rather than compensation. In the *"Rainbow Warrior"* arbitration, New Zealand sought only the return of the two agents to the island, and specifically disavowed any claim to compensation in lieu.[461] The Tribunal appears to have accepted this as a constraint upon its powers of decision, although the relevant passage is not free from ambiguity. It said:

> New Zealand has not however requested the award of monetary compensation—even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two Parties on … relevant matters, such as the amount of damages.[462]

The Tribunal accordingly decided "not to make an order for monetary compensation".[463] But it did make a recommendation to similar effect, in effect evading the rule.

247. In the Special Rapporteur's view, the *non ultra petita* rule is, in effect, the procedural complement of the more basic principle that an injured State is entitled to elect from among the remedies available to it in the context of full reparation. Assuming that the underlying right of election of the injured State is clearly expressed in part two bis, there is no need for the principle to be spelled out in any further detail. Moreover, to do so may limit the flexibility of international tribunals in deciding on the combination of remedies appropriate to the particular case, especially if, as the Rapporteur, Max Huber, did, in the *British Claims in the Spanish Zones of Morocco* case,[464] it is applied severally to the different aspects of reparation sought. The error of doing so should be explained in the commentary, but no separate article embodying the principle is necessary.

(b) *The rule against double recovery*

248. A second possible limitation on the invocation of responsibility is the rule against double recovery. It is generally accepted that the award of compensatory damages should not lead to a situation of "double recovery", i.e. to the recovery by the injured party of more than its assessed damage or injury. The need to "arrive at a just appreciation of the amount, and avoid awarding double damages" was treated as axiomatic, for example, by PCIJ in the *Chorzów Factory* case.[465] That principle has been reaffirmed by other international tribunals[466] and in State practice.[467] In some contexts it affects the quantum of compensation itself, and thus concerns issues already dealt with in part two, chapter II. For example, compensation for loss of profits and for interest on the capital sum which earns those profits cannot be awarded in respect of the same period.[468] But in other cases, there may be a po-

[458] See footnote 414 above.

[459] A rather more flexible approach, still upholding the basic principle, was that of the Roumano-German Mixed Arbitral Tribunal in *Dame R. S. Gologan et al.* v. *Germany* (1926), *Annual Digest of Public International Law Cases, 1925–1926* (London, Longmans, Green and Co., 1929), vol. 3, p. 419.

[460] See, for example, the review of the case law offered by the Court in *Nuclear Tests (Australia* v. *France), Judgment of 20 December 1974, I.C.J. Reports 1974*, pp. 262–263, para. 29 *(Australia* v. *France)*; and ibid. (*New Zealand* v. *France*) (footnote 305 above), pp. 466–467, para. 30).

[461] See paragraph 132 above.

[462] UNRIAA (see footnote 17 above), p. 272, para. 119.

[463] Ibid., para. 120.

[464] See footnote 414 above.

[465] PCIJ (see footnote 49 above), p. 49. See also page 45, where the Court observed that in the circumstances "there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State".

[466] See, for example, *Harza* v. *Islamic Republic of Iran, Iran-United States Claims Tribunal Reports* (footnote 404 above), pp. 88–89, para. 30; *Itel Corporation* v. *Islamic Republic of Iran* (1992), ibid. (Cambridge, Grotius, 1996), vol. 28, pp. 172–173, paras. 31–32; and *Seaco, Inc.* v. *Islamic Republic of Iran*, ibid., pp. 214–215, paras. 55–56.

[467] This can be seen, for example, from the practice of national compensation commissions, which in distributing lump-sum payments by way of compensation are required to have regard to any amounts received or which (if the individual claimant had exercised due diligence) would have been received in respect of the loss in question from any other source; see, for example, Foreign Compensation (Egypt) Order, Statutory Instrument No. 2104 (1971) (London, HM Stationery Office), art. 10, para. 2 (*b*); and Foreign Compensation (Romania) Order, Statutory Instrument No. 1144 (1976), ibid., art. 10.

[468] See, for example, *Uiterwyk Corporation* v. *Islamic Republic of Iran* (1988), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1989), vol. 19, pp. 158–159, para. 188.

tential entitlement of the claimant State to full reparation, which has to be qualified at the level of invocation in order to avoid double recovery. This will often be so where different persons or entities are entitled to bring what is effectively the same claim before different forums. Again the *Chorzów Factory* case provides an example, since the property in question there was the subject at the same time of claims by the (former) owners before mixed arbitral tribunals, and of a claim by Germany before PCIJ. The Court rejected a Polish argument that this circumstance made the German claim inadmissible, on the formal ground that the parties were not the same, and on the substantive ground that Germany's complaint related to property seized in breach of a treaty, whereas the tribunals' jurisdiction related to properties lawfully expropriated. However, it is quite clear that any compensation payable to the companies would have been taken into account in assessing the amount of compensation payable to Germany.

249. For most purposes the principle against double recovery is subsumed in the general principle of full (equitable) reparation, which generally implies that reparation should be no more than necessary to compensate the injured State for the loss, and not be inequitable in the circumstances. In one case, however, it may be necessary to make the principle explicit, i.e. where the same claimant is entitled to reparation as against several States responsible for essentially the same damage. This concerns the question of a plurality of responsible States, and it is dealt with below in that context.[469]

5. Loss of the right to invoke responsibility

250. Finally, under the rubric of the invocation of responsibility by an injured State, the question arises of the loss of the right to invoke responsibility. Again an analogy is provided by article 45 of the 1969 Vienna Convention, which deals with loss of the right to invoke a defect in a treaty. It provides that:

> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty … if, after becoming aware of the facts:
>
> (*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

This deals with issues such as waiver of a material breach. It suggests that a similar provision in part two bis may be useful.

251. The question is what elements this should include. In the first place it seems necessary to distinguish between the position of an injured State and other States concerned. Thus, for example, a valid waiver or settlement of the responsibility dispute between the responsible State and the injured State (or, if there is more than one, all the injured States) may preclude any claim for reparation or threat of countermeasures by other States.

252. Even in the bilateral context, however, issues of loss of the right to invoke responsibility can arise. Possible grounds include: (*a*) waiver; (*b*) delay; (*c*) settlement; and (*d*) the termination or suspension of the underlying obligation breached. There is room for the view that all these legal categories (including delay) are modes of waiver, and that a general provision along the lines of article 45 of the 1969 Vienna Convention would be sufficient to cover the field. Before reaching that conclusion, a brief review may be made of the various possibilities.

(a) *Waiver*

253. The first and most obvious ground for loss of the right to invoke responsibility is that the injured State has waived either the breach itself, or its consequences. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State. No doubt as with other forms of State consent, questions of validity could arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter arising perhaps from a misrepresentation of those facts by the responsible State. Such questions should be resolved in the same way as with the proposed article 29 dealing with consent as a circumstance precluding wrongfulness.[470] Thus reference should be made to a "valid waiver", leaving to the general law the question of what amounts to a valid waiver in the circumstances.

254. The question may be raised as to whether there is a difference between subsequent consent as to the breach itself and consent to waive the consequences of the breach. According to the commentary to article 29 as adopted on first reading, "if the consent is given only after the commission of the act (*ex post facto*), it will simply be a waiver of the right to assert responsibility and the claims arising therefrom. But with such a waiver, the wrongfulness of the prior act still remains".[471] Of course, where the waiver postdated the act in question, that act will by definition have been unlawful at the time of the breach. But it is not clear why (at least in respect of obligations owed only as between the waiving State and the responsible State) the former cannot consent retrospectively to the conduct in question, thus effectively legitimizing it for all purposes. On the other hand, the case envisaged in the commentary certainly could occur: a State might be willing to overlook the consequences of a breach—as it were, prospectively—without going so far as to excuse the conduct from its inception. In either case, it seems reasonable that a valid and unqualified waiver should entail the loss of the right to invoke responsibility.

255. In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum (corresponding to the capital amount of a loan), without any reference to interest or damages for delay. Turkey having paid the sum demanded, the Tribunal held that this conduct amounted to the abandonment of any other claim arising from the

[469] See paragraph 279 below.

[470] For a discussion of article 29, see the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 60–64, paras. 232–243.

[471] *Yearbook … 1979*, vol. II (Part Two), p. 113, para. (16) of the commentary to article 29.

loan.[472] The decision relates as much to the effect of settlement as to waiver in the general sense, but clearly, any formulation of the principle of waiver should allow for the waiver of part of a claim in this way.[473]

256. Although it may be possible to infer a waiver from the conduct of the States concerned, or from a unilateral statement, the conduct or statement must be clear and unequivocal. In the *Certain Phosphate Lands in Nauru* case, Australia argued that the Nauruan authorities before independence had waived the rehabilitation claim: (*a*) by concluding the Agreement relating to the Nauru Island Phosphate Industry 1967; and (*b*) by statements made at the time of independence. As to the former, it was true that that Agreement met a key Nauruan demand for control over the phosphate industry as from independence, but the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements included the remark that future royalties "would … make it possible to solve the [rehabilitation] problem".[474] ICJ rejected the Australian argument. As to the Agreement, it said:

> The Court does not deem it necessary to … consider whether any waiver by the Nauruan authorities prior to accession to independence is opposable to the Republic of Nauru. It will suffice to note that in fact those authorities did not at any time effect a clear and unequivocal waiver of their claims.[475]

As to the statement by the Nauruan Head Chief, it noted that "[n]otwithstanding some ambiguity in the wording, the statement did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[476] The context of the negotiations, and the de facto inequality of the parties, emphasized the need for any waiver to be clear and unequivocal: in case of doubt, a waiver is not to be presumed.[477] The proposed provision should equally make this clear.

(b) *Delay*[478]

257. Somewhat more controversial is the question of loss of the right to invoke responsibility arising from delay in the bringing of a claim. The existence of a principle of extinctive prescription as a ground for the inadmissibility of a claim of responsibility seems to be generally accepted. It was endorsed, for example, by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[479]

The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground.[480]

258. *Certain Phosphate Lands in Nauru* involved a State-to-State claim, but many of the judicial decisions on this question concern diplomatic protection claims pursued some or even many years after the incidents giving rise to them. The effect of these authorities may be summarized as follows:

(*a*) The first element that must be present before any question of undue delay can arise is obviously the lapse of a considerable period of time. But no generally accepted time limit, expressed in terms of years, has ever been laid down. The Swiss Federal Political Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[481] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[482] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[483] Indeed, it would be practically impossible to establish any single limit, given the variety of situations, obligations and conduct likely to give rise to a particular claim;

(*b*) There are of course many cases where time limits are laid down for specific categories of claim arising under specific treaties,[484] notably in the field of private law.[485] By contrast it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limit;

(*c*) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it in-

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[472] UNRIAA (see footnote 80 above), p. 446.

[473] In this sense, some cases of waiver are cognate to the settlement of a claim by the offer and acceptance of partial reparation. See paragraph 259 below.

[474] *I.C.J. Reports 1992* (see footnote 307 above), p. 249, para. 17.

[475] Ibid., p. 247, para. 13.

[476] Ibid., p. 250, para. 20.

[477] In a different context, see the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 24, where the Court held that the language of the relevant treaty was clear and unequivocal.

[478] For a useful review see Ibrahim, "The doctrine of laches in international law", with references to jurisprudence and the literature. Earlier accounts include Pinto, "Prescription in international law", pp. 438–448.

[479] *I.C.J. Reports 1992* (see footnote 307 above), pp. 253–254, para. 32.

[480] Ibid., p. 255, para. 36. The relevant passage is cited in paragraph 237 above. Judge Oda dissented, on the ground that Nauru's silence (as he regarded it) about its claim for more than 15 years after independence "makes it inappropriate for the Court to entertain it … if only on grounds of judicial propriety" (ibid., p. 324, para. 28).

[481] Communiqué of 29 December 1970, reproduced in Caflisch, "La pratique suisse en matière de droit international public 1975", p. 153.

[482] Fleischhauer, "Prescription", p. 1107.

[483] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides the *Certain Phosphate Lands in Nauru* case (footnote 307 above), see, for example, the *Gentini* case (1903), UNRIAA (footnote 374 above), p. 561; and the *Ambatielos Claim*, (1956), ibid., vol. XII (Sales No. 63.V.3), pp. 103–104.

[484] For example, the six-month time limit for individual applications under article 35, paragraph 1, of Protocol No. 11 to the European Convention on Human Rights. This does not, it seems, apply to inter-State cases brought under article 33.

[485] For example, in the field of commercial transactions and international transport. See the Convention on the Limitation Period in the International Sale of Goods. By contrast in the field of individual crimes against international law, the tendency is to avoid time limits on prosecution; see Weiss, "Time limits for the prosecution of crimes against international law".

admissible.[486] Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[487] In the *Tagliaferro* case, the Umpire, Ralston, likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred;[488]

(*d*) Indeed, international practice suggests that the lapse of time *as such* is not sufficient to render a claim inadmissible. A significant concern of the rules on delay seems to be the additional difficulties caused to the respondent State due to the lapse of time (e.g. as concerns the collection and presentation of evidence). Thus in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness were advanced.[489] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part;[490]

(*e*) The distinction between the notification of a claim and the commencement of proceedings before an international court or other body arises in part because of the absence of any general availability of third-party dispute settlement in international law. Often the only way in which a State's responsibility could be invoked was by the bringing of a claim through diplomatic channels, without any possibility of compulsory resort to any third party. Evidently it would be unfair to prejudice a claimant by holding a claim to be stale when the claimant (or the claimant's State) had done everything possible to prosecute the claim. But even when that State at all relevant times had an international forum available to it, the distinction has still been applied. For example, in the *LaGrand* case, ICJ accepted the German application for interim protection and indicated a stay of execution.[491] The Court made its order although Germany had taken legal action literally at the last minute, six and a half years after the breach had become known to Germany.[492]

259. The overall picture is one of considerable flexibility. A case will not be held inadmissible on grounds of delay unless the respondent State has been clearly disadvantaged and international courts have engaged in a flexible weighing of relevant circumstances in the given case, including, for example, the conduct of the respondent State and the importance of the right involved.[493] Contrary to what may be suggested by the expression "delay", international courts have not engaged in a mere exercise of measuring the lapse of time and applying clear-cut time limits. Rather, the decisive factor is whether the respondent could have *reasonably* expected that the claim would no longer be pursued.[494] Because of this, the distinction between delay on the one hand, and implied waiver or the more general idea of acquiescence on the other, is a relative one. Indeed, it is arguable that all the instances of non-admissibility discussed here could be treated as aspects of a general principle of waiver or acquiescence. For the purposes of the draft articles, however, it is proposed to adopt the traditional separation between waiver and delay. Moreover, given modern means of communication and the increased availability of third-party remedies in many cases, a somewhat more rigorous approach to the pursuit of available remedies seems justified, even in the context of inter-State claims. It is proposed that the draft articles provide that the responsibility of a State may not be invoked in respect of a claim if the claim was not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and in the circumstances the responsible State could reasonably have believed that the claim would no longer be pursued. Such a provision strikes a fair balance between the interests of the injured State and the allegedly responsible State, and reflects the relevance of the idea of "reasonable expectation" in the context of delay.

(c) *Settlement*

260. A third clear basis of loss of the right to invoke responsibility arises where the responsible State offers some form of reparation in settlement of the claim and that offer is accepted. This may be the better explanation of the decision in the *Russian Indemnity* case: the arbitral tribunal laid some emphasis on the fact that, after several years of Russian insistence on repayment of the capital sum, without any reference to moratory interest or damages for delay, the sum demanded was actually paid.[495] In the circumstances, the Tribunal was prepared to find that the tender and acceptance of the capital amounted to a full and final settlement, even in the absence of an express provision to that effect in a settlement agreement.[496] In-

[486] For statements of the distinction between notice of claim and commencement of proceedings, see, for example, Jennings and Watts, eds., *Oppenheim's International Law*, p. 527; and Rousseau, *Droit international public*, p. 182.

[487] See paragraph 256 above.

[488] *Tagliaferro* case (1903), UNRIAA (see footnote 374 above), p. 593.

[489] See the *Stevenson* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385; and the *Gentini* case, ibid., vol. X (footnote 374 above), p. 557.

[490] See, for example, the *Tagliaferro* case (footnote 488 above); similarly the actual decision in the *Stevenson* case, UNRIAA (footnote 489 above), pp. 386–387.

[491] See footnote 261 above.

[492] Germany's application was filed on 2 March 1999. Owing to the time constraints, the provisional measures phase was restricted to a meeting of the parties with the President of the Court. In a separate opinion, President Schwebel noted that "Germany could have brought its Application years ago, months ago, weeks ago, or days ago" and added that he had "profound reservations about the procedure followed ... by the Applicant" (*I.C.J. Reports 1999* (see footnote 261 above), p. 22).

[493] The importance of the right to life was no doubt highly relevant in the *LaGrand* case (see footnote 261 above).

[494] Another relevant factor has been the influence of private-law analogies and of domestic rules concerning limitation of actions or laches. Where the underlying claim (e.g. in contract) is governed by some national system of law and the claim is prescribed, extinguished or barred under that law, there is no reason why a diplomatic protection claim by the State of nationality should be in a better position. But there is also the possibility that national limitation periods may be applied by analogy, and the general (though not universal) tendency has been towards shorter limitation periods, and the treatment of limitation periods as substantive rather than procedural. For a general review, see Hondius, "General report", especially pp. 22–25.

[495] See paragraph 212 above.

[496] For cases of express provisions, see, for example, the General Agreement on the Settlement of Certain ICJ and Tribunal Cases of 9 February 1996, attached to the Joint Request for an Arbitral Award on Agreed Terms by order of the Iran-United States Claims Tribunal (22 February 1996) (ILM, vol. XXXV, No. 3 (May 1996)), and the Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning

deed there may be circumstances where a full and final settlement could be inferred from a combination of unilateral acts on the part of the two States concerned.[497] On the other hand, for a settlement to be reached there has to be action by both States, or at the least clear acquiescence by one State in the action of the other taken with a view to the settlement of the dispute. Unilateral action by one State cannot be enough.[498]

261. Arguably such cases of tender and acceptance or other forms of settlement can be subsumed under the category of waiver. Plainly where a State requests that a case be discontinued "with prejudice", it waives the claim in question. On the other hand, it will often be unclear who is waiving what, as the frequent resort to formulas such as "without prejudice" in settlement agreements suggests. The question is whether a specific provision should be included, to the effect that the tender and acceptance of reparation entails the loss of any further right to invoke responsibility in respect of the claim concerned unless otherwise stipulated or agreed between the parties. In accordance with such a provision, a State accepting a tender of reparation would be required to make it clear if it does so only by way of partial settlement. In the alternative, the unqualified acceptance of reparation tendered by the responsible State, even on a without-prejudice basis, could be mentioned as a species of waiver in that subparagraph. On balance the Special Rapporteur prefers the second alternative as the more economical one.

(d) *Termination or suspension of the obligation breached*

262. Finally, it is necessary to say something about the situation where the primary obligation, the breach of which is invoked, has terminated or been suspended. This is more likely to occur with treaty than non-treaty obligations, but it cannot be entirely excluded even in relation to the latter. For example, an area previously subject to the regime of the high seas might come within the jurisdiction of a coastal State as a result of processes of claim and recognition, but questions of responsibility for seizure of foreign fishing vessels might be raised and remain live in respect of the "interim" period, before the questions of jurisdiction have been resolved.[499] Other similar situations can be envisaged. So far as the law of treaties is concerned, article 70 of the 1969 Vienna Convention provides that:

> 1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> ...
>
> (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[500]

It is true that article 73 of the Vienna Convention also provides that its provisions "shall not prejudge any question that may arise in regard to a treaty … from the international responsibility of a State"; moreover, article 70, paragraph 1 (*b*), addresses situations of the "execution" or performance of a treaty rather than its non-performance. Nonetheless, if the breach of an international obligation gives rise immediately to a secondary right to reparation in favour of an injured State, it is hard to see how such a right would be affected by the termination of the primary obligation breached. The Arbitral Tribunal expressly so held in the *"Rainbow Warrior"* affair, where the bilateral treaty obligation terminated by effluxion of time after and notwithstanding its breach.[501] In such cases, far from the termination of the primary obligation producing a loss of the right to invoke responsibility, prima facie the secondary right to reparation continues to exist. The question is whether, by analogy with article 70, paragraph 1 (*b*) of the Vienna Convention, it is desirable to say so. On balance this does not seem necessary: the matter would seem to be covered, by inference at least, by articles 18 and 24 of the draft articles as provisionally adopted on second reading. Admittedly, article 18 is now formulated simply in negative terms.[502] But when it is read with article 24, paragraph 1,[503] it is clear that the breach of an international obligation is perfected at the time the act occurs, and the consequences referred to part two, chapters I and II, would follow automatically. No provision spelling this out seems to be required, though the point should be made clear in the commentary. In particular, in the case

Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

[497] See, for example, the apology issued by the United States on 4 November 1998 in respect of breach of article 35, paragraph 2, of the Vienna Convention on Consular Relations in the *Consular Relations* case (footnote 257 above) (Statement of the United States of America concerning the failure of consular notification in the case of Angel Breard, reproduced in *Digest of United States Practice in International Law 1991–1999*, Sally Cummins and David Stewart, eds. (Washington, D.C., Office of the Legal Adviser, United States Department of State), chap. 2, document No. 18). This coincided with Paraguay's request to discontinue the case "with prejudice"; see *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 10 November 1998, I.C.J. Reports 1998*, p. 427.

[498] Thus in the *Certain Phosphate Lands in Nauru* case (see footnote 307 above), the three partner Governments expressed the view that "the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement"; cited in *I.C.J. Reports 1992*, p. 248, para. 15. ICJ held that this view was not opposable to Nauru in the absence of clear acceptance on its part. See paragraph 256 above.

[499] See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116. In fact the parties "had agreed to leave this question [of compensation for seizures] to subsequent settlement if it should arise" (ibid., p. 126). Similarly in one of the *Fisheries Jurisdiction* cases, the request for compensation for interference with fishing vessels was not maintained; see *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 7, para. 12. In the other (ibid. *(Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175), the request was maintained but in such an abstract form that ICJ declined to act on it (ibid., pp. 203–205, paras. 71–76).

[500] See also articles 71, paragraph 2 (*b*), and 72, paragraph 1 (*b*).

[501] UNRIAA (see footnote 17 above), p. 266, para. 106, citing the dissenting opinion of Lord McNair in *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 63. The majority in that case did not have to deal with the issue.

[502] It provides that:

> "An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

(*Yearbook … 1999* (see footnote 2 above), p. 275)

[503] As provisionally adopted, article 24, paragraph 1 (ibid.), provides that:

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."

of a continuing wrongful act, it should be recalled that the breach ceases, by definition, with the termination or suspension of the obligation, without prejudice to the responsibility already incurred.

B. Cases involving a plurality of injured or responsible States

263. One matter not expressly dealt with in the draft articles adopted on first reading is the general topic of claims of responsibility relating to the same act or transaction but involving a plurality of States. This is a different problem from that of multilateral obligations, though it overlaps with it to a degree. The legal basis for asserting the responsibility of each of the States involved in a particular conduct might well be different, and even if it was the same, the obligation in question might be owed severally by each of the States responsible for the conduct to each of the States injured by it. The question is what difference does it make to the responsibility of one State, if another State (or indeed several other States) is also responsible for the very same conduct, or is also injured by it.[504]

264. The commentaries refer to the problem rather frequently. For example, the commentary to article 44 states that:

> [W]here there is a plurality of injured States, difficulties may arise if the injured States opt for different forms of remedy. This question is part of a cluster of issues which are likely to come up whenever there are two or more injured States which may be equally or differently injured. It has implications in the context of both substantive and instrumental consequences of internationally wrongful acts and the Commission intends to revert to it in due course.[505]

265. Unfortunately, this "due course" never eventuated, and because the subject was not included in the draft articles adopted on first reading, it has not been the subject of detailed written comments by Governments. In the debate in the Sixth Committee during the fifty-fourth session of the General Assembly in 1999, however, a number of Governments supported the inclusion of provisions dealing with a plurality of States. One Government, while supporting this course of action, noted "the scarcity of established international law on the subject".[506] Several Governments suggested that it would be sufficient to deal with the issue in the commentaries.[507]

1. Overview of the legal issues

266. It is necessary to consider separately the question of the plurality of injured and of responsible States.

(a) *Plurality of responsible States*[508]

267. Under the draft articles as they stand, a number of specific aspects of the problem are already dealt with or at least referred to:

(*a*) Article 9 deals with the attribution to the State of the conduct of organs placed at its disposal by another State.[509] Where the organ is under the control of the receiving State and acts in the exercise of that State's separate authority, the receiving State is responsible for its acts. The implication is that in any other circumstance the sending State (or possibly both States) will be responsible;

(*b*) Article A (proposed in lieu of article 13 as adopted on first reading) would exclude from the scope of the draft articles any question of the responsibility of an international organization or of a State for the conduct of an international organization.[510] There is, however, a distinction between conduct performed by an international organization as such (e.g. the conclusion of a treaty or contract by an organization, or its commission of a civil wrong or of some internationally wrongful act) and conduct performed by State organs within the framework of or at the instigation of an international organization. The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it;[511]

(*c*) Part one, chapter IV, deals with a number of cases where one State is responsible in respect of the act of another State.[512] These cases involve, respectively, aid or assistance (art. 27), direction and control (art. 27 bis) and coercion (art. 28). These articles all proceed on the basis that, generally speaking, State A is not responsible for acts attributable to State B, but that in certain circum-

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[504] In the literature this problem is often referred to using municipal law analogies, e.g. of joint and several liability. See Brownlie, op. cit., pp. 189–192 ("Joint responsibility"); Noyes and Smith, "State responsibility and the principle of joint and several liability"; and for a general review, Padelletti, *Pluralità di Stati nel fatto illecito internazionale*. But more than usual care is needed in the use of municipal law analogies here. Different legal traditions have developed in their own ways, subject to their own historical influences. For examples of earlier studies in different legal systems, see, for example, Williams, *Joint Obligations*; Planiol, *Traité élémentaire de droit civil conforme au programme officiel des Facultés de droit*; and for a useful comparative review, Weir, loc. cit.

[505] *Yearbook … 1993*, vol. II (Part Two), commentary to article 8 [present art. 44], p. 71, para. (15).

[506] A/CN.4/504 (see footnote 3 above), para. 12.

[507] Ibid.

[508] For a preliminary discussion, see the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 45–47, paras. 161–164, and pp. 55–56, paras. 212–213.

[509] See *Yearbook … 1998*, vol. II (Part One) (footnote 23 above), pp. 44–47, paras. 221–233, and for consideration on second reading, ibid., vol. II (Part Two), pp. 84–85, paras. 412–415 and 422–424, and p. 87, para. 447.

[510] Ibid., vol. II (Part One) (footnote 23 above), pp. 51–52, paras. 258–264, and for consideration on second reading, ibid., vol. II (Part Two), p. 84–85, paras. 414 and 424 and p. 87, para. 446. The location of article A is undecided; it may be better included in the proposed part four.

[511] Generally for the question of responsibility of member States for the acts of international organizations, see the reports of Ms. Rosalyn Higgins to the Institute of International Law, "The legal consequences for Member States of the non-fulfilment by international organizations of their obligations toward third parties", *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 249, and the Institute's resolution thereon, ibid., vol. 66–II (1996), p. 444. See also Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, pp. 426–524.

[512] See *Yearbook … 1999* (footnote 8 above), pp. 45–57, paras. 159–214, and for consideration on second reading, ibid., vol. II (Part Two), pp. 69–73, paras. 244–278.

stances the principle that each State is responsible only for its own acts may be set aside. Chapter IV is stated to be without prejudice to the international responsibility of the acting State (art. 28 bis); thus a State which is assisted, directed or even coerced to perform an act which injures a third State will be responsible for that act, although at least in the case of coercion it may be able to plead force majeure as a circumstance precluding the wrongfulness of its conduct.

More fundamentally, the draft articles implicitly deal with the general issue, in the sense that as things stand *each* injured State can hold to account *each* responsible State for internationally wrongful conduct, even though in respect of the same conduct there may be several injured States and several States to which the conduct is attributable. This position is set out in the commentary to article 27, where joint conduct is distinguished from participation of one State in the wrongful act of another. As the commentary makes clear:

> There can be no question … of the participation of a State in the internationally wrongful act of another State in cases where identical offences are committed in concert, or sometimes even simultaneously, by two or more States, each acting through its own organs … A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts.[513]

268. This seems to reflect the position under general international law, at least in the absence of agreement to the contrary between the States concerned. In the *Corfu Channel* case, the United Kingdom recovered to the full extent of the injuries suffered by its ships damaged by mines in transiting Albanian waters. ICJ held that Albania was responsible to the United Kingdom for these losses on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[514] The mines themselves, however, had not been laid by Albania (which had no mine-laying capacity at the time); they had in all probability been laid by a Yugoslavian vessel, as the Court briefly noted. It is probable that in the (inferred) circumstances Yugoslavia would also have been responsible to the United Kingdom for the damage caused to the vessels by its mines. Yet no one suggested that Albania's responsibility for failure to warn was thereby reduced, let alone precluded. This was a standard case where two different States were each responsible for the direct consequences of their own conduct in respect of a single incident. Many other similar cases can be envisaged.[515]

269. In such cases, the responsibility of each participating State would have to be determined individually, on the basis of its own conduct. For example, in the *Corfu Channel* case, the question of Yugoslavia's responsibility for laying the mines was a different question from that of Albania's responsibility for failure to warn of their presence, even though the injury and damage to the United Kingdom arose from the same event. The question is whether the position is any different where the responsible States are acting together in a joint enterprise, or indeed where one is acting on the joint behalf of several others.[516]

270. That issue was raised in the case concerning *Certain Phosphate Lands in Nauru*.[517] Australia, the sole respondent in that case, was one of three States parties to the Trusteeship Agreement for Nauru. Under article 2 of the Agreement, three Governments (Australia, New Zealand and the United Kingdom) were designated as "the joint Authority which will exercise the administration of the Territory". It was agreed that the Administering Authority so designated was not a separate legal person, but was nothing else than the three Governments acting jointly as provided for in the Agreement. Under article 4 of the Agreement, it was recognized that Australia "on behalf of the Administering Authority" would "exercise full powers of legislation, administration and jurisdiction in and over the Territory". Thus Australia administered the Territory under the Agreement on behalf of all three States.[518] As one of its preliminary objections, Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. One reason was procedural: any determination of Australia's responsibility would necessarily entail that of the other two States. They were necessary parties to the case and in accordance with the principle formulated in the *Monetary Gold* case,[519] the claim against Australia alone was inadmissible. But there was a second reason: the responsibility of the three States making up the Administering Authority was "solidary" and a claim could not be made against only one of them.

271. ICJ rejected both arguments, and upheld its jurisdiction. On the question of "solidary" responsibility it said:

> Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. In this connection, Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering

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[513] *Yearbook … 1978*, vol. II (Part Two), commentary to article 27 (as adopted on first reading), p. 99, para. (2).

[514] *I.C.J. Reports 1949* (see footnote 17 above), pp. 22–23.

[515] Nicaragua commenced three cases against neighbouring States in respect of the damage done to it by the activity of the contras, on the basis that the contras' actions were directed and supported by those States as well as by the United States. The three cases were eventually discontinued, although only after the Court had upheld its jurisdiction vis-à-vis Honduras (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69). The United States was held responsible for certain acts of the contras, and for its own actions in supporting them. The question of the quantum of United States responsibility was, however, not determined, as the case was discontinued (see footnote 309 above).

[516] It was not necessary in the *Corfu Channel* case (see footnote 17 above) to find the existence of a joint enterprise between Albania and Yugoslavia, since Albania's responsibility was sufficiently established by reference to its failure to warn. In any event ICJ could not have found Yugoslavia responsible since it was not a party to the case.

[517] *I.C.J. Reports 1992* (see footnote 307 above).

[518] Ibid., pp. 257–258, para. 45.

[519] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19.

Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits; but it is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[520]

It was careful to add, however, that its decision on jurisdiction

does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory.[521]

In fact the Court never had to resolve those issues. The case was withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement.[522]

272. The extent of responsibility for conduct carried on in conjunction by a group of States is occasionally addressed in treaties. Perhaps the most interesting example is the Convention on international liability for damage caused by space objects. Article IV provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Paragraph 2 then provides:

In all cases of joint and several liability referred to in paragraph 1 of this Article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

Similarly, article V provides for joint and several liability where two or more States jointly launch a space object which causes damage: the State from whose territory or facility a space object is launched is regarded as a participant in the joint launching. Article V, paragraph 2, provides that:

A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreements regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

This is, no doubt, a *lex specialis*—but at the same time it is a useful indication of what the regime of "joint and several" liability might amount to, so far as an injured State is concerned. Moreover, the incidents of "joint and several liability" as reflected in the Convention generally correspond to the notion of joint and several liability in the common law, from which the term comes. At common law, persons who are jointly and severally liable (e.g. partners or trustees) are each responsible for the whole damage caused to third parties by the partnership or in breach of trust, and may each be sued for the full amount without any requirement to join the other partners or trustees. Their liability is "joint" in that they take responsibility for each other's wrongful conduct vis-à-vis third parties; it is "several" in that they can be severally, i.e. separately, sued. Historically, however, there were other forms of liability at common law, including strict joint liability where the persons jointly liable normally had to be sued as a group and were not separately responsible for the actions of the group. Similarly in civil law systems, there are different forms of solidary responsibility, depending on the context.[523]

273. A possible example of "joint" inseverable responsibility under international law was the responsibility of the Four Powers for Germany as a whole and Berlin prior to 1990. In a series of cases, courts refused to hold that individual States could be sued alone for conduct arising from the quadripartite arrangements.[524]

274. Another "special case" is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name but responsibility for performance is distributed between them in ways not determined a priori. The most elaborate formulation of this responsibility so far is that set out in annex IX to the United Nations Convention on the Law of the Sea. Under these arrangements, responsibility for performance is allocated as between the Union and member States, though the basis for that allocation can change over time. There is provision by which other States can ascertain which of the Union and member States accepts responsibility at a given time; joint and several liability only arises in the case of "[f]ailure to provide this information within a reasonable time or the provision of contradictory information".[525]

275. The sources of international law as reflected in Article 38, paragraph 1, of the ICJ Statute do not include analogy from national legal systems, and while such analogies may have a certain role to play, it is clearly subsidiary.[526] Particular care is needed with analogies from rules or concepts which are not widely shared and which depend in their national setting on historical considerations or on the powers and procedures of courts; this is certainly true of concepts such as "joint and several" or "solidary" responsibility. By contrast, what matters at the

[520] *I.C.J. Reports 1992* (see footnote 307 above), pp. 258–259, para. 48.

[521] Ibid., p. 262, para. 56.

[522] For the removal of the list of the Court, see the Order of 13 September 1993 (footnote 307 above), and for the Settlement Agreement, footnote 496 above.

[523] See Weir, loc. cit., pp. 43–44, paras. 79–81. For the German law, see Markesinis, op. cit., pp. 904–907, with references to the literature.

[524] See the cases cited in the Special Rapporteur's first report, *Yearbook … 1998* (footnote 23 above), p. 46, para. 229, footnote 300.

[525] Annex IX, art. 6, para. 2. Generally on mixed agreements, see, for example, Rosas, "Mixed Union—mixed agreements".

[526] See *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 148 (separate opinion by Sir Arnold McNair).

international level are the actual terms of any agreement or arrangement, interpreted in the light of the principles of consent, the independence of States and the *pacta tertiis* rule.

276. Before considering what, if any, provision should be made in the draft articles, several cognate issues need to be briefly mentioned:

(a) *Responsibility of member States for the conduct of an international organization.* This raises sensitive issues relating to the structure and functioning of international organizations which it is not appropriate to deal with in the context of the draft articles. As noted above, it is excluded from the scope of the draft articles by the proposed article A;[527]

(b) *Application of the* Monetary Gold[528] *principle.* The *Monetary Gold* principle, as explained by the Court in the *Certain Phosphate Lands in Nauru* case[529] and applied by it in the case concerning *East Timor*,[530] is a procedural barrier to the admissibility of a claim before an international court and not as such, part of the law of State responsibility. It arises because a court or tribunal exercising judicial power cannot determine the legal responsibility of a State not a party to the proceedings, nor has it the power to order that a necessary third party be joined. Lacking such powers, it cannot make a finding of responsibility against State A, which is a party to a case, if in order to do so it is necessary first to make a determination as to the responsibility of State B, which is not a party;

(c) *Existence of special rules of responsibility for "common adventures".* Where two persons jointly engage in a common adventure causing loss to another, it is usually held that the victim can recover its total losses against either of the participants, on the common sense ground that the victim should not be required to prove which particular elements of damage were attributable to each of them. International tribunals have reached similar results by reference to considerations of "equity" or by requiring a State responsible for wrongful conduct to show what consequences flowing from the breach should *not* be attributed to it;[531]

(d) *Contribution as between several States in cases of joint activity.* Where two or more States engage in a common activity and one of them is held responsible for damage arising, it is natural for that State to seek a contribution from the others on some basis. Such a contribution is specifically envisaged in articles IV, paragraph 2, and V, paragraph 2, of the Convention on international liability for damage caused by space objects.[532] As noted already, a contribution was actually made by the United Kingdom and New Zealand to Australia in respect of its settlement of the *Certain Phosphate Lands in Nauru* case.[533] On the other hand, there may be cases where as a matter of equity a court disallows any contribution, e.g. on the basis of the maxim *ex turpi causa non oritur actio.* In such cases the victim is compensated, but as between the joint wrongdoers the loss lies where it falls.

277. This brief review of the current law suggests the following conclusion. In principle the normal rule appears to be that each State is separately responsible for conduct attributable to it under the rules set out in part one, chapters II and IV, and that this responsibility is not diminished or reduced by the fact that some other State (or States) is also responsible for the same conduct. This was the conclusion tentatively reached by Judge Shahabuddeen in his separate opinion in the *Certain Phosphate Lands in Nauru* case. Referring to the work of this Commission, he said:

> It is not necessary to enter into the general aspects of the difficult question carefully examined by the Commission as to when a State is to be regarded as participating in the internationally wrongful act of another State. It suffices to note that the Commission considered that, where States act through a common organ, each State is separately answerable for the wrongful act of the common organ. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded technically as a common organ.
>
> Judicial pronouncements are scarce. However, speaking with reference to the possibility that a non-party State had contributed to the injury in the *Corfu Channel* case, Judge Azevedo did have occasion to say:
>
> > "The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or the actual perpetrator of the offence." (*I.C.J. Reports 1949*, p. 92.)
>
> On the facts, the *Corfu Channel* case allows for a number of distinctions. However, it is to be observed that Judge Azevedo's basic view of the general law was that the right to sue "one only of the responsible parties, *in solidum*" was available to the injured party "in accordance with the choice which is *always* left to the discretion of the victim, in the purely economic field …" (emphasis added). This approach would seem to be consistent with the view that Nauru does have the right to sue Australia alone.[534]

However, there is no need to identify this situation with "joint and several liability" as it is understood in certain national legal systems. States are free to incorporate that principle into their agreements, but (apart from specific arrangements and the *lex specialis* principle) the normal case of responsibility arises because conduct attributable to a State under the principles set out in part one, chapters II or IV, is a breach of an international obligation of the State concerned vis-à-vis another State which is also a party to, or entitled to the benefit of, that obligation.

278. Apart from authority (admittedly sparse), a number of considerations support this conclusion:

(*a*) In each case it will be necessary to consider the position of each respondent State, for example, to determine whether any circumstance precluding wrongfulness applies to that State. If State A coerces State B to join it in committing an internationally wrongful act vis-à-vis State C, it may be possible for State B to rely on the coer-

[527] See paragraph 267 above.

[528] See footnote 519 above.

[529] *I.C.J. Reports 1992* (see footnote 307 above), p. 259, para. 50.

[530] *I.C.J. Reports 1995* (see footnote 205), p. 102, para. 29.

[531] See paragraph 35 above.

[532] See paragraph 272 above.

[533] See paragraph 271 above.

[534] *I.C.J. Reports 1992* (see footnote 307 above), pp. 284–285.

cion as a circumstance precluding wrongfulness, but this will not be so for State A;[535]

(*b*) Similarly the legal position of the two co-participant States may be different in terms of the applicable legal rules. For example, one co-participating State may be bound by a particular rule (e.g. in a bilateral treaty with the injured State) whereas the other co-participant is not. Only in very limited circumstances could the latter State be responsible for the former's breach.[536]

(b) *Plurality of injured States*

279. Turning to the question of the plurality of injured States, for reasons explained above the problem ith article 40 was significant. This was because, in the case of multilateral obligations, a large number of States were designated as "injured" and there was apparently no differentiation in the legal positions of any of them, irrespective of whether it was the primary victim of the breach or a concerned State seeking to ensure compliance in the "public" interest.[537] Now that it is proposed to distinguish between "injured" and other States, and to give priority to the reactions of the former, e.g. in terms of the choice of compensation over restitution, the problem is much reduced.

280. In practice, of course, several States could still qualify as "injured" under the proposed definition in respect of a single breach of a multilateral obligation. For example, all the States parties to an integral obligation would be injured by its breach, just as they would all be entitled to suspend a treaty for material breach of such an obligation by virtue of article 60, paragraph 2 (*c*), of the 1969 Vienna Convention.[538] In such a case the Convention allows each State to take action on its own account, or all of them to do so together. Only in the latter case can the action result, in effect, in the expulsion of the responsible State from the treaty arrangement; otherwise the remedy, if it is one, lies in individual suspension of the treaty.[539]

281. Turning to the invocation of responsibility, where several States are harmed (e.g. because each is specially affected) by a single internationally wrongful act, there is no difficulty with each claiming cessation, or compensation in respect of the injury to itself (but for respect of the rule against double recovery).[540] Nor is there any difficulty in principle with each seeking satisfaction in respect of the wrongful act (i.e. wrongful so far as it is concerned). The only problem that might arise would be if the injured States disagreed over whether to accept compensation in lieu of restitution, assuming restitution to be possible. In theory it could be argued that, given the principle of the priority of restitution over compensation, the applicable remedy is restitution unless all the injured States otherwise agree. In practice, however, the situation is likely to be the reverse. Thus in the *Forests of Central Rhodopia* case, the arbitrator declined to order restitution instead of compensation in a complex situation where several other persons had legal interests but had not claimed restitution.[541] Overall it does not seem that the situation where there are several injured States in respect of the same wrongful act has caused difficulties in practice, such as to require specific regulation in the draft articles.

2. Proposed provisions

282. To summarize, in the absence of a specific solution to the problem of the plurality of injured or responsible States, opposable by treaty or otherwise, the general position taken by international law seems to be a straightforward one. Each State is responsible for its own conduct in respect of its own international obligations. Each injured State (defined in the strict sense proposed) is entitled to claim against any responsible State for reparation in respect of the losses flowing from and properly attributable to the act of that State. Such claims are subject to the provisos, on the one hand, that the injured State may not recover from any source more compensation than the loss it has suffered, and on the other hand, that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. A complicating factor in claims involving a plurality of responsible States is the *Monetary Gold*[542] rule, but that is a rule of judicial admissibility, not a determinant of responsibility as such.[543] These questions are quite distinct from the issue whether or in what circumstances member States may be held responsible for the acts of international organizations; that is properly considered part of the law relating to international organizations and is outside the scope of the draft articles.

283. The question is whether it is necessary to spell out these propositions in the draft articles, or whether an explanation in the commentary would suffice. In the Special Rapporteur's view, some clarification is desirable, in view of the frequency with which these issues arise, their importance and the uncertainty that has surrounded them. Provisions to that effect are accordingly proposed.

C. Conclusions as to part two bis, chapter I

284. For these reasons, the Special Rapporteur proposes the following draft articles in part two bis, chapter I:

[535] See the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), p. 55, para. 207.

[536] Ibid., paras. 181–184.

[537] See paragraphs 85 and 109 above.

[538] See paragraphs 91 and 111 above.

[539] As noted above, the suspension of a treaty may not help the injured State at all, and is not in general terms a "remedy" for a breach.

[540] In the *S.S. "Wimbledon"* case (see footnote 201 above), four States brought proceedings in respect of a British ship under charter to a French company carrying munitions from Italy to Poland. Only France claimed compensation, no doubt because under the charter arrangements the French carrier bore the loss associated with the delay and rerouting.

[541] See paragraph 128 and footnote 237 above.

[542] See footnote 519 above.

[543] See paragraph 240 above for the distinction between admissibility of responsibility claims and admissibility of judicial proceedings.

"PART TWO BIS

"THE IMPLEMENTATION OF STATE RESPONSIBILITY

"CHAPTER I

"INVOCATION OF THE RESPONSIBILITY OF A STATE

***"Article 40 bis. Right to invoke the responsibility of a State*[544]**

"Article 46 ter. Invocation of responsibility by an injured State

"1. An injured State which seeks to invoke the responsibility of another State under these articles shall give notice of its claim to that State and should specify:

"(*a*) What conduct on the part of the responsible State is in its view required to ensure cessation of any continuing wrongful act, in accordance with article 36 bis;

"(*b*) What form reparation should take.

"2. The responsibility of a State may not be invoked under paragraph 1 if:

"(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

"(*b*) The claim is one to which the rule of exhaustion of local remedies applies, and any effective local remedies available to the person or entity on whose behalf the claim is brought have not been exhausted.

"Article 46 quater. Loss of the right to invoke responsibility

"The responsibility of a State may not be invoked under these articles if:

"(*a*) The claim has been validly waived, whether by way of the unqualified acceptance of an offer of reparation, or in some other unequivocal manner;

"(*b*) The claim is not notified to the responsible State within a reasonable time after the injured State had notice of the injury, and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued.

"Article 46 quinquies. Plurality of injured States

"Where two or more States are injured by the same internationally wrongful act, each injured State may on its own account invoke the responsibility of the State which has committed the internationally wrongful act.

[544] For the text of article 40 bis as proposed by the Special Rapporteur, see paragraph 119 above.

"Article 46 sexies. Plurality of States responsible for the same internationally wrongful act

"1. Where two or more States are responsible for the same internationally wrongful act, the responsibility of each State is to be determined in accordance with the present draft articles in relation to the act of that State.

"2. Paragraph 1:

"(*a*) Does not permit any State, person or entity to recover by way of compensation more than the damage suffered;

"(*b*) Is without prejudice to:

"(i) Any rule as to the admissibility of proceedings before a court or tribunal;

"(ii) Any requirement for contribution as between the responsible States."

D. Countermeasures by an injured State

285. The remaining issue concerning invocation of responsibility by an injured State relates to the taking of countermeasures. Consistently with the approach so far taken to the invocation of responsibility (part two bis), it is proposed to deal first with the taking of countermeasures in what may be regarded as the "normal" case, i.e. where an injured State confronts the responsible State (as it were alone or severally). In a subsequent section of the present report, the broader range of cases involving countermeasures with respect to multilateral obligations will be discussed, as an aspect of the broad group of issues associated with former articles 19, 40, and 51–53.

1. INTRODUCTION

286. Currently located in part two, chapter III, the provisions on countermeasures were the subject of extensive debate in the period 1992–1995, on the basis of the detailed reports of Mr. Arangio-Ruiz.[545] So far as the second reading process is concerned, initial discussion took place in 1999, at the fifty-first session, on the basis of the present Special Rapporteur's second report, which raised a number of general issues.[546] The outcome of the debate was summarized in the report of the Commission on the work of its fifty-first session as follows:

> [A] minority in the Commission preferred retaining the linkage between countermeasures and part three. However, even they did not defend the inequality that existed in the relationship between the taking of countermeasures and dispute settlement. Instead, a close relationship was supported out of concern for the danger of possible abuse inherent in countermeasures and the need to control them as much as possible.

[545] See his fourth, sixth and seventh reports (footnote 21 above). For the summary of the debates, see *Yearbook … 1992*, vol. II (Part Two), pp. 18–40, paras. 117–276; *Yearbook … 1994*, vol. II (Part Two), pp. 142–144, paras. 275–288, and pp. 151–152, paras. 347–353; and *Yearbook … 1995*, vol. II (Part Two), p. 61, paras. 340–343.

[546] See *Yearbook … 1999* (footnote 8 above), p. 3; and for a summary of the debate, see *Yearbook … 1999*, vol. II (Part Two), pp. 86–88, paras. 426–453.

> … [The] proposal to delink the two did not prejudice the position that issues arising out of the resort to countermeasures could be the subject of dispute settlement. Yet, it was untenable to make compulsory dispute settlement procedure in the draft articles available only to the State which had committed the internationally wrongful act.
>
> … [T]he call for equality in treatment between States within the existing arrangement, was really a call for a general system of dispute settlement in relation to the draft articles … [This] implied that the draft articles would have to take the form of a draft convention, which had not yet been decided.[547]

Pending a solution to questions of countermeasures raised by articles 47–50, the Commission did not, at its fifty-first session in 1999, adopt a precise formulation of article 30, under which the unlawfulness of conduct taken by way of countermeasures is precluded.[548]

287. Following the preliminary debate, held at the fifty-first session of the Commission in 1999, the Special Rapporteur believes that the provisions on countermeasures should be included in part two bis, but without any special linkage to dispute settlement. The reason for inclusion in part two bis is that in general, countermeasures should be seen as performing an instrumental function of ensuring compliance, and not as punitive measures or sanctions. The reason for de-linking countermeasures and dispute settlement is, in short, that such a linkage gives a one-way right to the target State (*ex hypothesi*, the State which has committed an internationally wrongful act) to invoke third-party settlement, yet such a right must equally be given to the injured State, in lieu of taking countermeasures. If countermeasures are dealt with in detail in part two bis, a simple reference to them in part one, chapter V, as circumstances precluding wrongfulness will suffice.

288. This view appears to command general support in the Commission, at least as a first hypothesis. On the other hand, if no agreement can be reached as to the content of the provisions dealing with countermeasures (in particular, so far as they concern the regime of countermeasures in respect of multilateral obligations), other alternatives may have to be considered. Of these, the most obvious would be the further specification of the conditions for countermeasures in part one, chapter V.

289. It should be noted that the ICJ treatment of countermeasures in the case concerning the *Gabčíkovo-Nagymaros Project* was generally supportive of the balance in the draft articles, while clarifying a number of issues. The Court, in a bilateral context in which no issue of prohibited countermeasures were at stake, endorsed four distinct elements of the law of countermeasures: (*a*) the countermeasure must be taken in response to an unlawful act;[549] (*b*) it must be preceded by a demand for compliance by the injured State;[550] (*c*) the countermeasure must be proportionate, in the sense of "commensurate with the injury suffered, taking account of the rights in question";[551] and (*d*) the countermeasure must have as its purpose "to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible".[552] In particular, the Court accepted the conception of countermeasures underlying article 47. It also endorsed the requirement of proportionality, but added useful clarifications in relation to the latter, adopting a stricter approach than the language of article 49 might imply.

290. The comments of Governments on countermeasures addressed both the general question whether articles 47–50 should be retained, and specific questions of drafting and balance.[553] At a general level, Governments have referred to:

(*a*) The difficulty of distinguishing in practice between countermeasures and "interim measures of protection" as referred to in article 48, paragraph 1;

(*b*) The question whether the countermeasures should have some nexus to the breach (i.e. the notion of reciprocal countermeasures);

(*c*) The eventuality of collective measures and of countermeasures in case of breach of multilateral or *erga omnes* obligations;

(*d*) The impact of the distinction between "crimes" and "delicts" on the regime of countermeasures, and more generally the question whether countermeasures have a punitive function;

(*e*) The impact of countermeasures on the economic situation of the target State and on human rights in that State, as well as possible impacts on third States;

(*f*) The unbalanced nature of countermeasures, which favour only the most powerful States.

291. In the Special Rapporteur's view, while these criticisms and queries need to be addressed, they do not lead to the conclusion that the draft articles should be deleted. In his view, countermeasures are properly considered as aspects of the invocation of State responsibility (i.e. as "instrumental consequences", to adopt the terminology of Mr. Arangio-Ruiz). A balanced regime of countermeasures is more likely to be of use in controlling excesses than silence on a vitally important subject, one to which, moreover, the Commission is otherwise unlikely to be able to contribute. In addition, it may be said that in general the response to the Commission's work on the subject so far has been positive. For these reasons it is proposed to consider, in this section, the existing articles and the comments made on them, and to do so from the perspective of countermeasures taken by an injured State (as that term is proposed to be defined in article 40 bis, paragraph 1). Countermeasures in respect of multilateral obligations, where the State or States taking the countermeasures are not themselves injured States, present altogether more difficult problems, which can only be dealt with once the basic issues of countermeasures taken by an injured State in the strict sense have been resolved.

[547] *Yearbook … 1999*, vol. II (Part Two), p. 88, paras. 450–452.

[548] Ibid., p. 78, para. 332.

[549] *I.C.J. Reports 1997* (see footnote 18 above), pp. 55–56, para. 83.

[550] Ibid., p. 56, para. 84. The Court did not mention any requirement of prior negotiations. In that case there had been exhaustive negotiations, so the point did not arise.

[551] Ibid., para. 85.

[552] Ibid., pp. 56–57, para. 87.

[553] See the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 92–93, paras. 376–381.

2. Review of existing chapter III (arts. 47–50)

292. Articles 47–50 presently form a rather integrated group, and it is not possible to deal with issues affecting, for example, article 47 without considering later articles. Accordingly, it is proposed to summarize the content of, and Government comments upon, all four articles first, before turning to discuss in a thematic way the issues raised thereby.

(a) *Article 47 (Countermeasures by an injured State)*

293. Article 47 provides:

> 1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.
>
> 2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.
>
> 3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State.

Thus article 47 is a hybrid, giving a "definition" of countermeasures, referring to the limitations on countermeasures provided for articles 48–50, and dealing with the position of third States in respect of countermeasures.

294. According to the commentary, article 47 specifies "the entitlement of the injured State" to take "lawful countermeasures".[554] By contrast, the ostensive definition in paragraph 1 refrains from saying that the injured State is entitled to take countermeasures, or that they are lawful. It simply says what they are. Their unlawfulness is precluded not by article 47 but by virtue of article 30. This is, however, somewhat evasive: the justification for dealing with countermeasures in former part two is that they are measures which can be taken, in certain circumstances, to induce a State in breach of an international obligation to comply with its "secondary" obligations of cessation and reparation. And the commentary treats them on this footing, while at the same time stressing the limitations on their use. In particular: (*a*) countermeasures can only be taken in response to conduct actually unlawful; a "good faith belief" in its unlawfulness is not enough;[555] (*b*) their purpose is limited to "the pursuit by the injured State of cessation and reparation"; in particular it is not punitive but instrumental;[556] (*c*) they "may be applied only as a last resort where other means … have failed or would clearly be ineffective in inducing the wrongdoing State to comply with its obligations";[557] (*d*) they may only be applied to the extent they are necessary for that purpose;[558] and (*e*) in assessing their necessity the injured State must take account of "the wrongdoing State's response to its demands", thus implying a dialogue between the injured State and the target State on the questions of cessation and reparation.[559] Obviously countermeasures only legitimize the conduct in question as between the injured State and the target State, although this does not exclude the possibility, "in an interdependent world where States are increasingly bound by multilateral obligations", of "incidentally affecting the position of third States".[560] According to the commentary, this is "of particular relevance in cases of possible violation by the injured State of rules setting forth *erga omnes* obligations".[561] But, despite this reference, the articles on countermeasures pay almost no attention to the issue of *erga omnes* obligations: the world of articles 47–50 is that of the injured State facing the responsible State *à deux*. As noted already, it is appropriate to consider this situation first, before turning to the more complex issues of collective obligations and collective countermeasures. But the point may be made that it is odd even to contemplate the injured State breaching an obligation *erga omnes* by way of a countermeasure taken vis-à-vis a single State.

295. Only a few Governments have commented generally on article 47. Apart from France, which considers that "article 47 is something of an amalgam"—the definition in paragraph 1 having apparently "no link with the other two paragraphs"[562]—they are generally supportive of it and favour the reinforcement and clarification of some of the principles it embodies. Some Governments call for the Commission not only to codify the existing customary law on countermeasures but also "to develop clear rules limiting the circumstances" under which they can be resorted to.[563] For example, one Government suggests that "only States directly injured by a wrongful act should have the right to react and even then they should have to prove that they have suffered harm".[564]

296. Paragraphs 1 and 3 have given rise to more specific observations. As to paragraph 1, a number of Governments express concern as to the potentially punitive function of countermeasures, although this view was not universal. Thus Greece suggests that chapter III as a whole "would appear to be more appropriate for breaches characterized as delicts than for breaches that constitute international crimes"; it further suggests that the language of chapter III should better reflect that distinction.[565] By contrast, other Governments firmly assert that "countermeasures should not be punitive in nature, but should be aimed at restitution and reparation or compensation".[566] In order to avoid any doubt on the issue, Ireland suggests that the sentence "It does not include the taking of measures of

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[554] *Yearbook … 1996*, vol. II (Part Two), commentary to article 47, p. 67, para. (1).

[555] Ibid.

[556] Ibid., para. (2). In this respect the conception of countermeasures in part two is narrower than that in article 30 as adopted on first reading, which included certain "sanctions".

[557] Ibid., para. (4).

[558] Ibid., para. (5).

[559] Ibid., p. 68, para. (6).

[560] Ibid., para. (7).

[561] Ibid., para. (8).

[562] *Yearbook … 1998* (see footnote 35 above), p. 155.

[563] A/CN.4/496 (see footnote 3 above), p. 18, para. 121.

[564] Ibid.

[565] *Yearbook … 1999* (see footnote 43 above), p. 109. See, for a different view, Mongolia (*Yearbook … 1998* (footnote 35 above), p. 153).

[566] A/CN.4/504 (see footnote 3 above), p. 20, para. 74. Singapore criticizes the "apparent contradictions" between the commentaries to articles 30 and 47 in that respect (*Yearbook … 1998* (footnote 35 above), p. 154).

a punitive nature" be added to paragraph 1.[567] Like all the other Governments which have commented on article 47,[568] Ireland also agrees with the principle embodied in paragraph 3 on the protection of third States, but suggests "a slight amendment" to it. "Since other international persons and bodies, such as intergovernmental organizations, may be injured by a countermeasure directed at a State, Ireland proposes that the term "third State" be replaced by the term "third party".[569]

297. France and Denmark (on behalf of the Nordic countries) do not question the substance of paragraph 3, but consider that it would be better dealt with in a separate provision.[570] Indeed Denmark supports a more general redrafting of article 47, in keeping "with a cautious approach" aimed at limiting the entitlement of resorting to countermeasures. It thus proposes to merge articles 47–49 into a single article entitled "Conditions of resort to countermeasures", which would first state that resort to countermeasures is unlawful unless some conditions are fulfilled, and then go on with the enumeration of the relevant conditions.[571]

(b) *Article 48 (Conditions relating to resort to countermeasures)*

298. Article 48 lays down certain procedural conditions for the taking of countermeasures, or for their continuation in force. It was by far the most controversial of the four articles adopted on first reading. It provides:

1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54. This obligation is without prejudice to the taking by that State of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter.

2. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under part three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure.

299. The commentary notes a central disagreement within the Commission on article 48. While all agreed that peaceful means for the settlement of the dispute should be pursued, the question was to what extent this should be a necessary prerequisite for taking countermeasures, given (*a*) the possibilities for a State to prolong negotiations and engage in dilatory procedures; and (*b*) the fact that "some forms of countermeasures (including some of the most readily reversible forms, for example, the freezing of assets) can only be effective if taken promptly".[572] The tension between maintaining the effectiveness of countermeasures and preventing premature resort to them is sought to be resolved by a distinction between "interim countermeasures" (described as "interim measures of protection") and other measures. According to the commentary, "interim measures" are those which are "necessary … to preserve [the] legal rights" of the injured State. By contrast "full-scale countermeasures"—a term not used in the articles themselves—may not "be taken without an initial attempt to resolve the dispute by negotiation".[573] Interim measures are said to be inherently reversible: thus "the comparison is between the temporary detention of property and its confiscation, or the suspension of a licence as against its revocation".[574]

300. A second way of striking a balance between the interests of the State taking countermeasures and the target State is to require that countermeasures be suspended in certain conditions, specified in paragraphs 3–4. A significant point here is that the provisions of articles 47–50 are associated with arrangements for the compulsory third-party settlement of disputes concerning countermeasures, proposed on first reading and referred to already.[575] The commentary summarizes the effect of these provisions as follows:

[I]f the basic conditions for countermeasures laid down in article 47 are met and if initial negotiations have failed to produce a solution, the injured State may take countermeasures without any prior resort to third party dispute settlement procedures. But if it does take countermeasures, the State against whom they are taken may resort to binding arbitration … or to other applicable binding third party settlement of the dispute. If the allegedly wrongdoing State does resort to such a procedure, and implements it in good faith, and provided the wrongful act itself has ceased, the countermeasures must be suspended.[576]

This suspension is however conditional; if the target State fails to cooperate in third-party dispute settlement, or fails to honour an order or indication of provisional measures issued by a third party, the suspension may be lifted.[577] The commentary expresses the view that "this system

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[567] *Yearbook … 1998* (see footnote 35 above), p. 155.

[568] See A/CN.4/496, p. 18, para. 121 and A/CN.4/504, p. 20, para. 74 (footnote 3 above). Singapore considers that paragraph 3 "may not go far enough" and that the draft articles "may need to address concerns on abuses against and contingencies for innocent third States" (*Yearbook … 1998* (footnote 35 above), p. 154).

[569] *Yearbook … 1998* (see footnote 35 above), p. 155.

[570] Ibid. For France, this principle is "hardly appropriate in this article (a State A can obviously not take vengeance on State C for what State B has done to it)".

[571] Ibid. According to Denmark, on behalf of the Nordic countries, these conditions are as follows:

"(*a*) The actual existence of an internationally wrongful act;

"(*b*) The prior submission by the injured State of a protest combined with a demand of cessation/reparation;

"(*c*) Refusal of an offer to settle the dispute through amicable settlement procedures, including binding third-party procedures;

"(*d*) Appropriate and timely communication by the injured State of its intention to resort to countermeasures;

"(*e*) Proportionality, i.e. the measures taken by the injured State shall not be out of proportion to the gravity of the internationally wrongful act and the effects thereof."

[572] *Yearbook … 1996*, vol. II (Part Two), commentary to article 48, p. 69, para. (2).

[573] Ibid., para. (3).

[574] Ibid., para. (4).

[575] See paragraph 265 above.

[576] *Yearbook … 1996*, vol. II (Part Two), commentary to article 48, p. 70, para. (11).

[577] Ibid., para. (12), summarizing the effect of article 48, paragraph 4.

marks an important advance on the existing arrangements for the resolution of disputes involving countermeasures", in particular by tending to "reduce that element of the system of countermeasures which tended to a spiralling of responses".[578]

301. The Czech Republic and Ireland note the "debate and controversy in the Commission" over article 48.[579] Government comments on it equally reflect a broad range of differing, sometimes conflicting, views. On the one hand, Switzerland, for example, is "satisfied with the provisions on the settlement of disputes with respect to countermeasures".[580] Other Governments consider that article 48 should be substantially amended, if not omitted altogether. France for example suggests an entirely new formulation for the provision,[581] while the United States is of the view that it should "at the least, be placed in an optional dispute settlement protocol".[582] Without prejudice to its general position as to the treatment of countermeasures in the draft articles, the United Kingdom proposes the addition of a provision "corresponding to article 45 of the 1969 Vienna Convention, barring recourse to countermeasures by a State after it has acquiesced in a breach of its rights";[583] particular attention should also be given to the situation where "[s]everal States may take countermeasures, but the State principally affected may decide to take none, or even to consent to the breach".[584]

302. Apart from these general observations and suggestions, Government comments mostly focus on paragraphs 1–2. Two main issues are discussed as far as paragraph 1 is concerned. The first relates to the obligation to negotiate, which must be fulfilled prior to the taking of full-scale countermeasures. Some Governments clearly support this provision, on the assumption that countermeasures are a solution of "last resort"[585] and "not a direct and automatic consequence of an internationally wrongful act".[586] Others do not deny the existence of the obligation to negotiate, but interpret it rather narrowly. Japan argues for example that, when countermeasures are aimed at inducing the wrongdoing State to restore the pre-existing situation as quickly as possible, "there is not enough time to negotiate"; accordingly, the prevailing interpretation should be that "the injured State is permitted to take countermeasures if the wrongdoing State has not made any specific response to its proposal within a reasonable period of time".[587] Other Governments oppose the inclusion of such a provision, mainly on the ground that the obligation to negotiate prior to the taking of countermeasures is not part of customary international law, unlike the prior demand for cessation and reparation.[588] For the United Kingdom, for example, "[p]aragraph 1 proposes a novel and unjustified restraint upon States which is impractical and utopian in the fast-moving modern world".[589] The United States goes further, stating that "the draft articles should reflect the fundamental customary rule that countermeasures are permissible prior to and during negotiations".[590]

303. The second issue raised in respect of paragraph 1 relates to the reference to "interim measures of protection". With the exception of Denmark (on behalf of the Nordic countries), which proposes that "[t]he concept of interim measures of protection … be singled out for special mention",[591] other Governments consider that it will be difficult in practice "to distinguish interim measures from countermeasures proper".[592] For Argentina, interim

[578] Ibid., para. (13).

[579] *Yearbook … 1998* (footnote 35 above), p. 156; in this context Ireland "doubts the wisdom of linking the conditions relating to countermeasures to [the] provisions" on dispute settlement.

[580] Ibid.. See also Japan, which considers that "articles 48 to 50 are, generally speaking, well drafted in that they would prevent abuse of countermeasures by imposing not only procedural but also substantive restrictions" (*Yearbook … 1999* (footnote 43 above), p. 109).

[581] The French proposition reads as follows:

"1. An injured State which decides to take countermeasures shall, prior to their entry into force:

"(*a*) Submit a reasoned request calling upon the State which has committed the act alleged to be internationally wrongful to fulfil its obligations;

"(*b*) Notify that State of the nature of the countermeasures it intends to take;

"(*c*) Agree to negotiate in good faith with that State.

"2. However, the injured State may, as from the date of such notification, implement provisionally such countermeasures as may be necessary to preserve its rights.

"3. When the internationally wrongful act has ceased, the injured State shall suspend countermeasures, provided that the parties have initiated a binding dispute settlement procedure under which orders binding on the parties may be issued.

"4. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour an order emanating from the dispute settlement procedure."

(*Yearbook … 1998* (see footnote 35 above), pp. 155–156)

[582] Ibid. The same State adds that "[a]s a mandatory system of conditions, [article 48] is without foundation under customary international law" (see also A/CN.4/496 (footnote 3 above), pp. 18–19, para. 121).

[583] *Yearbook … 1998* (see footnote 35 above), p. 156. For the United Kingdom, the Commission should limit itself to article 30 and omit articles 47–50 (ibid., p. 154).

[584] Ibid., p. 154.

[585] Ibid., p. 151. Argentina proposes that the text "reverse the presumption of the lawfulness of countermeasures", considered "as an act merely *tolerated*" by international law; see also A/CN.4/496, p. 18, para. 120, and A/CN.4/504, p. 20, para. 74 (footnote 3 above).

[586] *Yearbook … 1998* (footnote 35 above), p. 157, comments by the Czech Republic, adding that "[t]he purpose of these preconditions is to reduce the likelihood of premature, and thus improper, resort to countermeasures". Austria and France—the latter believing that "the taking of countermeasures should, as far as possible, be associated with a process for the peaceful settlement of disputes"—also favour the prior obligation to negotiate (ibid.; see also A/CN.4/496 (footnote 3 above), p. 18, para. 121).

[587] *Yearbook … 1999* (see footnote 43 above), p. 109. In a similar vein, Ireland considers that the State willing to take countermeasures "should normally negotiate with the wrongdoing State in order to obtain … cessation and … reparation", but that managing to impose upon them "any more wide-ranging obligation prior to taking countermeasures" is unlikely (*Yearbook … 1998* (footnote 35 above), p. 156).

[588] United States and Germany, the latter believing it "quite unreasonable to expect the injured State to refrain from taking (peaceful) countermeasures" before exhausting all means of friendly dispute settlement (*Yearbook … 1998* (footnote 35 above), p. 157; see also A/CN.4/504 (footnote 3 above), p. 20, para. 74).

[589] *Yearbook … 1998* (footnote 35 above), p. 157.

[590] Ibid., p. 158.

[591] Ibid., p. 157. The Czech Republic seems also to endorse the notion of interim measures, by noting that their suspension "would render the countermeasures meaningless" (ibid.; see also A/CN.4/496 (footnote 3 above), p. 18, para. 121).

[592] Germany, adding that "the new category of 'interim measures' may open the way to attempts to circumvent the limitations tradi

(*Continued on next page.*)

measures "would appear to differ from countermeasures not in their nature but in their degree or duration".[593] The United Kingdom vigorously denounces "an unfortunate use of language which may suggest a conceptual link, which it considers entirely misconceived, with interim measures in ICJ".[594] The United States questions whether interim measures "would, like countermeasures, be unlawful without the precipitating wrongful act"; if not, they would appear "unnecessary" in its view, but if they are, "it is unclear how in concrete circumstances the term might be applied".[595]

304. As far as article 48, paragraph 2, is concerned, even those Governments which support in principle the existence of a link between the taking of countermeasures and the dispute settlement regime embodied in part three of the draft, express some doubts concerning its wording and underlying conception. The Czech Republic for example, although "not unsympathetic to the idea of monitoring, at least a posteriori, the lawfulness of countermeasures", considers that paragraph 2 "introduces a relatively rigid organic link between parts two and three" and thus prejudges the question of the binding nature of that latter part to the detriment of the "substantive rules concerning countermeasures."[596] For the United States, "[p]aragraph 2 contains two flaws with respect to the draft's system of arbitration". First, the system of compulsory arbitration proposed in article 58, paragraph 2, "is not supported by customary international law, would be unworkable in practice" and would create "a serious imbalance in the treatment of injured and wrongdoing States", imposing "an unacceptable cost" on the former.[597] Secondly, the reference to "any other binding dispute settlement procedure in force" between the parties could "be misinterpreted as constituting consent to resort to dispute settlement procedures where the existing procedure requires mutual consent".[598] At the same time, it has been suggested by another Government that, even if no link is established between the taking of countermeasures and the dispute settlement procedure, resorting to countermeasures should be made conditional upon the "refusal by the wrongdoing State of an offer to settle the matter through a binding third-party procedure".[599]

305. As to paragraph 3, Japan supports the provision but finds its wording "rather vague": it suggests that, if the procedure mentioned is judicial, "this should be clearly stated".[600] The United States considers that the requirement embodied in paragraph 3 "may lead to further delay and abuse by the wrongdoing State".[601]

(c) *Article 49 (Proportionality)*

306. Article 49 lays down the basic requirement of proportionality as a condition for a legitimate countermeasure. It provides that:

> Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

307. The commentary described "the principle of proportionality as a general requirement for the legitimacy of countermeasures or reprisals … a crucial element in determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States".[602] The question is not the existence of the requirement but the rigour with which it is to be applied. It justifies the negative formulation of article 49 ("not … out of proportion") by reference to formulations in decided cases such as the *Naulilaa*[603] and *Air Service Agreement* cases.[604] The requirement of proportionality is thus flexible, allowing to be taken into account both the gravity of the wrongful act and its effects on the injured State.[605] In particular, it is not intended

> unduly [to] restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example violations of human rights. At the same time, a legally injured State, as compared to a materially injured State, could be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.[606]

308. All Governments which commented on article 49 agree that the principle of proportionality of countermeasures is part of customary international law;[607] some see it as an element "of crucial importance",[608] or as "one of the fundamental conditions to be met if the resort to countermeasures is to be legitimate".[609] A few express

(*Footnote 592 continued.*)

tionally attached to the taking of reprisals" (*Yearbook … 1998* (footnote 8 above), p. 157). See also Ireland, fearing that the distinction may "merely fuel further disagreement between States" (ibid., p. 156), and Japan, calling for a clearer definition of interim measures (*Yearbook … 1999* (footnote 43 above), p. 109; see also A/CN.4/504 (footnote 3 above), p. 21, para. 76).

[593] *Yearbook … 1998* (footnote 8 above), p. 151.

[594] Ibid., p. 157.

[595] Ibid., pp. 157–158.

[596] Ibid., p. 158.

[597] Ibid. See also A/CN.4/504 (footnote 3 above), p. 20, para. 75, where it is suggested that the State taking countermeasures and the target State "should have the same possibilities of recourse to means of peaceful settlement", and Japan (*Yearbook … 1999* (footnote 43 above), p. 109).

[598] *Yearbook … 1998* (footnote 35 above), p. 158.

[599] A/CN.4/504 (footnote 3 above), p. 20, para. 75.

[600] *Yearbook … 1999* (footnote 43 above), p. 109.

[601] *Yearbook … 1998* (footnote 35 above), p. 158.

[602] *Yearbook … 1995*, vol. II (Part Two), commentary to article 13 [present art. 49], pp. 64–65, para. (2).

[603] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1028 (excluding "reprisals out of all proportion to the act motivating them"). The case concerned armed reprisals and not countermeasures in the sense of chapter III.

[604] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7) ("not … clearly disproportionate when compared to [the action] taken by France"), p. 444, para. 83.

[605] *Yearbook … 1995* (see footnote 602 above), pp. 65–66, paras. (6)–(8).

[606] Ibid., p. 66, para. (9). The text of the draft articles as adopted on first reading, however, makes no distinction between "legal injury" and "material injury".

[607] See, for example, Germany (*Yearbook … 1998* (footnote 35 above), p. 159, referring to *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226); Ireland (ibid.), the United States (ibid., pp. 159–160); and A/CN.4/504 (footnote 3 above), p. 20, para. 74.

[608] *Yearbook … 1998* (see footnote 35 above), Austria (p. 158).

[609] Ibid., p. 159, the Czech Republic.

concerns as to the drafting of article 49,[610] but none doubt the relevance of the reference to the "degree of gravity of the internationally wrongful act".[611] The Czech Republic considers that the "function of the principle of proportionality becomes even more important in the case of countermeasures taken in response to a crime"; in its view, "[t]he effects of a crime may be felt by the community of States to varying degrees, and the principle of proportionality should therefore be applied by each injured State individually".[612]

309. The question raised by States in respect of article 49 is rather whether the provision should be refined by adding other relevant elements in the determination of proportionality. Austria for example, emphasizing the "regulating effect" provided by the principle of proportionality, calls for further refinement of the concept, at least in the commentary to the article.[613] Both Ireland and the United States consider it possible to define the notion more comprehensively in the draft article itself, even though "[p]roportionality is a matter of approximation, not precision, and requires neither identity nor exact equivalency in judging the lawfulness of a countermeasure".[614] These Governments criticize in particular the fact that the purpose of a countermeasure is not taken account of in the assessment of proportionality. Referring to the recent application of the concept of proportionality by international human rights bodies such as the European Court of Human Rights, Ireland declares that "both the particular aim of the countermeasure [i.e. cessation and/or reparation] and the particular form of reparation sought, if any, may indeed be relevant to the question of the proportionality of a countermeasure".[615] Similarly, for the United States, "[p]roportionality means principally that countermeasures should be tailored to induce the wrongdoer to meet its obligations under international law, and that steps taken towards that end should not escalate but rather serve to resolve the dispute".[616]

310. Two other points are raised with respect to article 49. Ireland questions the distinction drawn in the commentary between a legal and a material injury: it notes that "in many instances of human rights violations the material injury will be to nationals of the State committing the internationally wrongful act", so that "limitation of consideration of the effects of [the] act to the legal injury suffered by an injured State [might] be too restrictive". In such cases, "the classic understanding of proportionality in the context of countermeasures as a relationship between a wrongdoing and a wronged State may be inappropriate".[617] Secondly, in discussions in the Sixth Committee, it was suggested that "consideration should be given to the issue of State responsibility in the case of reprisals out of proportion to the original breach".[618]

(d) *Article 50 (Prohibited countermeasures)*

311. Article 50 specifies five categories of conduct which are prohibited as countermeasures. It provides:

> An injured State shall not resort by way of countermeasures to:
>
> (*a*) The threat or use of force as prohibited by the Charter of the United Nations;
>
> (*b*) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;
>
> (*c*) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;
>
> (*d*) Any conduct which derogates from basic human rights; or
>
> (*e*) Any other conduct in contravention of a peremptory norm of general international law.

312. The extensive commentary to article 50 begins by noting the overlap between subparagraph (*e*) and subparagraphs (*a*) and (*d*), which are justified because of the need to avoid arguments about the peremptory character of these particular norms.[619] It goes on to deal in turn with the specific exclusions:

(*a*) Armed reprisals or countermeasures involving a use of armed force are specifically excluded by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[620] as well as by modern doctrine and practice;[621]

(*b*) The commentary goes into more detail in justifying the exclusion of "extreme economic or political measures [which] may have consequences as serious as those arising from the use of armed force".[622] The problem here, however, is that countermeasures are by definition coercive: they are taken in order to induce a State to do something it is obliged but unwilling to do. To the extent that certain extreme measures are excluded by the Charter of the United Nations, they cannot of course be legitimized by the draft articles: to the extent they are not (and provided they meet the other requirements of the draft articles,

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[610] Ibid. Ireland endorses "the negative formulation of [the] condition, but "France proposes replacing the phrase 'out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State' by the phrase 'out of proportion to the effects of the internationally wrongful act on the injured State and the degree of gravity thereof'" (ibid).

[611] Ibid., Germany, for example. For the United States, however, the formulation adopted on first reading "gives undue emphasis" to "a vague concept of 'gravity'", which "reflects only one aspect of customary international law" (ibid., p. 160).

[612] Ibid., p. 159.

[613] Ibid., p. 158. For Germany, "an assessment of proportionality has to involve consideration of all elements deemed to be relevant in the specific circumstances" (ibid., p. 159).

[614] Ibid., p. 160, the United States, adding that "a degree of response greater than the precipitating wrong may be appropriate to bring the wrongdoing State into compliance with its obligations"; see also Ireland (ibid., p. 159).

[615] Ibid., p. 159.

[616] Ibid., p. 160. Accordingly, the United States considers that "a rule of proportionality should weigh the aims served by the countermeasure in addition to the importance of the principle implicated by the antecedent wrongful act" (ibid.).

[617] Ibid., p. 159.

[618] A/CN.4/504 (see footnote 3 above), p. 20, para. 74.

[619] *Yearbook … 1995* (see footnote 602 above), commentary to article 14 [present art. 50], p. 66, para. (1).

[620] Annexed to General Assembly resolution 2625 (XXV) of 24 October 1970.

[621] *Yearbook … 1995* (see footnote 602 above), pp. 66–67, para. (2), citing General Assembly resolution 2625 (XXV), annex, first principle, sixth paragraph.

[622] *Yearbook … 1995* (see footnote 602 above), commentary to article 14 [present art. 50], p. 68, para. (5).

especially proportionality), their *point* is to be coercive. The commentary attempts to address the point. It notes that "if formulated too broadly, subparagraph (*b*) might amount to a quasi-prohibition of countermeasures", but argues that article 50 limits "prohibited conduct to 'extreme economic or political coercion'"; moreover, "the term 'designed' … connotes a hostile or punitive intent and excludes conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State";[623]

(*c*) As to diplomatic inviolability, the commentary notes that this is confined to "those rules of diplomatic law which are designed to guarantee the physical safety and inviolability of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict".[624] This protection is of particular importance where the two States are at loggerheads, as may well be the case when countermeasures are threatened or taken;

(*d*) As to the prohibition of countermeasures affecting basic human rights, the commentary notes that this has its historical origin in the prohibition of reprisals against persons protected by international humanitarian law, and was extended subsequently to cover the protections afforded individuals by non-derogable norms of human rights. The problem here, however, is that countermeasures against a State by definition cannot permit the violation of non-derogable human rights, the beneficiaries of which are by definition third parties in relation to the target State, even if they are its nationals. Rather the question is that of "inhumane consequences [which are] … the indirect result of measures aimed at the wrongdoing State".[625] The commentary cites instances of boycotts and other measures which exempt "articles intended to relieve human suffering" or activities "aimed at humanitarian assistance".[626] Again the difficulty is that such exemptions do not necessarily involve conduct by the injured State which is legally required of it under human rights norms: however consistent with humanitarian considerations such exemptions may be, a State is not in general obliged by human rights law to allow humanitarian activities to be carried out by its nationals or officials on the territory of another State. A more persuasive justification for subparagraph (*d*) is the point that countermeasures are "essentially a matter between the States concerned" and that such measures should "have minimal effects on private parties in order to avoid collective punishment";[627]

(*e*) Finally, as to the residual exclusion of conduct derogating from other peremptory norms, the commentary attempts no examples: indeed it notes "that subparagraph (*e*) may not be strictly necessary since, by definition, *jus cogens* rules may not be departed from by way of countermeasures or otherwise". The reference to peremptory norms will, however "ensure the gradual adjustment of the articles in accordance with the evolution of the law in this area and would therefore serve a useful purpose".[628]

313. Those Governments commenting on article 50 appear rather divided as to its general purpose and content. On the one hand, some (the Czech Republic and Ireland for example) stressed that "the interests of the international community required that certain categories of countermeasures be prohibited",[629] and they accordingly supported the enumerated prohibitions, "most of which relate to *jus cogens*".[630] Even though it is not in agreement with some specific elements of the list, Ireland notes in particular that there has been in the last few decades "increasing recognition that there is conduct on the part of a State which should be prohibited under all circumstances and which logically therefore should not be permitted even in response to a prior unlawful act of another State".[631] Some Governments, on the other hand, are of the view that article 50 does not generally reflect State practice or customary international law.[632] Among others, Singapore criticizes article 50 for not addressing "the key issue of whether the measures taken should be related or have some nexus to the right infringed".[633] The United States finds it "unnecessary" to the extent that "the rule of proportionality in draft article 49 would generally limit the range of permissible countermeasures and would, in most circumstances, preclude resort to the measures enumerated in article 50".[634] It is also concerned that this provision "may add layers of substantive rules to existing regimes without clarifying either the specific rules or the law of State responsibility", taking as an example the rules on diplomatic and consular relations.[635]

314. Subparagraph (*a*) has not been subject to many comments by Governments, although France finds that its drafting is "strange" and suggests a formulation based on article 52 of the 1969 Vienna Convention.[636] Recalling that, according to General Assembly resolution 2625 (XXV), States have a duty to refrain from acts of reprisals involving the use of force, Ireland "fully agrees with the limitation on countermeasures specified in this subparagraph", which "implicitly recognizes the role of the United Nations and its organs in this area".[637]

315. Opinions as to subparagraph (*b*), by contrast, are divided. Among its supporters are, at least implicitly, those States which are generally critical of the use of counte-

[623] Ibid., p. 70, para. (12).

[624] Ibid., para. (14).

[625] Ibid., pp. 72–73, para. (20).

[626] Ibid., p. 73, para. (21).

[627] Ibid., para. (22).

[628] Ibid., p. 74, para. (26).

[629] A/CN.4/496 (see footnote 3 above), p. 18, para. 121.

[630] *Yearbook … 1998* (see footnote 35 above), p. 160, the Czech Republic. Similarly, Ireland "strongly endorses the itemization in draft article 50 of substantive limits to the measures which may lawfully be taken by way of countermeasures" (ibid., p. 161). Denmark, on behalf of the Nordic countries, would retain a provision on prohibited countermeasures "along the lines of draft article 50" (ibid.)

[631] Ibid., p. 161.

[632] Ibid., the United States, adding that it "may serve to magnify rather than resolve disputes"; see also Singapore (ibid., p. 153) and A/CN.4/496 (footnote 3 above), p. 18, para. 120.

[633] *Yearbook … 1998* (see footnote 35 above), p. 153; see also the United States (ibid., p. 161).

[634] Ibid., p. 161.

[635] Ibid.; the United Kingdom asserts that the limitations set in article 50 "are not satisfactory" (ibid.).

[636] Ibid.; the provision would read as follows: "The threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

[637] Ibid.; see also A/CN.4/504 (footnote 3 above), p. 20, para. 74, where it is stressed that "armed countermeasures [are] prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which ha[s] become a customary rule of international law".

measures, on the ground that they "favour more powerful States and … potentially undermine any system based on equality and justice".[638] As Singapore puts its:

> An economically or politically more powerful State is bound to be in a better position to impose effective countermeasures than weaker States, especially developing and less developed States. Similarly, the impact of countermeasures against weaker States will generally be far more detrimental than for more powerful States.[639]

On the other hand, some Governments are very much opposed to the subparagraph. France considers that it has "no basis in customary law" and should be deleted.[640] Japan fears that it "would prohibit virtually all countermeasures".[641] The United Kingdom and the United States both criticize its vague and subjective language,[642] the United Kingdom adding that "if the original wrong were the application of '[e]xtreme economic or political coercion' to the injured State, it is hard to see why that State should not respond in kind against the wrongdoing State".[643] Ireland and Switzerland are more supportive of the subparagraph. For Ireland, there is some State practice supporting it, although doubts remain as to "whether there would be universal agreement that such conduct is prohibited *in all circumstances*": the provision accordingly is *lex ferenda*.[644] Moreover, it considers that "some such limitation on the taking of countermeasures is desirable", even if the term "extreme" lacks precision. In its view the problem might be addressed by focusing on the protection of "the vital interests of the population of a wrongdoing State as opposed to the vital interests of the State itself": in particular, in its view, countermeasures should not have the result of "depriving the people of a State of their means of subsistence".[645] In a similar vein, Switzerland wonders why the prohibition of subparagraph (*b*) is not extended to "other types of coercion, for example environmental countermeasures", and suggests deleting the words "economic or political".[646]

316. Few comments have been made as to subparagraph (*c*). Ireland again considers it as *de lege ferenda*, to the extent that "the inviolability of diplomatic and consular agents, premises, archives and documents" may not exist "*in all circumstances*": however, it clearly supports the provision, noting that:

> There are other measures which may lawfully be taken as a response to an internationally wrongful act in relation to diplomatic and consular personnel and property and which would not be as deleterious to the functioning of the international legal system, for example, a rupture of the diplomatic relations between the wronged and the wrongdoing State.[647]

The United States is likewise "strongly" in favour of subparagraph (*c*) which, however, "should not be misinterpreted to preclude actions taken on the basis of reciprocity".[648]

317. Subparagraph (*d*) raises a similar debate as subparagraph (*b*). For some States, its language, especially the phrase "basic human rights", is not "clearly defined",[649] and is likely to create problems as "there are very few areas of consensus, if any, as to what constitutes 'basic human rights'".[650] The United Kingdom finds it also "difficult to grasp and unacceptably wide", even though it "strikes a sympathetic chord". Noting that "most countermeasures are not directed at individuals, but are measures taken by one State against another State", the United Kingdom wonders "how any recognizable countermeasure in the understood sense of the term could amount to 'conduct which derogates from' fundamental rights", or even from "other generally recognized human rights". In its opinion, subparagraph (*d*) raises "issues of substantive law" and this confirms that no "detailed regulation" of countermeasures should be attempted in the draft articles.[651] Ireland, on the other hand, "agrees with the general thrust of the limitation" for basic human rights. Like the other Governments, it considers "the phrase 'basic human rights' as too general and imprecise", but believes it "possible to identify certain such rights from which no derogation is permissible", even in time of war or other public emergency. Ireland refers in that regard to the "large degree of concordance" existing among various human rights treaties as to the list of non-derogable rights.[652] Relying in particular on article 4 of the International Covenant on Civil and Political Rights, it suggests that the list there laid down be included in draft article 50. Accordingly, it recommends that:

> [C]ountermeasures involving a derogation from any of the rights specified in article 4, paragraph 2, of of the International Covenant on Civil and Political Rights as well as countermeasures which are discriminatory on any of the grounds mentioned in article 4, paragraph 1, should be expressly prohibited.[653]

318. As to subparagraph (*e*), Ireland suggests that it be deleted. While there is, in its view, "widespread acceptance of the concept of a peremptory norm of general international law, there is not the same degree of consensus with respect to the identification and formulation of specific norms", and the provision thus cannot be sufficiently specified.[654] The United States similarly notes that "the content of peremptory norms is difficult to determine outside the areas of genocide, slavery and torture",[655] and France also supports the deletion of the subparagraph,

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[638] *Yearbook … 1998* (see footnote 35 above), p. 154, Singapore; see also Argentina (ibid., p. 151); and A/CN.4/496 (footnote 3 above), p. 18, para. 120.

[639] *Yearbook … 1998* (see footnote 35 above), p. 154.

[640] Ibid., p. 161.

[641] *Yearbook … 1999* (see footnote 43 above), p. 109.

[642] *Yearbook … 1998* (see footnote 35 above), p. 162; for the United Kingdom, "there is in any case no obvious way in which a definition of 'extreme' measures might be approached".

[643] Ibid.

[644] Ibid.

[645] Ibid.; see also Singapore, referring to the "ironic" suffering possibly caused by a countermeasure to a population "already … suffering from a repressive regime" (ibid., p. 154).

[646] Ibid., p. 162.

[647] Ibid.

[648] Ibid., p. 161, footnote 1.

[649] Japan, recommending the deletion of the provision, if it cannot be further clarified (*Yearbook … 1999* (see footnote 43 above), p. 109).

[650] *Yearbook … 1998* (see footnote 35 above), p. 163, the United States.

[651] Ibid.; the United Kingdom also notes that some issues dealt with in the commentary (such as the exclusion from "embargoes of items necessary for basic subsistence and humanitarian purposes") are currently subject to controversy within the Security Council and the General Assembly.

[652] Ibid., p. 162.

[653] Ibid., p. 163.

[654] Ibid.

[655] Ibid.

consistent with its current approach to the concept of *jus cogens*.[656] By contrast, it has been suggested that the Commission should "consider the measures adopted in recent years against 'pariah' States which were guilty of violating the fundamental norms of international law".[657]

319. Finally, France, seeking to "emphasize the essentially conditional and provisional nature of countermeasures", proposes adding a new article 50 bis on the cessation of countermeasures, which would read as follows:

> Countermeasures shall cease as soon as the obligations breached have been performed and full reparation has been obtained by the injured State.[658]

3. Recasting the provisions on countermeasures by an injured State

320. Against this background, five basic issues can be identified, as follows:

(*a*) The definition of countermeasures;

(*b*) Obligations not subject to the regime of countermeasures;

(*c*) Conditions for taking and maintaining countermeasures;

(*d*) The termination of countermeasures;

(*e*) The formulation of article 30.

These will be considered in turn.

(a) *Definition of countermeasures*

321. Article 47, as noted already, is a hybrid provision "defining" countermeasures taken by an injured State and specifying the limitation that countermeasures may not affect the rights of third States.[659] It has attracted a significant number of comments and proposals from Governments. Underlying these is a concern as to the dual character of the draft articles on countermeasures. Their inclusion in part two (or part two bis) is justified because countermeasures are a means—sometimes the only means—of inducing a responsible State to comply with its obligations of cessation and reparation and are, to that extent, allowed by international law. But their focus is on the regulation of countermeasures, and this corresponds to the focus of much governmental concern, viz. the possible abuse of countermeasures. The inelegance of the "definition" of countermeasures in article 47 arises because the Commission was not prepared to say, in so many words, that countermeasures which meet the specified conditions are a lawful (or "legitimate") response to the breach of an international obligation. It is entirely proper to seek to prevent the abuse of countermeasures, but this is a necessary by-product of their inclusion here, not its raison d'être.

322. Paradoxically, some of the concerns as to the breadth of permitted countermeasures and as to the hybrid character of article 47 could be addressed by a more forthright formulation. The essential point is that countermeasures, which are by definition measures otherwise in breach of the obligations of the injured State to the responsible State, are only legitimate or permitted in the relations between those two States, i.e. in a relative sense.[660] If it says this at all, article 47 says it only implicitly, and the references in article 47, paragraph 3, to breaches of obligations to third States, and in article 50 (*d*) to breaches of human rights, further tend to obscure the point. Rather than a purported definition, article 47 would be better expressed as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles.[661]

323. But there are still problems in the underlying conc-eption of countermeasures. Two in particular need to be mentioned. The first is the relationship between non- compliance with an obligation and the suspension of that obligation. The second is the question of the essential scope of countermeasures: should they be (as article 47 apparently implies) at large, or should they be limited in some way—either by reference to "reciprocal" countermeasures (taken in relation to the same or a closely related obligation) or at least by reference to some criterion of reversibility.

(i) *Countermeasures and suspension of obligations, especially treaty obligations*

324. Difficulty has sometimes arisen because of (perhaps understandable) confusion between the taking of countermeasures otherwise in breach of an international obligation and the suspension of an obligation. Commentators have stressed the significant constraints on the suspension of treaties under the 1969 Vienna Convention, and have asked how these can be seemingly evaded by reliance on countermeasures.[662] By implication, the taking of countermeasures is seen as equivalent to the suspension of an obligation. ICJ seems to have given credence to this position in the case concerning the *Gabčíkovo-Nagymaros Project*, when it said that:

> The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the

[656] Ibid.

[657] A/CN.4/496 (see footnote 3 above), p. 18, para. 121.

[658] *Yearbook … 1998* (see footnote 35 above), p. 164.

[659] See paragraphs 271–275 above.

[660] In the words of ICJ in the *Gabčíkovo-Nagymaros Project* case, countermeasures must be "directed against" the responsible State, *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 83.

[661] Correspondingly, the question of the effect on third States can be dealt with in the context of article 50. The very definition of countermeasures excludes measures targeted at third States. The problem is rather one of the *consequences* of countermeasures on third States. See paragraphs 347–348 below.

[662] Thus a treaty can only be suspended in whole or in part for "material" breach, but the cardinal requirement for taking countermeasures is proportionality, not materiality: see, for example, Greig, loc. cit., p. 359, who treats suspension of treaties as a "remedy" and argues that the limitations in articles 42, paragraph 2, and 60, of the 1969 Vienna Convention are rendered a "dead letter" if one allows countermeasures for non-material breaches.

provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".[663]

It is clear that Hungary indicated its unwillingness to comply with some of the provisions of the Treaty from 1989, through the suspension of works required by the Treaty; it is also clear that, once the reasons given by Hungary for its action were held to be legally insufficient, this refusal entailed its responsibility for breach of those very provisions. It may also be that in substance what Hungary sought to do in 1989–1990 (though it never said so in such terms) was to suspend those parts of the Treaty of which it disapproved. But it is clear that there is a legal difference between the suspension of a treaty and the refusal (whether or not justified) to comply with a treaty. The suspension of a treaty (or of a severable part of a treaty), if it is legally justified, places the treaty in a sort of limbo; it ceases to constitute an applicable legal standard for the parties while it is suspended and until action is taken to bring it back into operation.[664] By contrast conduct inconsistent with the terms of a treaty in force, if it is justified as a countermeasure, does not have the effect of suspending the treaty; the treaty continues to apply and the party taking countermeasures must continue to justify its non-compliance by reference to the criteria for taking countermeasures (necessity, proportionality, etc.) for as long as its non-compliance lasts. Countermeasures are no more a ground for the suspension of a treaty than is necessity.[665]

325. There is thus clear distinction between action taken within the framework of the law of treaties (as codified in the 1969 Vienna Convention), and conduct raising questions of State responsibility (which are excluded from the Convention). The law of treaties is concerned essentially with the content of primary rules and with the validity of attempts to alter them; the law of responsibility takes as given the existence of the primary rules (whether based on a treaty or otherwise) and is concerned with the question whether conduct inconsistent with those rules can be excused and, if not, what the consequences of such conduct are. Thus it is coherent to apply the Convention rules as to the materiality of breach and the severability of provisions of a treaty in dealing with issues of suspension, and the rules proposed in the draft articles as to proportionality etc., in dealing with countermeasures.

(ii) *Scope of countermeasures*

326. According to article 47, "the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". It is true that the draft articles go on to limit countermeasures in a variety of ways: (*a*) by the requirement that the taking of countermeasures be "necessary" to ensure compliance with the secondary obligations of cessation and reparation; (*b*) by imposing certain substantive and procedural conditions on the taking and continuation of countermeasures, in particular proportionality; and (*c*) by excluding certain measures entirely (especially those involving the use of force or the violation of basic human rights). Even so, article 47 embodies an extremely broad formulation of countermeasures. A State which confiscates the property of another State, or destroys its embassy, "does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". Yet it seems difficult to justify such measures as instrumental in ensuring compliance with the secondary obligations of the target State.

327. One way of limiting the breadth of countermeasures, initially proposed by the Special Rapporteur, Mr. Riphagen, is the notion of reciprocal countermeasures.[666] Such countermeasures involved suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[667]

328. The notion of reciprocal countermeasures has a certain visceral appeal, associated with the instinct of "tit for tat" retaliation, and the idea that a State can hardly complain, if it has done something to another State, that the very same thing should be done to it, or the very same obligation breached. But there are serious objections to the notion of reciprocal countermeasures as a limiting condition for taking countermeasures.[668] These may be briefly summarized. First, reciprocal countermeasures evidently require that the injured State be in a position to impose the same or related measures as the responsible State, and whether this is so is essentially a matter of chance. For example, State A may not be able to sequester the assets of State B on its territory (in response to the seizure of its assets by State B) if State B has no assets there. Secondly, the notion of reciprocal countermeasures assumes that international obligations are reciprocal, but this is not necessarily true: for example, the obligation may be a unilateral one, or State A may already have irrevocably performed its side of the bargain. Thirdly, considerations of good order and humanity preclude many measures, whether or not one is the victim of similar action: if State A arbitrarily expels all the nationals of State B from its territory, this cannot justify State B doing the same. The notion of reciprocal countermeasures (adopted as a limitation on the right to take countermeasures) would place a premium on outrages by the responsible State, to which the injured State was not prepared to descend.

329. This conclusion (reached by the Commission on first reading) does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as for example

[663] *I.C.J. Reports 1997* (see footnote 18 above), p. 39, para. 48.

[664] See the 1969 Vienna Convention, art. 72. The Convention does not say how a suspended treaty is to be revived, i.e. whether by consent of the parties or by unilateral act of the suspending State, and if the latter, in what circumstances. Cf. however article 72, paragraph 2.

[665] As the Court affirmed in *I.C.J. Reports 1997* (see footnote 18 above), p. 63, para. 101.

[666] *Yearbook … 1985* (see foonote 117 above), p. 3. See also *Yearbook … 1999* (footnote 8 above), pp. 81, 89–90 and 94, paras. 325, 361 and 385.

[667] *Yearbook … 1985* (see footnote 117 above), p. 10 (art. 8). Mr. Riphagen also allowed for "reprisal[s]", involving suspension of performance of other unrelated obligations, but subject to a (loosely formulated) condition of reciprocity (ibid., p. 11 (art. 9)).

[668] *Yearbook … 1996*, vol. II (Part Two), commentary to article 47, p. 67, para. (1).

in the *Air Service Agreement* case.[669] Where a State steps outside the immediate context of a dispute, whether it involves air services or port access for another State, and imposes unrelated measures in some other field, the dispute may well be exacerbated rather than resolved. There is something to be said for a presumption in favour of reciprocal countermeasures—which could be expressed, for example, by a provision that, where reciprocal countermeasures are reasonably available, any measures taken with respect to unrelated obligations would be presumed not to be proportionate. But there would be difficulties in assessing what amounted to reasonable availability for this purpose, and on balance, the Special Rapporteur believes that the link between reciprocity and proportionality can sufficiently be drawn out in the commentary.

330. This leaves open the question whether some further limitation should not be imposed on the scope of countermeasures, even if they are not to be strictly reciprocal. In the *Gabčíkovo-Nagymaros Project* case, ICJ asserted that a countermeasure must be "reversible". After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.[670]

The problem here is that, whereas a measure may be reversible (assets can be unfrozen, civil aviation can be resumed), its effects while it was in force will rarely be entirely reversible, since consequential losses will have been suffered, by the target State and by third parties. For example the airline affected by the suspension of an air service agreement will have lost revenue (indeed it may have been driven from the brink of insolvency into actual liquidation). Yet it has never been suggested that a State successfully taking countermeasures should be required to compensate all those who may have suffered consequential loss, and to require this would effectively preclude countermeasures in many cases.[671]

331. But the notion of reversibility can nonetheless stand. The point about countermeasures is that they are instrumental; they are taken with a view to achieving a particular result (compliance by the target State with its international obligations of cessation and reparation), and they are justified only insofar as they continue to be necessary to that end. Irrevocable damage done to the target State in breach of an international obligation of the State taking countermeasures would amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the draft articles. The difficulty is how to convey that idea. Rather than using the language of reversibility, it seems sufficient for this purpose that article 47, paragraph 2, define countermeasures as conduct involving the suspension of performance of an obligation to the target State.[672] This will clearly entail that the countermeasure not be such as to preclude the resumption of performance, and the commentaries can spell out this requirement in more detail.

(iii) *Other aspects of article 47*

332. Other aspects of the formulation of article 47 are less controversial. It is evident that countermeasures may only be taken subject to the conditions and restrictions set out in the following articles. No doubt this needs to be said, but it does not need a separate paragraph to say it. It is also clear that under the draft articles, countermeasures are intended to have an instrumental, not a punitive purpose. They can only be taken in order to induce the responsible State to comply with its obligations of cessation and reparation. Correspondingly, it is necessary before countermeasures are taken that the injured State should have called on the responsible State to comply, and that it should have failed or refused to do so.[673] The circumstance of necessity justifying countermeasures arises, not because of the breach as such but because of the subsequent failure to comply with these obligations. Obviously for this failure to be established, the responsible State must first have been called on to comply.

333. The Special Rapporteur proposes below a version of article 47 in line with these conclusions.[674]

(b) *Obligations not subject to the regime of countermeasures*

334. As it stands, article 50 (Prohibited countermeasures) combines a number of quite different prohibitions.[675] Some subparagraphs are directed at excluding certain forms of countermeasure altogether (subparas. (*a*), (*c*) and (*e*)). One at least (subpara. (*b*)) is directed at the effect of countermeasures, providing that they may not involve certain forms of "[e]xtreme … coercion". One (subpara. (*d*), excluding derogations "from basic human rights") is inspired by certain well-established prohibitions of reprisals in the field of international humanitarian law, but also raises the separate question whether the effect of countermeasures in indirectly impairing basic human rights should not be addressed. It seems better and clearer, however, to distinguish between obligations which may not be suspended by way of countermeasures, and obligations which must be respected in the course of taking countermeasures—in other words, between the subject of countermeasures and their effect. Article 50 might usefully be divided into two: an article (in relation with article 47) which addresses the former question, and another which addresses the latter.

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[669] UNRIAA (see footnote 604 above), p. 417.

[670] *I.C.J. Reports 1997* (see footnote 18 above), pp. 56–57, para. 87.

[671] There is of course a distinction between those whose rights vis-à-vis the injured State are impaired by a countermeasure, and those who are indirectly affected by such a measure. A trade embargo against State B may well affect third parties trading in or with State B; this is quite different from a trade embargo directed against those third parties as such.

[672] In this respect the Special Rapporteur proposes to revert to the language of Mr. Riphagen in his sixth report (*Yearbook … 1985* (see footnote 117 above), pp. 10–11).

[673] As ICJ affirmed in the *Gabčíkovo-Nagymaros Project* case, *I.C.J. Reports 1997* (see footnote 18 above), p. 56, para. 84, affirming that "the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it".

[674] See paragraph 367 below.

[675] For the text of and comments on article 50, see paragraphs 311–319 above.

(i) *Forcible countermeasures*

335. Turning to the subject of countermeasures, the first and uncontroversial exclusion is forcible countermeasures (existing art. 50 (*a*)). The rules relating to the use of force by States in international relations are those primary rules contained in or referred to by the Charter of the United Nations, together, perhaps, with certain other rules sustained by generally accepted international practice. To the extent that these rules are contained in the Charter, they are given effective paramountcy by Article 103; in any event there is a broadly held view that if any rules of international law have the status of peremptory norms it is these. In terms of the distinction between primary and secondary obligations these rules are primary; it is not the function of the draft articles to qualify or extend them by the development of secondary rules, even if that were possible.[676] But there is, in any event, no basis in modern international law for countermeasures involving the use of force as prohibited by the Charter.

336. The only question then is the formulation of article 50 (*a*). France proposes a new formulation based on article 52 of the 1969 Vienna Convention;[677] this is an improvement, but some further adjustment is required to take into account the proposed conception of article 50, viz. that it excludes certain obligations, a priori, as possible subjects of countermeasures. Accordingly, article 50 (*a*) should exclude from the regime of countermeasures the obligations as to the threat or use of force embodied in the Charter of the United Nations.

(ii) *Minimum obligations necessary to maintain diplomatic and consular inviolability*

337. A second exclusion, contained in article 50 (*c*), deals with "conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents". By contrast with subparagraph (*a*) the concern here is a functional one. It is not that diplomatic and consular inviolability are peremptory or non-derogable norms. Rather subparagraph (*c*) seeks to maintain the basic level of diplomatic communication between the two States at a time when, by definition, relations between them are likely to be strained. It also seeks to avoid the situation where diplomatic personnel and premises become, in effect, permanent potential hostages as targets for countermeasures. In this context, the remarks of ICJ in the *United States Diplomatic and Consular Staff in Tehran* case are significant. The Court noted that even alleged criminal activities of the United States against the Islamic Republic of Iran would not have justified breaches of diplomatic and consular inviolability: "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions".[678] It went on to refer to the rules of diplomatic law as a "self-contained régime" and to "the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions [as] one of the very foundations of this long-established régime".[679] Evidently the Court did not contemplate that a breach of some other international obligation could constitute a justification or excuse for a breach of inviolability.

338. It may be noted that no Government has proposed the deletion of article 50 (*c*).[680] It is true that, as one Government commented, such inviolability may not exist "*in all circumstances*";[681] but it should be explained in the commentary that what is preserved is precisely the obligation to respect inviolability as it exists between the two States in accordance with the applicable rules of international law. That is, of course, entirely without prejudice to the rights of the receiving State under those rules (e.g. to terminate the mission, to declare personnel *persona non grata*, to impose reciprocal restraints on freedom of movement, etc.). Another State, by inference at least, raised the question whether the inviolability of diplomatic and consular premises and personnel might be subject to reciprocal countermeasures: in other words, whether State B's seizure of the diplomatic personnel or premises of State A could justify State A in similarly detaining the personnel or premises of State B.[682] But there appears to be no modern case where infringements of diplomatic or consular inviolability (as distinct from other privileges) has been justified as a countermeasure, and—quite apart from the categorical language of ICJ, already quoted—it does not seem desirable to institute such a system exclusively for the purposes of subparagraph (*c*). That subparagraph should be maintained as it stands.

(iii) *Obligations in the field of dispute settlement*

339. Another functional necessity in times of conflict between States is to maintain in operation all existing provisions for dispute settlement. As ICJ noted in the *United States Diplomatic and Consular Staff in Tehran* case in relation to a bilateral treaty of amity, "any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes".[683] Although not included in article 50, this is implicit in article 48, paragraph 2, which requires the injured State to comply with "any … dispute settlement procedure in force" between it and the target State. However it is desirable to say explicitly in article 50 that an obligation relating to dispute settlement may not be suspended as a countermeasure.

[676] This includes, to the extent that they may still be recognized in international law, the rules relating to belligerent reprisals, which are primary rules relating to permissible conduct in armed conflict, not secondary rules of responsibility.

[677] See paragraph 314 above.

[678] *I.C.J. Reports 1980* (see footnote 65 above), p. 38, para. 83, referring, inter alia, to article 9 of the Vienna Convention on Diplomatic Relations.

[679] Ibid., p. 40, para. 86.

[680] See paragraph 316 above.

[681] *Yearbook … 1998* (see footnote 35 above), p. 162.

[682] See paragraph 316 above, for the comment of the United States to that effect; and for discussion of reciprocal countermeasures, see paragraphs 327–329 above.

[683] *I.C.J. Reports 1980* (see footnote 65 above), p. 28, para. 53. This is the counterpart in the field of countermeasures of the principle of the autonomy of arbitration clauses. See, for example, the 1969 Vienna Convention, art. 65, para. 4, and Schwebel, *International Arbitration: Three Salient Problems*, chap. I.

(iv) *Obligations under human rights and humanitarian law*

340. Article 50 (*d*) exempts from the scope of countermeasures "[a]ny conduct which derogates from basic human rights". As one Government noted,[684] this raises a difficulty, since human rights obligations are not, in the first instance at least, owed to particular States, and it is accordingly difficult to see how a human rights obligation could itself be the subject of legitimate countermeasures. Of course it is possible that State A, in the course of taking countermeasures against State B (e.g. by freezing assets of State B in its territory) might violate the human rights of some individual, whether or not a national of State B. But it is obvious from the proposed formulation of article 47 that the lawfulness or legitimacy of the conduct vis-à-vis State B does not entail that it is lawful vis-à-vis third parties, including individuals. In any event, the measure itself would not be prohibited in such a case, merely its effects vis-à-vis the third party.[685] A reservation for "basic" human rights may be necessary in the proposed article 48, dealing with the conditions for taking countermeasures, but it is out of place in article 50.

341. There may, however, be a need to reflect in article 50 the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the Geneva Conventions of 12 August 1949 and Protocol I thereof, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[686] It is clear that where applicable rules of general international law or multilateral treaties prohibit certain conduct by way of reprisals, the relevant obligations cannot themselves be suspended in any circumstances, including by way of countermeasures, reciprocal or other.[687] A provision, modelled on article 60, paragraph 5, of the 1969 Vienna Convention, does have a place in the draft articles. The broader issue of countermeasures whose effect is to impair fundamental human rights will be considered below.[688]

[684] See paragraph 317 above.

[685] As the Tribunal pointed out in the *"Cysne"* case, "reprisals are not admissible except against the wrongdoing State. It may be, admittedly, that legitimate reprisals, carried out against an offending State, affect those belonging to an innocent third State. But that is only an indirect and involuntary consequence, which the injured State will seek, in practice, always to avoid or to limit as far as possible" (*Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (see footnote 16 above), p. 1057).

[686] See Partsch, "Reprisals", pp. 203–204; and Oeter, "Methods and means of combat", pp. 204–207, with references to relevant provisions.

[687] See article 60, paragraph 5, of the 1969 Vienna Convention, which precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". Paragraph 5 was added at the United Nations Conference on the Law of Treaties by 87 votes to none, with 9 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), 21st plenary meeting, p. 115, para. 68). It is repeated unchanged in the counterpart 1986 Vienna Convention, art. 60, para. 5.

[688] See paragraphs 349–351 below.

(v) *Obligations under other peremptory norms*

342. Finally, article 50 (*e*) prohibits as countermeasures "[a]ny other conduct in contravention of a peremptory norm of general international law". It is obvious that a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Nonetheless a number of Governments have expressed concern at saying so, either because of their general position with respect to peremptory norms, or out of concern for the lack of specification of the category.[689] The real difficulty, however, is in identifying existing peremptory norms whose application is not already excluded either by the conception of countermeasures itself, or by other specific exclusions. For example such matters as the prohibitions of genocide, slavery and torture are evidently excluded (both by the basic conception of countermeasures against a State and by the proposed equivalent of article 50 (*d*) dealing with basic human rights).[690] Forcible countermeasures are excluded by subparagraph (*a*), on the basis that the rules relating to the use of force in international relations (widely regarded as non-derogable) govern the matter.[691] There is thus a case for the deletion of subparagraph (*e*) as unnecessary. On the other hand, new peremptory norms may come to be recognized, and if the international community as a whole comes to regard a particular rule as one from which no derogation may be permitted in any circumstances, it should follow that countermeasures derogating from that rule are prohibited. For these reasons, paragraph (*e*) should be retained.

343. Indeed there is a case for extending article 50 (*e*) to other rules of international law in force between the injured State and the target State which are agreed to be non-derogable, whether or not they are regarded as peremptory under general international law. On the other hand the standard example of a non-derogable norm occurs in the field of the regional human rights conventions, and issues of the effect of countermeasures on human rights are dealt with in other ways. Moreover the non-existence of a derogation clause in a multilateral treaty is not an indication that derogations may be freely made; indeed they can only be made in the presence of such a clause. No doubt a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the Treaties establishing the European Communities, which have their own system of enforcement.[692] Under WTO, special permission has to be obtained for retaliatory measures, and this again would exclude any residual right to take countermeasures under general international law for breaches of the WTO and re-

[689] See paragraph 318 above.

[690] See paragraphs 349–351 below.

[691] See paragraph 335 above.

[692] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91–63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*) (1964), *Reports of cases before the Court*, p. 631; case 52/75 (*Commission of the European Communities* v. *Italian Republic*) (1976), ibid., p. 284; and case 232/78 (*Commission of the European Economic Communities* v. *French Republic* (1979), ibid., p. 2792.

lated agreements.[693] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible", they may well entail an exclusion of countermeasures.[694] But this can be achieved by the *lex specialis* provision (currently art. 37), and it is sufficient to note the possibility in the commentary to article 50.

(c) *Conditions for taking and maintaining countermeasures*

344. Article 48 as adopted on first reading deals exclusively with procedural conditions for taking and maintaining countermeasures.[695] For the reasons already given, it is necessary to consider both procedural and substantive issues under this rubric.

(i) *Substantive conditions*

345. Four issues need to be considered here: proportionality, effect on the rights of third States, effect on human rights, and situations of "extreme coercion". These were covered respectively by articles 49, 47, paragraph 3, 50 (*d*) and (*b*) as adopted on first reading.

a. Proportionality

346. No one doubts that proportionality is a key constraint on the taking of countermeaures, and the retention of a separate article dealing with proportionality is widely supported.[696] The question is rather one of its formulation. It is clearly appropriate to take into account both the degree of gravity of the breach and its effects on the victim (which, however, may or may not be a State). A number of Governments proposed, however, that the requirement of proportionality be more strictly formulated, and this suggests that the present double negative formulation "not be out of proportion" needs reconsideration. In other areas of the law where proportionality is relevant, it is normal to express the requirement in positive terms, even though—in those areas as well—what is proportionate is not a matter which can be determined precisely.[697] ICJ in the case concerning the *Gabčíkovo-Nagymaros Project* said that countermeasures must be "commensurate with the injury suffered, taking account of the rights in question".[698] That positive formulation seems clearly preferable. The question is whether it is also useful to introduce into article 49 the notion of purpose, i.e. to require that the proportionality of countermeasures be tested by asking whether they are "tailored to induce the wrongdoer to meet its obligations under international law".[699] That is indeed a requirement, but it is an aspect of the test of necessity formulated in article 47. Proportionality is no doubt linked to necessity, in that a clearly disproportionate measure may well be judged not to have been necessary either. But it is also a limitation even on measures which are necessary in the sense that, without them, the target State is unlikely to comply. In every case a countermeasure must be proportionate to the injury suffered, and this has a function partly independent of the question whether the countermeasure was necessary to achieve a particular result. Accordingly, the Special Rapporteur proposes that countermeasures be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its effects" on the injured party.

b. Effect on third States

347. Article 47, paragraph 3, makes it clear that countermeasures only justify a breach of international law vis-à-vis the responsible State. Indeed this follows from the relative and conditional effect of countermeasures, specified already in article 47, paragraph 1; it should also follow from the statement of countermeasures as circumstances precluding wrongfulness in part one, article 30. Governments have not cast any doubt upon the proposition, though some questioned the placement of paragraph 3 in article 47, and one at least suggested it should be more broadly formulated.[700] The Special Rapporteur, for his part, rather doubts the value of a separate provision: since it is already clear that countermeasures only allow the suspension of performance of an obligation as between the injured State (or, perhaps, some other State or States acting on its behalf) and the responsible State, there is strictly speaking no need to refer to the position of third States. By definition their rights (i.e. the performance of obligations by the injured State which are owed to them) are unimpaired. This does not mean that third States may not be affected as a consequence of countermeasures. Countermeasures (e.g. in the form of an interruption of trading links, assuming that such an interruption constitutes a breach of international law vis-à-vis the target State)[701] may have indirect or consequential effects on third States, but that is another matter. Indeed it can be argued that a separate limitation so far as the rights of third States are concerned is not only unnecessary but that it is undesirable, since it raises, *a contrario*, an impression

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[693] See article 3, paragraph 7, of the Understanding on Rules and Procedures governing the Settlement of Disputes (footnote 319 above), and for an example of such authorization, see WTO, European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under article 22.6 of the DSU: Decision by the Arbitrators (WT/DS27/ARB) (9 April 1999).

[694] To use the synonym adopted by ICJ in *Legality of the Threat or Use of Nuclear Weapons* (see footnote 607 above), p. 257, para. 79.

[695] See paragraphs 298–305 above.

[696] See the summary of Government comments in paragraphs 308–309 above.

[697] This was the reason why the Arbitral Tribunal in the *Air Service Agreement* case adopted the negative formulation (see footnote 604 above). But they were of course dealing with a reciprocal countermeasure, in the same field of air services as the French restriction to which it was a response. Mr. Riphagen, Special Rapporteur, did not expressly apply the proportionality test to reciprocal countermeasures, though he did observe that "elements of 'proportionality' and of 'interim protection' are inherent in measures by way of reciprocity" (*Yearbook … 1985* (see footnote 117 above), commentary to article 8, p. 11, para. (3)). He adopted a "manifestly disproportional" test for non-reciprocal countermeasures or reprisals as he called them (ibid., art. 9, para. 2).

[698] *I.C.J. Reports 1997* (see footnote 18 above), p. 56, para. 85.

[699] *Yearbook … 1998* (see footnote 35 above), p. 160. See also paragraph 306 above.

[700] See paragraphs 296–297 above.

[701] See paragraph 322 above. On the extent to which economic boycotts may breach international law, see, for example, Neff, "Boycott and the law of nations: economic warfare and modern international law in historical perspective".

that countermeasures operate objectively, i.e. as against the world—which is not the case.[702]

348. The relative and limited effect of countermeasures, which preclude wrongfulness only vis-à-vis the responsible State, should be clearly expressed in articles 30 and 47, paragraph 1. If this is done, then strictly speaking the issue whether countermeasures justify breaches of obligations to third States cannot arise. However there is a point to Ireland's suggestion[703] for a broader provision protecting the position of third parties; this will incidentally make it clear that countermeasures cannot justify breaches of obligations to third States.

c. Effect on human rights

349. The position with respect to human rights is at one level the same as the position with respect to the rights of third States. Evidently, human rights obligations are not owed to States as the primary beneficiaries, even though States are entitled to invoke those obligations and to ensure respect for them. Moreover human rights obligations have their own regime of qualifications and derogations which takes into account considerations such as national emergency. Thus it is obvious that human rights obligations (whether or not qualified as "basic" or "fundamental") may not themselves be the subject of countermeasures, in other words, that human rights obligations may not be suspended by way of countermeasures, and that conduct inconsistent with human rights obligations may not be justified or excused except to the extent provided for by the applicable regime of human rights itself. The real problem is a different one. It involves the case where measures taken against a State have consequential effects on individuals, or indeed on the population of the State as such.

350. This issue has mostly been discussed in the context of the impact on civilian populations and especially on children, of Security Council sanctions, a subject which falls outside the scope of the draft articles. It may be noted, however, that General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights covers equally the case of sanctions imposed as countermeasures by individual States or groups of States as those imposed by the Security Council. The General Comment stresses that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[704] and goes on to state that:

> In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering on the most vulnerable groups within the targeted country.[705]

Analogies can be drawn from other elements of general international law. For example, article 54, paragraph 1, of Protocol I to the Geneva Conventions of 12 August 1949 stipulates unconditionally that: "Starvation of civilians as a method of warfare is prohibited." The final sentence of article 1, paragraph 2, of the two International Covenants on Human Rights states that: "In no case may a people be deprived of its own means of subsistence": this provision was the basis for article 42, paragraph 3, of the draft articles adopted on first reading.[706]

351. There is thus a range of concerns as to the impact of countermeasures on human rights, and some clarification of the position seems necessary, along the lines of present article 50 (*d*). In order to avoid suggesting that human rights obligations as such may be suspended by way of countermeasures, the proposed provision protecting the position of third parties generally should make express reference to the human rights of affected persons.[707] Although some Governments wondered what is or is not included in referring to "basic" or "fundamental" human rights,[708] this is not a matter the draft articles can resolve one way or the other. Rather the question will be determined by having regard to the human rights obligations under treaty and general international law of the acting State.

d. Situations of "extreme coercion"

352. Finally reference must be made to article 50 (*b*), which precludes countermeasures involving "[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". Subparagraph (*b*) has proven controversial, giving rise to a wide range of Government comments, including proposals for its deletion or radical amendment.[709] The difficulty is that, on the one hand, there is widespread concern as to the possibility for abuse of countermeasures, while on the other hand the essence of countermeasures is that they are coercive: they are by definition measures taken to induce a State to comply with its international obligations, measures otherwise unlawful which are necessary to that end. Thus a prohibition of "extreme coercion" has to meet the objections (*a*) that the reference to "extreme" coercion may only mean coercion which is effective for the permitted purpose; (*b*) that what is "extreme" cannot be defined; (*c*) that in accordance with the strengthened requirement of proportionality, "extreme" measures can only properly be

[702] It is useful to contrast countermeasures with measures taken in the exercise of belligerent rights. There is a complex body of rules relating to the position of third parties in armed conflict; they may be subject, for example, to the exercise of rights of search and seizure on the high seas, and their nationals, though they may not be targeted as such, may be the victims of weapons properly targeted at a belligerent. See, for example, International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*; Schindler, "Transformations in the law of neutrality since 1945"; and Bothe, "Neutrality in naval warfare: what is left of traditional international law?". There appears to be no specific equivalent to this body of rules in the field of countermeasures, since the taking of countermeasures has never given rise to a "status" under international law equivalent to the status of belligerency.

[703] See paragraph 296 above.

[704] *Official Records of the Economic and Social Council, 1998, Supplement No. 2* (E/1998/22–E/C.12/1997/10), annex V, para. 1.

[705] Ibid., para. 4.

[706] See paragraphs 38–42 above.

[707] For the proposed provision, see paragraph 367 below.

[708] See paragraph 317 above.

[709] See paragraph 315 above.

responses to extreme and unlawful measures on the part of the responsible State. The reference in article 50 (*b*) to measures "designed to endanger the territorial integrity or political independence" of the target State raises analogous questions. Arguably, a measure cannot lawfully be "designed" to endanger the territorial integrity of a State because, first of all, the use of force is excluded as a countermeasure, and secondly, the territorial integrity of a State could not, as such, be the subject of countermeasures; like territorial sovereignty, territorial integrity is a permanent attribute of the State and is not subject to measures of suspension. As to political independence, if by endangering the political independence of a State is meant requiring that State to do something it refuses to do—i.e. comply with its international obligations—again it can be said that this is the very point of countermeasures, whereas if it means that a State's political independence in other respects cannot be endangered, the question is how countermeasures otherwise lawful under the draft articles could have that effect.

353. Then there is the problem that article 50 (*b*) only prohibits measures which involve "extreme" coercion and which are designed to endanger territorial integrity or political independence. This suggests that less extreme measures designed to endanger territorial integrity (e.g. counter-intervention or counter-insurgency measures) may be lawful. Thus if State A allows a secessionist or rebel group to broadcast from its territory against neighbouring State B, State B could similarly allow a rebel group seeking the dissolution of State A to broadcast. Broadcasting, even if unlawful, is not normally a form of "extreme coercion".

354. The formulation of article 50 (*b*) is thus deficient, and the question becomes whether some alternative formulation can be conceived to give assurances against the abuse of countermeasures, over and above the limitations included in the other articles. There is a case for the deletion of subparagraph (*b*), but on balance the Special Rapporteur believes that the concerns it tries to address are real ones. He suggests a provision to the effect that countermeasures may not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the target State.[710] Evidently, whether that State complies with its international obligations of cessation and reparation is not a matter of its domestic jurisdiction, but countermeasures must not be taken as an excuse to intervene in other issues internal to the responsible State, distinct from the question of its compliance with its international obligations; such issues continue to be protected by the principle of domestic jurisdiction.

[710] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see footnote 620 above), in dealing with the principle of non-intervention, stipulates that:

> "No State … has the right to intervene, directly or indirectly, *for any reason whatever*,* in the internal or external affairs of any other State …
>
> "Every State has an *inalienable** right to choose its political, economic, social and cultural systems, without interference in any form by another State."

Similar affirmations are contained in a large number of resolutions, treaties and other texts.

(ii) *Procedural conditions*

355. In the light of the Commission's conclusions reached at its fifty-first session in 1999 and summarized already,[711] discussion of article 48 must proceed on the basis that the draft articles will not establish an organic link between countermeasures and any specific method of dispute settlement. It is, for the time being at least, the function of the Commission to formulate provisions on countermeasures on the basis that (*a*) it is seeking to express, as a matter of codification and progressive development, appropriate provisions on countermeasures under general international law; and (*b*) under general international law, States are entitled (as well as obliged) to settle their disputes by peaceful means of their own choice. This does not mean, however, that the draft articles need make no reference to such forms of dispute settlement as may be applicable to the parties in a given case.

356. The provisions of article 48, and the vigorous debate it has aroused, have already been noted.[712] Three distinct issues are raised:

(*a*) The initial requirement of the notification of the dispute;

(*b*) The relation of the taking of countermeasures to the requirement to negotiate (and the compromise provision for "interim measures of protection");

(*c*) The provision for suspension of countermeasures in the event that the dispute is submitted in good faith to third-party settlement.

357. As to the first, clearly a State aggrieved by a breach of international law and contemplating taking countermeasures in response to that breach should first call on the responsible State to comply with its obligations of cessation and reparation.[713] Whatever position may be taken on the formal requirements for the invocation of responsibility,[714] a State may not take countermeasures without giving the opportunity to the responsible State to respond to its complaint. This is spelled out very briefly indeed in article 47, paragraph 1, as adopted on first reading, under which the necessity for countermeasures is assessed in the light of any response to the demands of the injured State. But nothing is said as to the way in which these demands should be formulated. In its redrafted version of article 48, France proposes that the injured State should "[s]ubmit a reasoned request" to the responsible State calling on it to comply, notify it of the proposed countermeasures and agree to negotiate. But in the meantime (as from the date of the notification), it may "implement provisionally such countermeasures as may be necessary to preserve its rights".[715] In effect this brings together in new, more specific (and in the Special Rapporteur's view, improved) language the two elements contained in article 48, paragraph 1, adopted on first reading. But whatever position may be taken as to the second element of

[711] See paragraph 265 above.

[712] See paragraphs 298–305 above.

[713] According to ICJ, this requirement already exists under general international law (see paragraph 289 above).

[714] See paragraphs 234–238 above.

[715] See footnote 581 above, for the full text of France's proposal.

provisional measures, it seems desirable to require specifically that, before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so. In a situation where countermeasures are or may be warranted, a relatively short time limit could be set for a response; given the variety of possible cases. However, it does not seem appropriate to set any particular time limit in article 48 itself.

358. As to the second point, there is general agreement that the parties to a dispute potentially involving countermeasures should comply with any dispute settlement procedures in force between them. Existing article 48, paragraph 2, which says this, should be retained. The question, however, is whether the obligation to negotiate over the dispute should be a prerequisite to the taking of countermeasures in any form, or at least in any other than a provisional way. In that regard, the following comments may be offered:

(*a*) Whether or not the criterion of "reversibility" of countermeasures is expressly adopted, the essential point of countermeasures is that they are instrumental, not punitive, and that they must be terminated in the event that the responsible State complies with its international obligations. In this sense they *always* have a temporary character;

(*b*) The language of "interim measures of protection" adopted in article 48, paragraph 1, on first reading is unclear, and invites confusion with the provisional measures indicated or ordered by international courts and tribunals.[716] The very brief "definition" of such measures is also unsatisfactory;

(*c*) Even if it is poorly formulated in article 48, paragraph 1, there is a sensible distinction between measures taken immediately and provisionally in response to a breach (e.g. the temporary suspension of a licence, the temporary freezing of assets) and measures which, while still terminable, have a more definite impact (e.g. the withdrawal of a licence—which may nonetheless be reissued; the placing of assets under some form of management or administration—from which they may nonetheless be released). The draft articles should encourage more measured responses, as well as the opportunity for negotiations if these can be held without ultimate prejudice to the rights of the injured State;

(*d*) Although such a proposition received a degree of support during the debate on article 48 on first reading, to postpone all countermeasures until negotiations are concluded or have definitively broken down does not seem satisfactory.[717] Rather it would be a recipe for delay and prevarication.

Defective as it may be in its expression, for these reasons the Special Rapporteur believes that the essential balance struck in article 48 between notification and negotiation, on the one hand, and the capacity of the injured State to take provisional measures to protect its rights, on the other, is an appropriate one. Furthermore that balance seems to be elegantly struck by France's proposal, already referred to. The Special Rapporteur proposes a provision broadly along those lines.[718]

359. The third point relates to the possible suspension of countermeasures once dispute settlement procedures have been engaged and a court or tribunal has the power to order or indicate interim measures of protection. In such a case—and for so long as the dispute settlement procedure is being implemented in good faith—unilateral action would not seem to be justified. Article 48, paragraphs 3–4, which incorporated this principle, was not simply an invention of the Commission. It was inspired by the remarks of the Tribunal in the *Air Service Agreement* case.[719] Moreover it has been on the whole accepted by the Governments which commented on article 48.[720] In the Special Rapporteur's view, it should be retained.

360. To summarize the conclusions on the three issues identified above, it is suggested that the draft articles provide that:

(*a*) Before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so;

(*b*) Countermeasures should not be prohibited during negotiations; rather, the distinction adopted on first reading between "provisional" and other measures should be retained, but in a clearer formulation;

(*c*) Countermeasures should be suspended in the event that the dispute is submitted in good faith to third-party settlement, provided that the breach is not a continuing one.

(d) *Termination of countermeasures*

361. As noted already, France proposes a provision on the termination of countermeasures, to the effect that countermeasures must be terminated as soon as the conditions which justified taking them have ceased, i.e. "as soon as the obligations breached have been performed and full reparation has been obtained by the injured State".[721] This is clearly implied by the existing articles but could well be made express.[722] The Special Rapporteur suggests a single article dealing with the suspension and termination of countermeasures, incorporating also the provisions of article 48 as to suspension of countermeasures, adopted on first reading.[723]

[716] See, for example, article 41 of the ICJ Statute; and article 290 of the United Nations Convention on the Law of the Sea.

[717] That view was rejected as a matter of general international law by the Tribunal in the *Air Service Agreement* case (see footnote 604 above), p. 445, para. 91.

[718] See paragraph 367 below, for the proposed provision; see also footnote 734 for an alternative provision, not embodying any distinction between "provisional" and other measures.

[719] UNRIAA (see footnote 604 above), pp. 445–446, paras. 94–96.

[720] See paragraph 305 above. The proposal of France (see footnote 581 above) incorporates the same principle in nearly the same language.

[721] See paragraph 319 above.

[722] See paragraph 367 below for the proposed provision.

[723] For the text of the proposed article, see paragraph 367 below.

(e) *Formulation of article 30*

362. The remaining question is the formulation of article 30 in part one. On the assumption that detailed provisions on countermeasures are incorporated in part two bis, article 30 can be very simple. It is recommended that it provide:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [47]–[50 bis]."[724]

4. Countermeasures and the exception of non-performance

363. In his second report, the Special Rapporteur recommended that a narrow version of the exception of non-performance (*exceptio inadimplenti non est adimplendum*) be recognized as a circumstance precluding wrongfulness.[725] The proposal received a mixed reception, and it was agreed to review it in the light of the reconsideration of the provisions on countermeasures.[726] Likewise the views of Governments on the proposal, as expressed in the Sixth Committee during its fifty-fourth session in 1999, were mixed.[727]

364. The first question is whether the exception of non-performance is to be considered as a form of countermeasure. It is clear that the exception only applies to synallagmatic obligations (*prestations*), where one party's performance is related to and contingent upon the other's. Normally this will involve performance of the same or a closely related obligation. But in the Special Rapporteur's opinion it is clear that the exception of non-performance is not to be identified as a countermeasure in the sense of article 47. In cases where the exception applies, the reason why State A is entitled not to perform is simply that, in the absence of State B's performance of the related obligation, the time for State A's performance has not yet come. It is true that State A may withhold performance in order to induce State B to perform. But that is not the point of the exception, as it is of countermeasures. State A's motive is irrelevant; it may simply have no interest in performance in the absence of State B. Moreover there is no requirement of notice or of any attempt to settle the dispute by diplomatic or other means as a condition of continued application of the exception. It is simply that, following an agreement, for example, concerning the exchange of prisoners of war or for the joint funding of some project, State A is not obliged to release its prisoners of war to State B or to make its contribution unless State B is in turn ready to perform its part of the bargain. Thus the exception of non-performance is to be seen either as a circumstance precluding wrongfulness in respect of a certain class of (synallagmatic) obligations, or as limited to an implied term in certain treaties. By contrast, while the nexus between the breach and non-performance is relevant to the question of proportionality, there is and should be no specific requirement of a nexus in the law of countermeasures.[728]

365. But even if it is juridically distinct from countermeasures, and even though it is recognized by a respectable body of international authority and opinion,[729] the exception of non-execution may not warrant inclusion in the draft articles as a circumstance precluding wrongfulness. The essential question is whether the exception is to be conceived in international law as limited to conventional or treaty obligations, i.e. as an inference to be drawn, as a matter of interpretation, from an exchange of obligations in a treaty, or whether it has a broader legal basis.[730] If the former, it can properly be classified as a primary rule and need not be included in the draft articles.

366. There seems little doubt that in its broader form the exception of non-performance should be regarded as based upon treaty or contract interpretation, performance of the same or related obligations being treated as conditional.[731] But the position with the narrower principle recognized by the Court in the *Chorzów Factory* case[732] is different. Here the relationship is not between synallagmatic obligations but between the conduct of the two parties: a breach by one party has "prevented" the other from fulfilling the obligation in question. This is but an application of the general principle that a party should not be allowed to rely on the consequences of its own unlawful conduct. In the Special Rapporteur's view that principle is capable of generating new consequences in the field of State responsibility, consequences which would be preserved by article 38 adopted on first reading.[733] Whether any specific aspect of that general principle should be included in the draft articles is a matter of judgement. If article 38 is to be retained, however, it is open to the Commission to take the view that the *Chorzów Factory* principle is sufficiently covered.[734] On that basis, and in the light of the equivocal

[724] See the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), p. 96, para. 394.

[725] Ibid., pp. 78–83, paras. 316–331. The version recommended (as article 30 *bis* (ibid., p. 87, para. 358)) was based on the dictum of PCIJ in the *Chorzów Factory* case (see footnote 47 above), p. 31, according to which "one Party cannot avail himself of the fact that the other has not fulfilled some obligation … if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question".

[726] *Yearbook … 1999* (see footnote 12 above), pp. 78–80, paras. 334–347, for a summary of the debate.

[727] A/CN.4/504 (see footnote 3 above), p. 16, para. 52, summarizing a wide range of responses.

[728] See paragraphs 327–329 above.

[729] In addition to the authorities cited in the Special Rapporteur's second report, *Yearbook … 1999* (footnote 8 above), pp. 78–83, paras. 316–331, see *Klöckner Industrie-Anlagen GmbH and others* v. *Republic of Cameroon, ICSID Reports* (Cambridge, Grotius, 1994), vol. 2, pp. 156–159; and O'Neill and Salam, "Is the *exceptio non adimpleti contractus* part of the new *lex mercatoria*?", p. 152.

[730] There is a clear analogy with the debate over whether the doctrine of fundamental change of circumstances in the law of treaties was based upon an implied clause in the treaty or was an independent rule of law. The 1969 Vienna Convention treated it as a rule of law (art. 62), and this is now the accepted view; see *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 63, para. 36.

[731] See, for example, Ruzié, *Droit international public*, p. 48; and Greig, loc. cit., pp. 399–400.

[732] See footnote 47 above.

[733] See paragraph 63 above.

[734] Moreover there are difficulties with its formulation. Where State A's breach absolutely prevents State B's performance (e.g. where State A bars access to its territory or to resources indispensable for the per

(*Continued on next page.*)

response it has received, the Special Rapporteur does not press his proposed article 30 bis.

5. Conclusions as to countermeasures by an injured State

367. For these reasons, the Special Rapporteur recommends that the following provisions on countermeasures taken by an injured State be incorporated in part two bis, chapter II:

"Part Two bis

"THE IMPLEMENTATION OF STATE RESPONSIBILITY

"Chapter II

"COUNTERMEASURES

"Article 47. Purpose and content of countermeasures

"1. Subject to the following articles, an injured State may take countermeasures against a State which is responsible for an internationally wrongful act in order to induce it to comply with its obligations under part two, as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so.

"2. Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking those measures towards the responsible State.

"Article 47 bis. Obligations not subject to countermeasures

"The following obligations may not be suspended by way of countermeasures:

"(*a*) The obligations as to the threat or use of force embodied in the Charter of the United Nations;

"(*b*) Obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents;

"(*c*) Any obligation concerning the third-party settlement of disputes;

"(*d*) Obligations of a humanitarian character precluding any form of reprisals against persons protected thereby; or

"(*e*) Any other obligations under peremptory norms of general international law.

"Article 48. Conditions relating to resort to countermeasures

"1. Before taking countermeasures, an injured State shall:

"(*a*) Submit a reasoned request to the responsible State, calling on it to fulfil its obligations;

"(*b*) Notify that State of the countermeasures it intends to take;

"(*c*) Agree to negotiate in good faith with that State.

"2. The injured State may, as from the date of the notification, implement provisionally such countermeasures as may be necessary to preserve its rights under this chapter.

"3. If the negotiations do not lead to a resolution of the dispute within a reasonable time, the injured State acting in accordance with this chapter may take the countermeasures in question.[735]

"4. A State taking countermeasures shall fulfil its obligations in relation to dispute settlement under any dispute settlement procedure in force between it and the responsible State.

"Article 49. Proportionality

"Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party.

"Article 50. Prohibited countermeasures

"Countermeasures must not:

"(*a*) Endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State;

"(*b*) Impair the rights of third parties, in particular basic human rights.

(*Footnote 734 continued.*)
formance by State B of its obligation), State B will be able to plead force majeure. If, however, it is still technically possible for State B to perform (e.g. by using its own resources rather than those which State A should have provided), it cannot be said that State A has actually prevented performance: State B's excuse rests on equity, not impossibility. This in turn suggests a need for flexibility in the application of the *Chorzów Factory* dictum (see footnote 47 above), and reinforces the case for leaving it to be covered by article 38, if that article is to be retained.

[735] If the Commission decides not to draw a distinction between "provisional" and other countermeasures, the following provision could be substituted for paragraphs 1–3:

"1. Before countermeasures are taken, the responsible State must have been called on to comply with its obligations, in accordance with article 46 ter, and have failed or refused to do so."

"Article 50 bis. Suspension and termination of countermeasures

"1. Countermeasures must be suspended if:

"(*a*) The internationally wrongful act has ceased; and

"(*b*) The dispute is submitted to a tribunal or other body which has the authority to issue orders or make decisions binding on the parties.

"2. Notwithstanding paragraph 1, countermeasures in accordance with this chapter may be resumed if the responsible State fails to honour a request or order emanating from the tribunal or body, or otherwise fails to implement the dispute settlement procedure in good faith.

"3. Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act."

CHAPTER IV

Invocation of responsibility to a group of States or to the international community

368. Earlier sections of this report considered the range of consequences of State responsibility for the responsible State, as well as the invocation of responsibility by the injured State or States, whether by the bringing of an international claim or, eventually, by the taking of countermeasures. Two groups of issues remain with a view to the completion of the draft articles: (*a*) the invocation of the responsibility of a State towards a group of States extending beyond the State directly injured, including the invocation of responsibility towards the international community as a whole; and (*b*) the question of the residual and savings clauses envisaged for part four of the draft articles. This section of the report deals with these questions in turn. Since they have already been discussed or envisaged in the course of work on the topic since 1998, it is possible to deal with them at the level of principle. For the most part, the background in law and practice for the proposals made here—to the extent it exists at all—has already been described.[736]

A. General considerations

369. In his first report the Special Rapporteur analysed in detail the range of issues raised by articles 19 and 51–53 in respect of "international crimes".[737] Following an extensive debate,[738] the Commission provisionally decided that it would address these issues in the following way:

> [I]t was noted that no consensus existed on the issue of the treatment of "crimes" and "delicts" in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (*a*) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of part one; (*b*) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19.[739]

The issue has generated a substantial further body of literature,[740] and some additional comments of Governments.[741] In some cases existing positions have been restated, but there has also been some movement towards the idea that the systematic development of existing concepts—obligations to the international community as a whole, peremptory norms of international law—combined with a category of "gross" or "egregious" breaches, may respond sufficiently to the concerns raised by article 19.

370. It should be stressed that the adoption of the draft articles with the general support of the Commission is highly desirable, if not essential. In the Special Rapporteur's view, it remains the case that no consensus can be formed around article 19 as adopted on first reading. But the same would be true of any proposal for the deletion of article 19, unless it is accompanied by the specific recognition of the importance for State responsibility of breaches of obligations to the international community as a whole, especially the most serious breaches.

371. In subsequent reports the Special Rapporteur has sought to give effect to the mandate recited in paragraph 369. To summarize:

(*a*) Compliance with the requirements of a peremptory norm of general international law is recognized as a circumstance precluding wrongfulness (art. 29 bis), and obligations arising from peremptory norms are recognized in other respects as having priority (art. 33, para. 2 (*a*); proposed art. 47 bis (*e*));

[736] See, however, paragraphs 391–394 below for a review of State practice in relation to collective countermeasures.

[737] *Yearbook … 1998* (see footnote 23 above), pp. 9–23 paras. 43–95.

[738] Described in *Yearbook ... 1998*, vol. II (Part Two), pp. 64–77, paras. 241–331.

[739] Ibid., p. 77, para. 331.

[740] See, for example, Abi-Saab, "The uses of article 19"; Bowett, "Crimes of State and the 1996 report of the International Law Commission on State responsibility"; Dominicé, "The international responsibility of States for breach of multilateral obligations"; Gaja, "Should all references to international crimes disappear from the ILC draft articles on State Responsibility?"; Graefrath, "International crimes and collective security"; Pellet, "Can a State commit a crime? Definitely, yes!"; and "Vive le crime! Remarques sur les degrés de l'illicite en droit international"; Rao, "Comments on article 19 of the draft articles on State responsibility adopted by the International Law Commission"; Rosenne, "State responsibility and international crimes: further reflections on article 19 of the draft articles on State responsibility"; Rosenstock, "An international criminal responsibility of States?"; Triffterer, "Prosecution of States for crimes of State"; and Zemanek, "New trends in the enforcement of *erga omnes* obligations".

[741] For a summary of these views, see A/CN.4/496, paras. 110–115, and A/CN.4/504, paras. 23 and 78–81 (footnote 3 above).

(*b*) Necessity may not be invoked as a circumstance precluding wrongfulness where this would seriously impair an essential interest of the international community as a whole (art. 33, para. 1, (*b*)); such an interest may also weigh in favour of the invoking State;

(*c*) The definition of "injured State" specifically recognizes the general interests of States in securing compliance with obligations to the international community as a whole (proposed art. 40 bis).

In addition, the articles carefully distinguish between State responsibility for breaches of multilateral as distinct from bilateral obligations.

372. The question is, what remains? What is still necessary in order to fulfil the Commission's mandate? In this respect, certain preliminary remarks are called for.

(*a*) First, it is necessary to recognize that the primary means in present international relations for dealing with emergencies affecting the very existence of States or the security of populations do not lie within the scope of the secondary rules of State responsibility. They are, inter alia, a matter for the competent international organizations, in particular the Security Council and the General Assembly;

(*b*) No doubt there are questions of the accountability and proper functioning of the Security Council and of other organizations faced with emergencies. It is significant, however, that such questions concern as much things not done as things badly done—the failure of timely intervention that could, perhaps, have averted a disaster, the formal promise as to the safety of "safe havens" that was dishonoured by inaction and lack of will.[742] To repeat, whatever institutional and other reforms may help to address these questions, they are not matters which can be resolved by way of the general secondary rules of State responsibility;

(*c*) For these and other reasons, it has already been provisionally agreed that the notion of "lawful sanctions" implicit in article 30 should be eliminated. Sanctions adopted pursuant to Chapter VII of the Charter of the United Nations, or otherwise validly imposed under international treaties, fall outside the scope of the project, and are covered respectively by articles 39 and 37–38;[743]

(*d*) One key feature of such sanctions is that their imposition and monitoring require organized collective action. The substantial systems of sanctions committees, procedures for authorizations and exceptions, the consideration of compensation to affected third States pursuant to article 50 of the Charter, deciding on the relations between non-forcible sanctions, peacekeeping and other measures—none of these are achievable within the scope of the draft articles, nor is there any value in seeking to duplicate them by any parallel systems that could be envisaged;[744]

(*e*) A significant development in recent years has been the establishment of an international criminal court. Events during the 1990s have shown again the limited results that can flow from the sanctioning of whole populations, and the dilemma of appearing to punish many in order to sanction a few controlling figures. Where humanitarian or other tragedies are produced, or exacerbated, by the criminal conduct of individual leaders (whether or not they are formally in government), responses against the "State" or its people seem to miss the point. In the majority of cases of large-scale criminal conduct, the people of the State concerned are, either directly or collaterally, victims. Mechanisms are now being developed—of which the Rome Statute of the International Criminal Court is but one element—for holding the individuals involved accountable. In this enterprise, State responsibility has a role, but it is ancillary.[745]

(*f*) In particular, it has not been suggested that individual criminality under international law depends on any prior finding of the criminality of the State concerned. Were it to do so, difficult questions would be raised, since either there would be a need for a preliminary finding against the State itself,[746] or the State would be dragged into the criminal court as an "absent" accused. This is not the way to achieve due process, for States or for individuals.[747]

In short, the general law of State responsibility can only play an ancillary role in this field. But there is such a role. In accordance with the provisions of part one of the draft articles, States as such may be responsible for gross breaches of fundamental obligations, and the consequences of that situation are correspondingly substantial: accountability to the international community as a whole, the obligation to cease the breach and to make full reparation for it, especially by way of restitution, and the possibility of significant countermeasures if these obligations are not fulfilled. In seeking to elaborate this role, certain key ideas need to be developed.

[742] See, for example, "Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica" (A/54/549) (15 November 1999); "Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda" (S/1999/1257, annex) (15 December 1999); and the statement of the Secretary-General of 16 December 1999 (SG/SM/7263–AFR/196).

[743] For article 38, see paragraphs 60–65 above; for article 37, paragraphs 415–421 below; for article 39, paragraphs 422–426 below.

[744] Any such systems would have to be in treaty form, whereas the form of the draft articles has not been decided (see paragraph 6 above).

[745] For the role of criminal or disciplinary sanctions against individuals as a form of satisfaction in special cases, see paragraph 192 above.

[746] Cf. the two-stage procedure applied to "criminal organizations" under the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279), arts. 9–11. It is very doubtful whether these provisions (which, of course, were not applied to the Government of Germany as such) were among "the principles of international law" affirmed by General Assembly resolution 95 (I) of 11 December 1946. They have not since been reflected in any international resolution or treaty.

[747] It is sometimes said that State participation in a crime under international law renders the State "transparent", thereby denying protection to its officials charged with international crimes. But the principle (affirmed in article 7 of the Charter of the International Military Tribunal (see footnote 746 above) and repeatedly since) that the official position of a person accused of an international crime "shall not be considered as freeing them from responsibility or mitigating punishment" applies irrespective of whether the official's conduct formed part of a "crime of State".

1. Right of every State to invoke responsibility for breaches of obligations to the international community

373. In the context of State responsibility, it is appropriate to begin with the notion of obligations to the international community as a whole. It may be inferred that the content of those obligations is largely coextensive with the content of the peremptory norms. By definition a peremptory norm must have the same status vis-à-vis all States.[748] It arises under general international law and local or conventional derogations from it are prohibited. It is conceivable that an obligation might exist *erga omnes* which was subject to variation as between two particular States by agreement between them. It would follow that the obligation was not peremptory. But it would equally follow that, in the event of a derogation, the *same* obligation was not owed to the international community as a whole.

374. However this may be, it is proposed to consider as the essential core of obligations to the international community as a whole those few norms which are generally accepted as universal in scope and non-derogable as to their content, and in the performance of which all States have a legal interest. This was the category which the Court seemed to have in mind in its dictum in the *Barcelona Traction* case.[749] It is not necessary (indeed it is undesirable) for the draft articles to cite examples of such norms. They include the prohibition of the use of force in international relations, the prohibitions of genocide and slavery, the right of self-determination, and those other human rights and humanitarian law obligations which are recognized as non-derogable by general international law. The commentary should make it clear that the category includes only a small number of universally accepted norms.

375. With respect to this category of obligations, all States should be recognized as having a legal interest in compliance, whether or not the State is specially affected by their breach.[750] This entails, as a minimum, that all States have a legal interest to secure cessation of any breach of these norms and to obtain appropriate assurances or guarantees of non-repetition. The draft articles should give effect to that entailment. It may be noted that there is no risk of conflict or contradiction where several or many States seek the cessation of a breach, or a declaration of a breach (or for that matter restitution, where what is to be restored is an objective situation, the status quo ante, in the interests of the victims of the breach[751]). That being so, to limit such invocation to cases where all or virtually all States could agree to act would be too limiting. Any State party to an obligation established in the collective interest should be recognized as having at least the right to protest, to seek cessation and a declaration of the breach, and in appropriate cases to seek restitution.

2. Limitations on the right to invoke responsibility on behalf of another

376. On the other hand, even if the right of each State to invoke responsibility in respect of obligations to the international community as a whole is to be recognized as an individual one, it is not a right established for the personal interest of that State, but in the community interest. It is distinct from the interest of a State, person or entity which is the specific victim of the breach (a State subject of an armed attack, a people denied the right of self-determination …). Not-directly-affected States[752] asserting a legal interest in compliance are not seeking cessation or reparation on their own behalf but on behalf of the victims of the breach and in the public interest. It seems then that provisions for the invocation of responsibility on behalf of the international community need to acknowledge the primacy of the interests of the actual victims. In considering how this is to be achieved, it is necessary to consider separately the case where the victim is a third State, as distinct from a human group or other entity.

(a) *The victim State*

377. Where there is an identifiable victim State, then collective measures taken on its behalf, including in relation to reparation, should be taken with its consent.[753] Difficulties can arise where the government of the victim State has been suppressed or overthrown, e.g. as a result of unlawful intervention from outside or of a coup, and where the victim State lacks valid representatives. This extreme case has certainly occurred, but it must be left to be resolved by existing law and practice relating to the representation of the State in times of emergency, and by the competent international organizations.[754] It should not be allowed to obscure the normal situation where the victim State continues to be validly represented at the international level.

(b) *Victims other than States: peoples and populations*

378. In principle, the same solution might be envisaged where the primary victim is not a State but a human group or an individual. For obvious reasons, however, there may be great difficulties in securing legitimate representation by human groups or individuals, and in limiting the rights of other States to address issues of compliance at an international level, in the absence of a valid expression of the wishes of the victim or victims.[755] In any event, such States may be properly concerned as to the issues of inter-

[748] See article 53 of the 1969 Vienna Convention.

[749] *I.C.J. Reports 1970* (see footnote 164 above), p. 32, para. 33; see also paragraph 97 above.

[750] See paragraphs 106–107 and table 1 above. An appropriate analogy here is the idea of *locus standi* in the public interest; it may be noted that human rights and many other treaties give State parties generally the right to invoke responsibility, at least for the purposes of obtaining a declaration of a breach, without imposing any threshold requirement of their being specially affected.

[751] See paragraph 113 above.

[752] Such as Ethiopia and Liberia in the *South West Africa* case, *I.C.J. Reports 1966* (see footnote 168 above).

[753] See paragraph 109 above.

[754] For a review see Talmon, *Recognition of Governments in International Law: with Particular Reference to Governments in Exile*, who seeks to reinstate the doctrine of recognition of governments-in-exile as the means of resolving such problems.

[755] See the problem of representation referred to by Judge Vereshchetin in his separate opinion in the case concerning *East Timor*, *I.C.J. Reports 1995* (footnote 205 above), p. 135.

national legality, without necessarily identifying with the victims or seeking to represent them. It has already been proposed that parts two and two bis should not deal with the question of the invocation of responsibility by entities other than States, and an appropriate savings clause has been recommended in part two, chapter I.[756] As to the invocation of responsibility by a State in cases where the primary victim is a non-State, the draft articles should provide that any State party to the relevant collective obligation should have the right to invoke responsibility by seeking cessation, assurances and guarantees of non-repetition and, where appropriate, restitution.

(c) *"Victimless" breaches of community obligations*

379. If there are no specific, identifiable victims (as may be the case with certain obligations *erga omnes* in the environmental field, e.g. those involving injury to the "global commons"), and if restitution is materially impossible, then other States may be limited to seeking cessation, satisfaction and assurances against repetition. Again, however, these are significant in themselves, and any State party to the relevant collective obligation should be entitled to invoke responsibility in these respects.

3. Issues of penalty and process

380. Evidently questions of cessation, non-repetition and restitution do not exhaust the potential consequences that may flow from a breach of obligations to the international community as a whole. Other consequences might include substantial damages reflecting the gravity of the breach, and even outright penalties. Indeed monetary payments are at the low end of the spectrum of possible consequences.[757] But the question of penalties or punitive damages is a useful test case. It will be recalled that the draft articles as adopted on first reading did not provide for punitive damages even in the case of "international crimes" as defined in article 19.[758] The exclusion of punitive damages in international law received support even from Governments which otherwise favoured article 19.[759] Indeed, there is substantial authority for the proposition that punitive damages do not exist in international law.[760] In the Special Rapporteur's view, while responsibility may be invoked by States individually in order to ensure cessation and restitution in *all* cases involving breaches of obligations towards the international community as a whole,[761] the question must also be asked whether penalties or punitive damages can be provided for at least in the case of gross or egregious breaches. If the answer is no, then in this field the draft articles can have only a limited scope, and the development of the secondary consequences by way of penalties for gross breaches will have to be left to the future. And this would be so, whether the reason given was the absence of any provision for punitive damages in international law, or the absence of any mechanism for imposing them, or its unacceptability to States for pragmatic reasons, or the impossibility of imposing such a regime in a text which does not have the force of a widely accepted treaty.[762]

381. It must be stressed that, despite the substantial debate that has surrounded article 19 and the notion of international crimes of States, practice has been almost entirely lacking. Active steps have been taken to implement the notion of international criminal responsibility for certain crimes under international law, and existing principles of international responsibility have been applied, under the auspices of the Security Council, to certain grave breaches, most notably the situation resulting from Iraq's invasion of Kuwait in 1990. But legally and institutionally, arrangements for holding States accountable for the worst breaches of international law remain essentially as they were when article 19 was first proposed and adopted.

382. The situation may be compared with that under European Union law, so far the most developed supranational regulatory system. In particular, reference may be made to article 228 (formerly art. 171) of the Treaty establishing the European Community, which provides:

> 1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
>
> 2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.[763]

In 1996 the European Commission adopted guidelines for applying this provision, and in 1997 it adopted further guidelines on methods of calculating penalty payments. The first case in which these provisions were actually applied against a State occurred in 2000, when the Court of Justice of the European Communities imposed a penalty for a continuing breach of European Union law of

[756] See paragraph 99 above, and for the text of the proposed provision, see paragraph 119.

[757] Cf. the various consequences visited upon Iraq in the aftermath of its invasion of Kuwait, or on 1945 Germany in the aftermath of the Holocaust and the Second World War.

[758] There is no reference to punitive damages in article 53. As already demonstrated, the Commission in adopting article 45, paragraph 2 (*c*), did not intend to provide for punitive damages (see paragraph 190 above).

[759] See *Yearbook … 1998* (footnote 23 above), p. 13, para. 54.

[760] See the decisions referred to (ibid., pp. 14–15, para. 57); and paragraph 190 above.

[761] See paragraph 375 above.

[762] This does not exhaust the catalogue of possible reasons. The international community is beginning to take seriously the imposition of penalties on individuals, including present and former governmental figures, who have committed egregious international crimes. That task might be thought more immediate and urgent than the penalizing of States and (indirectly) their populations.

[763] This procedure is stated to be without prejudice to article 227, which allows any member State which considers that another member State has failed to fulfil any obligation under the Treaty to bring the matter before the Court, in effect for declaratory relief. However article 228 is the only procedure by which penalties can be imposed on member States.

€ 20,000 per day. This was imposed for the continuing dumping of harmful wastes into a river. In the course of its opinion, the Court summarized the effect of the Commission's guidelines for penalties as follows:

> Memorandum 96/C 242/07 states that decisions as to the amount of a fine or penalty payment must be taken with an eye to their purpose, namely the effective enforcement of Community law. The Commission therefore considers that the amount must be calculated on the basis of three fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to continuation of the infringement and to further infringements.
>
> Communication 97/C 63/02 identifies the mathematical variables used to calculate the amount of penalty payments, that is to say a uniform flat-rate amount, a coefficient of seriousness, a coefficient of duration, and a factor intended to reflect the Member State's ability to pay while ensuring that the penalty payment is proportionate and has a deterrent effect, calculated on the basis of the gross domestic product of the Member States and the weighting of their votes in the Council.[764]

The Court noted that these guidelines "help to ensure that [the Commission] acts in a manner which is transparent, foreseeable and consistent with legal certainty and are designed to achieve proportionality in the amounts of the penalty payments to be proposed".[765] It approved the suggestion that the penalty amounts take into account national GDP and the State's voting power in the Council, on the ground that this "enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range".[766] It concluded that:

> [T]he basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.
>
> In the present case, having regard to the nature of the breaches of obligations, which continue to this day, a penalty payment is the means best suited to the circumstances.[767]

In reducing the penalty proposed by the Commission, the Court took into account that not all the continuing violations of the earlier judgement alleged by the Commission had been proved. At the same time, the continuing infringements, in view of their capacity to "endanger human health directly and harm the environment", as well as their inconsistency with European Union environmental policy, were to "be regarded as particularly serious".[768]

383. How the penalty procedure under article 228 will evolve is a matter for the future, and of course the procedure exists only in relation to European Union law as such, not international law. A number of points may, however, be made:

(*a*) The procedure shows that, despite occasional claims to the contrary, there is nothing in the notion of the State or of treaty-based legal relations that excludes, a priori, the imposition of penalties;

(*b*) Penalties under article 228 are not denominated as "criminal", and their intention, primarily at least, is to enforce compliance;[769]

(*c*) They are imposed only in special cases, at the request of a collective organ, after a two-stage proceeding before a court with general and compulsory jurisdiction, and with all the accompaniments of due process;

(*d*) They are imposed in a system in which countermeasures are excluded.[770]

384. It seems clear to the Special Rapporteur that in the present stage of development of international law, the conditions for the regular imposition of penalties upon States do not exist, and can only be created with great difficulty. The Court of Justice referred to the need for transparency, certainty and proportionality. These are general legal requirements of due process in penal matters. They are not confined to legal subsystems such as that of the European Union.

385. But if there are difficulties in imposing penalties or similar sanctions on States in the absence of adequate institutions and procedures, there is on the other hand the practice of applying countermeasures in order to induce a State to comply with its international obligations. Special regimes apart, such countermeasures do not require the prior exhaustion of judicial remedies, let alone prior judicial authorization.[771] If the injured State is entitled to apply countermeasures as a decentralized form of seeking redress, the question is why it cannot be supported in doing so by other States which themselves have a recognized interest in compliance with the obligation breached. There is a further question, whether collective countermeasures should be allowed to one or some States faced with the breach of an obligation to the international community as a whole which does not directly injure any State (e.g. in the field of human rights or internal armed conflict).

B. Collective countermeasures[772]

386. A previous section of this report reviewed the provisions on countermeasures as adopted on first reading,

[764] Court of Justice of the European Communities, *Commission of the European Communities* v. *Hellenic Republic*, case C–387/97, *Judgment of 4 July 2000*, *Reports of Cases before the Court of Justice and the Court of First Instance*, 2000–7 (A), p. I–5116, paras. 85–86, citing European Community memorandum 96/C 242/07 of 21 August 1996 (*Official Journal of the European Communities*, No. C 242 (1996), p. 6) and communication 97/C 63/02 of 28 February 1997 (ibid., No. C 63 (1997), p. 2).

[765] *Judgment of 4 July 2000* (see footnote 764 above), para. 87.

[766] Ibid., para. 88; cf. paragraph 89, where the European Community's guidelines are described as "a useful point of reference".

[767] Ibid., paras. 92–93.

[768] Ibid., para. 94.

[769] The Court of Justice rejected the respondent's argument that the proceedings were inadmissible because there was a retrospective element to the penalty. It noted that "the argument put forward ... concerning the relevance, when setting the penalty payment, of factors and criteria relating to the past is indissociable from consideration of the substance of the case, in particular as regards the object of penalty payments under Article 171(2) of the Treaty" (ibid., para. 42).

[770] See paragraph 343 above.

[771] See paragraph 355 above.

[772] There is a valuable discussion of these issues by Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, pp. 110–175. See also Akehurst, "Reprisals by third States"; Charney, loc. cit.; Frowein, loc. cit.; Hutchinson, loc. cit.; and Simma, "From bilateralism to community interest in international law".

so far as they concern actions taken by injured States in the narrow sense (i.e. as proposed to be defined in article 40 bis, paragraph 1). The question is to what extent other States may legitimately assert a right to react against breaches of collective obligations to which they are parties, even if they are not injured in this sense. For the sake of simplicity, these cases will be discussed under the rubric of "collective countermeasures". They are not limited to situations where some or many States act in concert. The collective element may also be supplied by the fact that the reacting State is asserting a right to respond in the public interest to a breach of a multilateral obligation to which it is a party, though it is not individually injured by that breach, or that the measures are coordinated by a number of States involved.

387. It is important to distinguish between individual countermeasures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs, on the one hand, and institutional reactions in the framework of international organizations, on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the draft articles.[773] More generally the draft articles do not cover the case where action is taken by an international organization, even though the member States direct or control its conduct.[774]

388. A second necessary distinction is that between "unfriendly" but not unlawful reactions to the conduct of another State (retorsion) and those reactions which are inconsistent with the international obligations of the State and are justified, if at all, as legitimate countermeasures. While the distinction may sometimes be difficult to draw in practice, especially in the context of collective action, it is crucial for the purposes of State responsibility. Only countermeasures properly so-called fall within the scope of the draft articles.[775] Thus countermeasures do not include policies of collective non-recognition, whether such non-recognition is obligatory[776] or optional.

389. Thirdly, non-forcible countermeasures must be clearly distinguished from reactions involving the use of force. Measures involving the use of force in international relations, or otherwise covered by Article 2, paragraph 4, of the Charter of the United Nations, are regulated by the relevant primary rules, and do not fall within the scope of the secondary obligations covered by the draft articles. This has already been affirmed in the context of existing article 50.[777]

390. On these understandings it is proposed, first, briefly to review some examples of recent experience concerned with collective countermeasures as defined, secondly, to attempt an assessment of that practice, and thirdly to consider, in the light of this practice, what provisions ought to be made in the draft articles. It should be stressed that this is not a matter of *introducing* into the draft articles provisions for collective countermeasures. As adopted on first reading, the draft articles allowed any injured State (broadly defined in the original article 40) to take countermeasures on its own account, without regard to what any other State might be doing, and in particular without regard to the views or responses of the victim State. The deficiencies of such a broad approach to collective countermeasures have already been considered.[778] Thus the question is rather how the presently unlimited and uncoordinated provision for collective countermeasures, created by article 40 read in conjunction with article 47, is to be limited and controlled.

1. A review of State practice

391. In a number of instances, States have reacted against violations of collective obligations, although they could not claim to be injured in the sense of article 40 bis, paragraph 1. Reactions have taken such forms as economic sanctions (contrary to treaty obligations) or other measures (e.g. the breaking off of air links in disregard of bilateral aviation treaties; the freezing of assets). Examples include the following:

(a) *United States-Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[779] As members of GATT, Uganda and the United States were obliged not to introduce general export restrictions and quotas in their economic relations.[780] The United States however did not rely on GATT exceptions: the legislation recited that "the Government of Uganda … has committed genocide against Ugandans" and that "the United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide";[781]

(b) *Certain Western countries-Poland and the Soviet Union (1981).* On 13 December 1981, following the movement of Soviet troops along Poland's eastern border, the Government of Poland imposed martial law and subsequently suppressed demonstrations and interned

[773] See existing article 39, discussed below (paras. 422–426).

[774] See paragraph 428 below for the proposed exclusion from the draft articles of questions concerning responsibility for the acts of international organizations.

[775] Thus collective diplomatic boycotts, avoidance of State visits or sporting links, etc. do not breach international law and while their intent may be hostile or unfriendly, they do not involve countermeasures. The collective action taken by OAU against the apartheid system in South Africa also seems not to have involved countermeasures in the strict sense, in the absence of relevant treaty obligations with South Africa as to trade or aviation etc. See Ferguson-Brown, "The legality of economic sanctions against South Africa in contemporary international law"; cf. Dugard, "The Organization of African Unity and colonialism: an enquiry into the plea of self-defence as a justification for the use of force in the eradication of colonialism" (referring to self-defence rather than countermeasures). The collective measures against Rhodesia were taken pursuant to Chapters VI and later VII of the Charter of the United Nations: see Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, pp. 365–422.

[776] As, for example, in the situation considered by ICJ in the *Namibia* case, *I.C.J. Reports 1971* (see footnote 169 above), p. 16.

[777] See paragraph 335 above.

[778] See paragraphs 109 and 114 above.

[779] Uganda Embargo Act, Public Law 95–435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

[780] See article XI, paragraph 1, of GATT.

[781] Uganda Embargo Act (see footnote 779 above), p. 1052, sect. 5 (*a*)–(*b*).

12,500 dissidents.[782] After verbal condemnations from individual United Nations members, the United States and other Western countries took action against both Poland and the Soviet Union. Besides unfriendly acts, the measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in Austria, France, the Netherlands, Switzerland, the United Kingdom and the United States.[783] In all those instances, the suspension procedures provided for in the respective treaties were disregarded, and (unless their wrongfulness was precluded) the measures thus constituted violations of international law;[784]

(c) *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[785] Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand went beyond the sphere of verbal condemnations and adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI, paragraph 1, and possibly article III, of GATT. It is doubtful whether the measures could be justified under the national security exception provided for in article XXI (*b*) (iii) of GATT.[786] Moreover, the embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[787] for which security exceptions of GATT did not apply;

(d) *United States-South Africa (1986)*. When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[788] Subsequently, some countries introduced measures which went beyond those recommended by the Council and which involved prima facie breaches of international law. For example, the United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended, with immediate effect, landing rights of South African Airlines on United States territory.[789] This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories[790] and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy";[791]

(e) *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion as a breach of international peace and security and, from 6 August onwards, adopted a series of resolutions legitimizing reactions of Member States to restore the Government of Kuwait. Even before Member State action was authorized by the Council, European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[792] This action was taken in direct response to the Iraqi invasion and, at least initially, was not legitimized by Council resolutions;

(f) *Collective measures against the Federal Republic of Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[793] For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the breach of bilateral aviation agreements.[794] Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply."[795] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[796]

392. In some other cases, "interested" States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted instead a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

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[782] Rousseau, "Chronique des faits internationaux", pp. 603–604.

[783] Sicilianos, op. cit., pp. 161–162; and Rousseau, loc. cit., p. 607.

[784] See, for example, article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic (Warsaw, 19 July 1972), United Nations, *Treaty Series*, vol. 1279, No. 21084, p. 205; and article 17 of the Civil Air Transport Agreement between the United States of America and the Union of Soviet Socialist Republics (Washington, 4 November 1966), ibid., vol. 675, No. 9606, p. 3.

[785] Security Council resolution 502 (1982).

[786] Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Brazil and Spain, GATT document C/M/157, pp. 5–6. For an analysis, see Hahn, *Unilateral Suspension of GATT Obligations as Reprisal*, pp. 328–334; and Sicilianos, op. cit., p. 163.

[787] The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 (26 November1979), p. 2; and ibid., No. L 275 (18 October 1980), p. 14.

[788] Security Council resolution 569 (1985). For further references, see Sicilianos, op. cit., p. 165.

[789] ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306), and p. 104 (implementation order).

[790] United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

[791] ILM (see footnote 789 above), p. 105.

[792] See, for example, President Bush's Executive Orders of 2 August 1990, reproduced in *American Journal of International Law* (Washington, D.C.), vol. 84, No. 4 (October 1990) pp. 903–905.

[793] Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, Nos. L 143, p. 1, and L 190, p. 3 (1998); implemented through Council Regulations 1295/98, ibid., No. L 178 p. 33 (1998), and 1901/98, No. L 248, p. 1 (1998).

[794] See, for example, United Kingdom, *Treaty Series* No. 10 (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, No. 69 (1967).

[795] See *British Year Book of International Law, 1998*, vol. 69, p. 581. The British position is again summarized in ibid., *1999*, vol. 70, pp. 555–556.

[796] Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998, reproduced in Weller, *The Crisis in Kosovo 1989–1999*, p. 227.

(a) *Netherlands-Suriname (1982)*. In 1980, a military government seized power in the former Dutch colony of Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Government of the Netherlands suspended the bilateral treaty on development assistance under which Suriname was entitled to financial subsidies until 1985.[797] While the treaty itself did not contain any suspension or termination clauses, the Government of the Netherlands stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension;[798]

(b) *European Community member States-Federal Republic of Yugoslavia (1991)*. A similar line of reasoning was advanced by European Community member States in their relation to Yugoslavia. In late 1991, in response to resumption of fighting within Yugoslavia, European Community members suspended, and later denounced, the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia.[799] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in its resolution 713 (1991). The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice.[800] Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[801]

393. These examples are illustrative rather than exhaustive. They show a certain willingness on the part of some States to resort to countermeasures in response to violations of collective obligations. In other cases, it is not always easy to decide whether the actions already involved conduct inconsistent with international obligations or were cases of unfriendly but lawful acts by way of retorsion. For example, the measures taken by Western countries against the Soviet Union following the invasion of Afghanistan may be mentioned. While most of the measures probably constituted acts of retorsion, the most controversial reaction, the United States embargo on cereal exports, may have violated its commitment to the Soviet Union under bilateral agreements.[802]

394. In a number of other cases, it seems that "interested" States at least asserted a right to resort to countermeasures in response to violations of collective obligations, although their actual responses fell short of being countermeasures. In this regard, mention can be made of various declarations adopted at Group of Seven summits calling for collective action against countries harbouring airline terrorists.[803] The reaction of certain States in supporting the United States at its request during the crisis concerning diplomatic and consular personnel suggests that the reacting States were prepared to take countermeasures, although the measures actually taken arguably remained mere retorsions.[804]

2. An assessment

395. The survey shows that in a considerable number of instances States, which were not "injured" in the sense of article 40 bis, paragraph 1, have taken measures against a target State in response to prior violations of collective obligations by that State. Moreover in some cases at least, those measures were themselves in breach of (or would otherwise have been in breach of) the obligations of the State taking the measures vis-à-vis the target State. This seems to suggest that a right to resort to countermeasures cannot be restricted to the victims of the breach in question, but can also derive from violations of collective obligation, as these have been defined earlier in the present report.[805]

396. However, this statement must be qualified in a number of respects:

(*a*) First, it has to be frankly admitted that practice is dominated by a particular group of States (i.e. Western States). There are few instances in which, for example, States from Africa or Asia have taken collective countermeasures;[806]

(*b*) Secondly, practice is selective; in the majority of cases involving violations of collective obligations, no reaction at all has been taken, apart from verbal condemnations;

(*c*) Thirdly, even if coercive measures were taken, they were not always designated as countermeasures. The decision of the Government of the Netherlands to rely on fundamental change of circumstances in order to suspend its treaty with Suriname seems to imply a preference for other concepts.[807]

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[797] See Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", pp. 68–69. The relevant treaty is reprinted in *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975).

[798] See Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", p. 321.

[799] *Official Journal of the European Communities*, No. L 315 (1991), p. 1, for the suspension; and No. L 325 (1991), p. 23, for the denunciation.

[800] Article 60, second paragraph, of the Cooperation Agreement.

[801] Equally the European Court of Justice relied on the law of treaties and not the law of State responsibility in upholding the validity of the European Community regulation in question: see *A. Racke GmbH and Co.* v. *Hauptzollamt Mainz*, case C–162/96, *Judgment of 16 June 1998, Reports of Cases before the Court of Justice and the Court of First Instance*, 1998–6, pp. 3706–3708, paras. 53–59.

[802] While the terms of the agreement were observed, the United States Government had unilaterally given permission for the purchase of larger quantities of cereals. These were annulled by the United States embargo. See Sicilianos, op. cit., p. 158.

[803] See the joint statement on international terrorism adopted at the Bonn Economic Summit (17 July 1978), ILM, vol. XVII, No. 5 (September 1978), p. 1285. Subsequent statements can be found, ibid., vol. XX, No. 4 (July 1981), p. 956; and ibid., vol. XXV, No. 4 (July 1986), p. 1005.

[804] See the analysis by Frowein, loc. cit, p. 417; and Sicilianos, op. cit., pp. 159–160.

[805] Paras. 83 and 92.

[806] But for collective action in the context of southern Africa, see footnote 169 above.

[807] See paragraph 392 (*a*) above. It may be noted that stringent conditions are applicable to fundamental change of circumstances under article 62 of the 1969 Vienna Convention, as interpreted and applied for example in the case concerning the *Gabčíkovo-Nagymaros Project*,

397. It must be admitted that practice does not allow clear conclusions to be drawn as to the existence of a right of States to resort to countermeasures, in the absence of injury in the sense of article 40 bis, paragraph 1. On the other hand, a number of observations can be made.

398. First, there does not appear to exist a distinction based on the legal source of the collective obligation which has been violated. In the examples given, States have reacted against breaches of conventional as well as customary international law. Of course, resort to countermeasures will be excluded in response to violations of treaties which generally exclude the application of general rules of international law, or which contain their own provisions for authorizing collective measures. But on the other hand, the mere existence of conventional frameworks including monitoring mechanisms (e.g. in the field of human rights) has not been treated as excluding recourse to countermeasures.

399. Furthermore, despite the selectiveness of practice, none of the instances concerns isolated or minor violations of collective obligations. If States have resorted to countermeasures in response to violations of collective obligations, the violation has been seen to have reached a certain threshold.[808] Indeed the examples referred to involve some of the major political crises of recent times. With all due caution, it seems possible to say that reactions were only taken in response to severe violations of collective obligations.

400. Finally, in cases involving one directly injured State (i.e. a victim State as well as other "interested" third States), the victim State's reaction seems to have been treated as legally relevant, if not decisive, for all other States. For example, during the Falklands conflict and the Tehran hostage crisis, States other than the United Kingdom and the United States respectively only acted upon the appeal of those States as the direct victims, and only within the scope of the appeal made. Where a State is the victim of a breach (and other States' interest in the breach, if any, is of a more general character), it seems appropriate that the victim State should be in a position to decide whether and what countermeasures should be taken, within the overall limits laid down by the draft articles. Third States should not be able, in effect, to intervene in a dispute by taking countermeasures if the principal parties wish to resolve it by other means. There is here an analogy with collective self-defence. In the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the primary obligee (the State subjected to the armed attack).[809] Yet, of course, the rules relating to the use of force give rise to obligations *erga omnes*: they are collective obligations. The *Military and Paramilitary Activities in and against Nicaragua* case was referred to by the Court in the *Gabčíkovo-Nagymaros Project* case as relevant to the law of countermeasures,[810] and the analogy seems a reasonable, if not a compelling, one. If State A cannot act in collective self-defence of State B without State B's consent, it does not seem appropriate to hold that it could take (collective) countermeasures in cases where State B is the victim, irrespective of State B's wishes. On the other hand, if State A, a member of the international community to which the obligation is owed, cannot take proportionate countermeasures on behalf of State B, the victim of the breach, then State B is in effect left to face the responsible State alone, and a legal relationship based on multilateral obligation is effectively converted to a bilateral one at the level of its implementation. That too does not seem right as a matter of principle.

3. Tentative conclusion

401. The conclusions to be drawn from the practice reviewed above are necessarily tentative; the practice is rather sparse and involves a limited number of States. Nonetheless there is support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. If other States are entitled to invoke responsibility on account of such breaches, at least in terms of seeking cessation and assurances of non-repetition, as well as restitution on behalf of the injured State,[811] it does not seem inconsistent with principle that they be recognized as entitled to take countermeasures with the consent of that State. Of course such countermeasures should comply with the conditions laid down for the injured State itself,[812] and in addition their "collective" character should be recognized. Thus all the countermeasures taken in relation to a particular breach should be considered in determining whether the response is, overall, proportionate. In addition, if the responsible State is cooperating with the injured State in the resolution of the dispute, other States should respect that process. This can be achieved by limiting the action of "third" States to countermeasures that would have been legitimate if taken by the injured State itself.

402. It is therefore proposed to alter the position of the draft articles on the question of collective countermeasures by limiting the extent to which States, not themselves directly injured by a breach of multilateral obligation, can take action by way of countermeasures. In contrast to the position taken on first reading, the draft articles should make clear that the distinction, proposed to be incorporated in article 40 bis, between injured States and other States entitled to invoke responsibility, has repercussions on the right of the broader group of States to resort to countermeasures.

I.C.J. Reports 1997 (see footnote 18 above). It is accordingly doubtful that such a doctrine will be applicable in many of these cases. The point is, however, that in some cases Governments have preferred to rely on (possibly inapplicable) grounds for the termination of treaties rather than on countermeasures.

[808] It is not the function of the Special Rapporteur, or the Commission, to judge in particular cases whether more or less widely shared perceptions of egregious breaches actually corresponded to the facts. States taking countermeasures do so at their peril, and the question whether they are justified in any given case is one for objective appreciation (see paragraph 289 above). The point is rather that the States taking these measures asserted that they were justified on the basis—and by clear implication, only on the basis—that the grounds invoked were genuine, serious and, if established, warranted such a response.

[809] See footnote 207 above.

[810] *I.C.J. Reports 1997* (see footnote 18 above), p. 55, para. 83.

[811] See paragraph 377 above.

[812] See paragraph 367 above, for the terms on which it is proposed that an injured State be entitled to take countermeasures.

In cases where the violation of a collective obligation directly injures one State, other States bound by the obligation and falling within the definition proposed in article 40 bis, paragraph 2, should be entitled to take countermeasures on behalf of the injured State, with that State's request and consent and within the scope of the consent given. In addition, it will be necessary to adapt the regime of countermeasures by an injured State on its own account to deal with the situation where several States take, or are entitled to take, countermeasures in the collective interest. In particular the conduct of each of the States that takes such measures should be taken into account in the assessment of proportionality. These conditions and limitations are reflected in the proposed provision set out in paragraph 413 below.

403. A second situation concerns the question of collective countermeasures in cases where no State is "injured" in the sense of article 40 bis, paragraph 1—notably, breaches of human rights obligations, owed to the international community as a whole but affecting only the nationals of the responsible State. The difficulty here is that, almost by definition, the injured parties will lack representative organs which can validly express their wishes on the international plane, and there is a substantial risk of exacerbating such cases if third States are freely allowed to take countermeasures based on their own appreciation of the situation. On the other hand it is difficult to envisage that, faced with obvious, gross and persistent violations of community obligations, third States should have no entitlement to act.

404. In various contexts, especially those involving human rights and humanitarian law, a distinction is drawn between individual violations of collective obligations, and breaches which have a gross and systematic character. Moreover this is done even where the underlying rule is the same for individual and for gross or systematic breaches (as it often is). For example:

(*a*) The European Court of Human Rights has distinguished between individual complaints and cases involving systematic violations amounting to a practice of inhuman or degrading treatment or punishment, holding the exhaustion of local remedies rule inapplicable in the latter case;[813]

(*b*) The procedure established by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 targets cases involving "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms".[814]

(*c*) The definition of crimes against humanity as a matter of general international law implies a threshold of systematic or widespread violations, either in terms or (as with genocide and apartheid) by necessary implication from the very definition of the prohibited acts.[815]

Attention should also be drawn to the justification for the ban on airline flights to the Federal Republic of Yugoslavia, as articulated by the Council of the European Union in Council Regulation (EC) No. 1901/98 of 7 September 1998. The recital alleged, inter alia:

> indiscriminate violence and brutal repression against its own citizens, which constitute serious violations of human rights and international humanitarian law.[816]

405. As a matter of policy, the constraints and inhibitions against collective countermeasures—in particular, concern about due process for the allegedly responsible State, the problem of intervention in and possible exacerbation of an individual dispute—are substantially reduced where the breach concerned is gross, well attested, systematic and continuing. To disallow collective countermeasures in such cases does not seem appropriate. Indeed to do so may place further pressure on States to intervene in other, perhaps less desirable ways. It is not the function of the Commission to examine in the present context the lawfulness of humanitarian intervention in response to gross breaches of community obligations.[817] But at least it can be said that international law should offer to States with a legitimate interest in compliance with such obligations, some means of securing compliance which does not involve the use of force.

406. For these reasons, the Special Rapporteur proposes that the draft articles should allow States parties to a community obligation to take collective countermeasures in response to a gross and well-attested breach of that obligation, in particular in order to secure cessation and to obtain assurances and guarantees of non-repetition on behalf of the non-State victims.[818] Such countermeasures should comply with the other conditions for countermeasures laid down in the draft articles, and in particular they should not, taken together, infringe the requirement of proportionality. The text should reflect this restriction rather than implying—as did articles 40 and 47 as adopted on first reading—that individual countermeasures are a corollary to all kinds of injury broadly defined.

C. Additional consequences of "gross breaches" of obligations to the international community as a whole

407. The next question is whether further consequences can be attached to the category of gross, egregious or systematic breaches of obligations to the international com-

[813] *Ireland* v. *United Kingdom* (see footnote 175 above), discussed in the Special Rapporteur's second report, *Yearbook … 1999* (see footnote 8 above), p. 37, para. 125.

[814] For an assessment of the resolution 1503 procedure, see, for example, Alston, "The Commission on Human Rights", pp. 145–155.

[815] See, for example, the definition of "crimes against humanity" in article 7 of the Rome Statute of the International Criminal Court, reflecting the Commission's own definition in article 18 of the draft Code of Crimes against the Peace and Security of Mankind (*Yearbook ... 1996*, vol. II (Part Two), p. 47,

[816] *Official Journal of the European Communities*, No. L 248 (8 September 1998), p.1.

[817] As ICJ noted in the cases concerning *Legality of Use of Force, Provisional Measures*, *Order of 2 June 1999*, *I.C.J. Reports 1999*, para. 16, "the use of force in Yugoslavia ... under the present circumstances ... raises very serious issues of international law".

[818] See also paragraphs 115–116 and table 2 above.

munity as a whole.[819] Of course, the general legal consequences of responsibility will apply to such breaches, and their incidence will be more substantial in proportion to the gravity of the breach. But are there any further legal consequences applicable to "gross breaches" as such? It is necessary to distinguish the question of additional obligations on the responsible State and possible consequences for other States.

408. So far as the responsible State itself is concerned, it is remarkable that the draft articles on first reading only proposed the following consequences of crimes as defined in article 19:

(*a*) Restitution was required, even if the burden of providing restitution was out of all proportion to the benefit gained by the injured State instead of compensation (art. 52 (*a*), disapplying article 43 (*c*) in case of crimes);

(*b*) Restitution could seriously jeopardize the political independence or economic stability of the responsible State (art. 52 (*a*), disapplying article 43 (*d*));

(*c*) Measures by way of satisfaction could "impair the dignity" of the responsible State (art. 52 (*b*), disapplying article 45, paragraph 3).

If, as recommended, article 43 (*d*) is deleted,[820] only the first and third of these "consequences" will remain, and it is very difficult to envisage actual cases in which either will make any difference. As to the first, in the absence of a valid election of compensation in lieu of restitution by the injured party,[821] restitution (if it is possible) will be effectively mandatory, having regard to the importance of the values associated with obligations to the international community as a whole, and the need not to condone their violation. As to the third, the main element of the proposed article 45, paragraph 4, is now proportionality,[822] and there is no need to "humiliate" even a State which has committed a gross breach of a community obligation. In the Special Rapporteur's view, these "consequences" are trivial, incidental and unreal, and should be deleted.

409. On the other hand, having regard to the values underlying article 19—which are valid whether or not one accepts the language of "crimes" to express them—then there is a case for damages to be awarded for gross breach in a way that will reflect the gravity of the breach and deter its commission in future. It has been argued that the imposition of penalties by some centralized judicial process, equivalent to that under article 228 of the Treaty establishing the European Community, is beyond the scope of the present text, and would require a special regulatory regime which is presently lacking, and which the draft articles cannot realistically create.[823] The position with respect to punitive damages is not necessarily the same, however, and it can be envisaged that an injured State could be held entitled to demand punitive damages. In reality, following gross and systematic breaches of community obligations, there will always be a much wider group of persons indirectly affected, and major restoration work to be done. For the purposes of discussion, the Special Rapporteur proposes that in the case of gross breach of community obligations, the responsible State may be obliged to pay punitive damages. Alternatively, if the present formulation of article 45, paragraph 2 (*c*), is not retained in relation to breaches more generally,[824] it could be applied to the category of gross breaches.

1. Additional obligations for other States faced with gross breaches of community obligations?

410. If article 52 as adopted on first reading envisaged few or no additional obligations for the responsible State, article 53 did—paradoxically—envisage such obligations for third States. In respect of the gross breaches referred to in article 19, third States were obliged:

(*a*) Not to recognize as lawful the situation created by the crime;

(*b*) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(*c*) To cooperate with other States in carrying out the obligations under subparagraphs (*a*) and (*b*); and

(*d*) To cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

These consequences were analysed in an earlier report.[825] There the point was made that, leaving to one side the controversial terminology of "crimes", they are broadly acceptable, but only so long as they do not carry *a contrario* implications for other breaches which may not be egregious, systematic or gross. States may not recognize as lawful, for example, a unilateral acquisition of territory procured by the use of force, even if the use of force was arguably lawful. States may not lawfully assist in the detention of hostages, even in isolated cases. Again, for the purposes of discussion, the Special Rapporteur proposes a consolidated version of articles 51–53. The commentary should make it clear that the consequences spelled out may also apply in other cases, depending on the context and the content of the applicable primary rule.

[819] In the draft articles adopted on first reading, it was noted that "alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime'" (*Yearbook … 1996*, vol. II (Part Two), art. 40, p. 63, para. 3). It should be stressed that some of these gross breaches are distinct legal wrongs in themselves, since the definition of the wrong of itself ensures that only severe or extreme cases are covered (e.g. genocide, crimes against humanity). Others (e.g. torture) are general legal wrongs which in circumstances of extreme or systematic application would fall within the category. It has been suggested that a draft article be added to make this clear. This might be located in part two, chapter I, and might provide that:

> "The obligations of the responsible State set out in this part may be owed to another State, to several States, to all other States parties or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation."

[820] See paragraph 144 (*d*) above.

[821] To the extent that restitution relates to the continuing performance of the primary obligation, it may be that not even the injured State can validly waive it (see paragraphs 134 and 253 above).

[822] See paragraph 194 above.

[823] See paragraphs 382–383 above.

[824] As proposed in paragraph 191 above.

[825] *Yearbook … 1998* (see footnote 23 above), p. 11, para. 51.

2. Leaving scope for further developments

411. It is obvious that issues of the salience and enforcement of community obligations are undergoing rapid development.[826] Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples. The draft articles cannot hope to anticipate future developments, and it is accordingly necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as a crime, or as a breach of an obligation to the international community as a whole. Such a clause might perhaps be seen as an admission of defeat in the search for adequate and principled alternatives to existing article 19. But in the Special Rapporteur's view, it is rather a realistic acknowledgement of the limits of codification and progressive development, at a time of rapid institutional and political change.

D. Summary of conclusions as to part two, chapter III, and part two bis

412. For these reasons, the Special Rapporteur proposes that the text of part two, chapter III, should read as follows:

"[Chapter III

"SERIOUS BREACHES OF OBLIGATIONS TO THE INTERNATIONAL COMMUNITY AS A WHOLE

"Article 51. Consequences of serious breaches of obligations to the international community as a whole

"1. This chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an obligation owed to the international community as a whole.

"2. Such a breach entails, for the State responsible for that breach, all the legal consequences of any other internationally wrongful act and, in addition, [punitive damages] [damages reflecting the gravity of the breach].

"3. It also entails, for all other States, the following further obligations:

"(*a*) Not to recognize as lawful the situation created by the breach;

"(*b*) Not to render aid or assistance to the State which has committed the breach in maintaining the situation so created;

"(*c*) To cooperate in the application of measures designed to bring the breach to an end and as far as possible to eliminate its consequences.

"4. Paragraphs 2 and 3 are without prejudice to such further penal or other consequences that the breach may entail under international law.]"

Since the proposed chapter III is self-contained, and since article 19 adopted on first reading played no role whatever in part one, if chapter III is adopted article 19 itself can be deleted. The commentary will need to explain in further detail the limited content of the category to which chapter III applies and the non-exclusiveness of the consequences set out in paragraph 3.

413. A number of provisions must also be added to part two bis as already proposed. First of all, article 40 bis as already proposed should make it clear in what respects the broader category of States (referred to in paragraph 2) is entitled to invoke responsibility, in accordance with the recommendations already made.[827] The conditions for the invocation of responsibility laid down in part two bis should also apply as far as necessary to such States.[828] In addition the following provisions should be added to that part:

"Article 50A.[829] Countermeasures on behalf of an injured State

"Any other State entitled to invoke the responsibility of a State under [article 40 bis, paragraph 2] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take those countermeasures.

"Article 50B. Countermeasures in cases of serious breaches of obligations to the international community as a whole

"1. In cases referred to in article 51 where no individual State is injured by the breach, any State

[826] See paragraphs 372 and 391, and cf. paragraph 382 above.

[827] See paragraphs 378–379 above.

[828] This can be achieved by adding to proposed article 40 bis provisions to the effect that an injured State may invoke all the consequences of an internationally wrongful act in accordance with part two. In addition the following paragraph should be added in relation to the broader category of States presently referred to in article 40 bis, paragraph 2:

"A State referred to in paragraph 2 may seek:

"(*a*) Cessation of the internationally wrongful act, in accordance with article 36 bis;

"(*b*) On behalf of and with the consent of the injured State, reparation for that State in accordance with article 37 bis and chapter II;

"(*c*) Where there is no injured State:

"(i) Restitution in the interests of the injured person or entity, in accordance with article 43; and

"(ii) [Punitive damages] [Damages reflecting the gravity of the breach], in accordance with article 51, paragraph 2, on condition that such damages shall be used for the benefit of the victims of the breach."

In addition article 46 ter as already proposed (para. 284 above) can apply to any State invoking responsibility, whether or not it is an injured State.

[829] These articles would come before article 50 bis (Suspension and termination of countermeasures) as proposed in paragraph 367 above.

may take countermeasures, subject to and in accordance with this chapter, in order to ensure the cessation of the breach and reparation in the interests of the victims.

"2. Where more than one State takes countermeasures under paragraph 1, those States shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled."

CHAPTER V

Part Four

GENERAL PROVISIONS

414. Finally, it is necessary to bring together certain savings clauses already adopted on first reading, or subsequently proposed, and to consider what other provisions of a general character might be included in part four. Part four is to be understood as a general and concluding part, clarifying certain matters with which the draft articles do not deal, and spelling out certain relationships between the draft articles and other rules, and fields, of international law.

A. Existing articles

1. ARTICLE 37. *LEX SPECIALIS*

415. Article 37 as adopted on first reading is headed "*lex specialis*". It provides:

> The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

416. The very brief commentary to article 37 stresses "the *residual* character of the provisions of part 2", and notes that, either in the instrument creating the primary obligation in question or otherwise, States may "determine the legal consequences, as between them, of the internationally wrongful act involved".[830] The only limitation upon this freedom, according to the commentary, is that States may not, even

> *inter se*, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security.[831]

417. Government comments on draft article 37 have supported the principle;[832] indeed a number of Governments have suggested that it should apply generally to the draft articles.[833] The Czech Republic raises the relationship between the provisions of article 37 and "crimes" as dealt with in article 19, suggesting that it would be useful to review the wording of draft article 37 "with a view to making it clearer that the provisions of part two, when they deal with the regime applicable to 'crimes', are no longer simply residual in character".[834] It points out that if "'crimes' consist of breaches of peremptory rules" of *jus cogens*, "the secondary rules applicable to them must also be peremptory in nature, with no possibility of derogating from them by means of an agreement *inter partes*".[835]

418. Switzerland raises the relationship between draft article 37 and article 60 of the 1969 and 1986 Vienna Conventions, noting that on the current wording of article 37, the termination of a treaty in accordance with these provisions "could be considered as precluding all other consequences, namely, those deriving from the draft articles on State responsibility".[836] It suggests that this situation should be clarified and that a reservation concerning article 60 of the Vienna Conventions might be appropriate.[837]

419. As to the location of the draft article, Japan suggests that it should be placed in part one, chapter I, of the draft.[838] France, on the other hand, considers that the draft article could be included in either the introductory or final provisions of the draft articles as, along with articles 38 and 39, it deals "with the relationship between the draft articles and external rules, and emphasize[s] the supplementary nature of [the] text".[839]

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[830] *Yearbook … 1983*, vol. II (Part Two), commentary to article 2 [present art. 37], p. 42–43, para. (1). No examples are given.

[831] Ibid., p. 43, para. (2).

[832] See the discussion held in the Sixth Committee in which "the remark was made that the draft should continue to respect *lex specialis*" (A/CN.4/496 (footnote 3 above), p. 20, para. 127). The Sixth Committee has noted that specific treaty regimes providing their own framework for the responsibility of States would ordinarily prevail over the provisions of the draft articles (regardless of their eventual form) (ibid.). Likewise, at its fifty-fourth session it was noted that the draft articles "would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade, which had been developed in recent years" (A/CN.4/504 (footnote 3 above), p. 9, para. 15).

[833] See comments by Germany (*Yearbook … 1998* (footnote 35 above), p. 102), the United States (ibid., p. 133), the United Kingdom (ibid., p. 100) and Japan ("the precedence given to the *lex specialis* rule certainly cannot be unique to part two, but may also be relevant to part three or even part one" (*Yearbook … 1999* (footnote 43 above), p. 107). See also the observation made in the Sixth Committee that "the Commission should draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle" (A/CN.4/496 (footnote 3 above), p. 20, para. 127).

[834] *Yearbook … 1998* (see footnote 35 above), p. 137.

[835] Ibid.

[836] Ibid.

[837] The discussion in the Sixth Committee also stressed the importance of respecting the "parellelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention" (A/CN.4/496 (footnote 3 above), p. 20, para. 127).

[838] *Yearbook … 1999* (see footnote 43 above), p. 107.

[839] *Yearbook … 1998* (see footnote 35 above), p. 137.

420. States often make specific provision for the legal consequences of breaches of particular rules. The question then is whether those consequences are exclusive, in other words, whether the consequences which would otherwise apply under general international law are thereby excluded. This is always a question of interpretation in each case, which no provision such as article 37 can prejudge. In some cases it will be clear from the language of a treaty or other text that only the consequences specified flow. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO dispute settlement mechanism as it relates to remedies.[840] An example of the latter is article 41 (formerly 50) of the European Convention on Human Rights.[841] Both concern matters dealt with in part two of the draft articles, but the same considerations apply, in principle, to part one. Thus a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produced different consequences than would otherwise flow from the rules of attribution in part one, chapter II.[842]

421. The Special Rapporteur agrees with the view that article 37 should apply generally to the draft articles, and that it should accordingly be placed in part four. A version of article 37, leaving open the question of interpretation, is accordingly proposed.[843]

2. Article 39. Relationship to the Charter of the United Nations

422. Article 39 provides as follows:

> The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

423. Government comments on draft article 39 have been somewhat mixed. A number of States seem to view as unproblematic the precedence given by the draft article to the mechanism of the Charter of the United Nations for the maintenance of international peace and security over the provisions of part two of the draft articles.[844] The United States, for instance,

> agrees with the objective of the draft article in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an act of a State, properly undertaken pursuant to a Chapter VII decision of the Council, cannot be characterized as an internationally wrongful act.[845]

In its view, Article 103

> not only establishes the pre-eminence of the Charter, but [sic] it makes clear that subsequent agreements may not impose contradictory obligations on States. Thus, the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security.[846]

424. France, on the other hand, is concerned that draft article 39 "appears to run counter to Article 103 of the Charter of the United Nations, which makes no distinction between the provisions of the Charter"[847] and suggests that such a provision would "have the effect of restricting the prerogatives of the Security Council". France considers that it would "be preferable to state that the provisions of the draft articles do not impair the provisions and procedures of the Charter, in accordance with Article 103 thereof",[848] and proposes reformulation of the article as follows: "The provisions of the present articles are without prejudice to the provisions and procedures of the Charter of the United Nations, pursuant to Article 103 thereof."[849] The United Kingdom, though it supports the principle of pre-eminence of the Charter reflected in Article 103 and draft article 39, opposes addressing the question of the relationship between the rights and obligations of States under the law of State responsibility and under the Charter in the draft articles. In its view, this "question raises complex issues, which concern not only the United Nations but also other international and regional organizations which may be acting in conjunction with the United Nations or in roles assigned to them under the Charter".[850]

425. As to the location of the draft article, France believes that it could be included in the final or introductory provisions of the draft articles.[851] Japan is in favour of placing the article in part one, chapter I, "[a]s article 39 is related to the draft articles as a whole".[852]

426. The Special Rapporteur agrees in principle with this view, although having regard to the content of part one, chapter I, article 39 is better placed in part four. He also agrees that there is no need to single out those provisions of the Charter of the United Nations relating to the maintenance of international peace and security, or to use the qualifying phrase "where appropriate", which is suggestive but lacks meaning.[853] Article 103 of the

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[840] See paragraph 157 and footnote 319 above.

[841] See paragraph 156 and footnote 312 above.

[842] Cf. "federal" clauses in treaties, allowing certain component units of the State to be excluded from the scope of the treaty (e.g. the Convention on the settlement of investment disputes between States and nationals of other States, arts. 70 and 72), or limiting obligations with respect to such units (e.g. the Convention for the protection of the world cultural and natural heritage, art. 34).

[843] See paragraph 429 below.

[844] See the comments of the Czech Republic (discussing responses to "international crimes" and noting that "in the field of the maintenance of international peace and security ... there is in fact already a specific mechanism, which is appropriately covered by draft article 39" (*Yearbook … 1998* (footnote 35 above), p. 137); Mongolia (emphasizing that the text "should take into full account the current situation concerning the measures which the United Nations is taking under Chapter VII of the Charter" (ibid.)); and Japan ("It is evident that under such provisions as Article 103 of the Charter of the United Nations and article 39 of the draft articles, the Charter has precedence over the draft articles" (*Yearbook … 1999* (footnote 43 above), p. 108).

[845] *Yearbook … 1998* (see footnote 35 above), p. 138.

[846] Ibid. The United States further notes that "State responsibility principles may inform the [Security] Council's decision-making, but the draft articles would not govern its decisions".

[847] Ibid., p. 137.

[848] Ibid.

[849] Ibid.

[850] Ibid., p. 138.

[851] Ibid., p. 137.

[852] *Yearbook … 1999* (footnote 43 above), p. 108.

[853] The language of article 39 adopted on first reading is strongly criticized by Arangio-Ruiz, "Article 39 of the ILC first-reading draft articles on State responsibility". He proposes either the deletion of article 39 altogether, or a provision which does not go "further than Article 103 of the Charter in a way which may lead to distortions of the régime of State responsibility" (p. 751). For the reasons given in the text the present Special Rapporteur proposes a simple savings clause relating to article 39, and is therefore consistent with the latter alternative.

Charter is comprehensive and categorical: its effect, whatever it may be, can be reserved in a simple provision.[854]

B. Proposed additions to part four

427. It has become usual for texts proposed by the Commission (whether for adoption in treaty form or otherwise) to contain a range of savings and other general clauses. These are intended to delimit the scope of the text and to preserve cognate legal questions. A conspicuous example is the 1969 Vienna Convention, which reserves cases of State succession, State responsibility and the outbreak of hostilities (art. 73) as well as the case of an aggressor State (art. 75). Any function the latter article may play is performed here by article 39, and it does not seem necessary to refer to questions of State succession in the draft articles.[855] On the other hand, there has been uncertainty and confusion over the relations between suspension or termination of treaties and the non-performance of treaty obligations by way, for example, of countermeasures. It seems appropriate that the draft articles return the compliment of article 73 of the Vienna Convention and expressly reserve any question as to the validity, suspension, termination or content of a treaty.[856] Indeed it might be asked whether the same should not be said about the content and applicability to a State of any rule of substantive customary international law, i.e. any rule specifying the content of an international obligation. To assist discussion, such a proposal is made below.

428. Other possible savings clauses include the following:

(a) *Reservation for responsibility of or for acts of international organizations*. This has already been proposed and was provisionally agreed by the Commission at its fiftieth session in 1998;[857]

(b) *Cases of diplomatic protection.* By contrast the relation between the draft articles and the Commission's project on diplomatic protection cannot be expressed in terms of exclusion. The draft articles cover cases of State responsibility in the field of diplomatic protection, as well as in the field of direct State-to-State injury, and this is so even though the secondary rules in the field of diplomatic protection will be specified in more detail in the course of the Commission's work on that topic. There seems no need to spell this out in the text; it can be made clear in the commentary;

(c) *Issues of invalidity and non-recognition.* Questions of fundamental validity of State acts fall outside the scope of the draft articles, even though they may be, in some cases at least, consequential upon internationally unlawful conduct. Correlatively so do general questions of non-recognition, which concern issues either of fundamental validity or of State policy, as the case may be. Again, however, there seems no need to spell this out in the text as distinct from the commentary;

(d) *Non-retroactivity of the draft articles.* Treaty texts based on the Commission's work often provide that they do not apply, as such, to events occurring prior to their entry into force, but without prejudice to the possible effect of any rule embodied in the treaty which reflects general international law.[858] Since no decision has yet been taken as to the possible form of the draft articles, it seems unnecessary to consider such a clause at this stage;

(e) *Definition clauses*. The draft articles have adopted a strategy of defining terms as required for particular purposes in particular articles. No separate definition clause seems to be required.

C. Summary of conclusions as to part four

429. For these reasons, the Special Rapporteur proposes that the text of part four should read as follows:

"PART FOUR

"GENERAL PROVISIONS

"Article 37. Special provisions made by other applicable rules

"The provisions of these articles do not apply where and to the extent that the conditions for or the legal consequences of an internationally wrongful act of a State have been exclusively determined by other rules of international law relating to that act.

"Article A. Responsibility of or for the conduct of an international organization

"These articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

"Article B. Rules determining the content of any international obligation

"These articles are without prejudice to any question as to the existence or content of any international obligation of a State, the breach of which may give rise to State responsibility.

"Article 39. Relationship to the Charter of the United Nations

"The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to Article 103 of the Charter of the United Nations."

[854] See paragraph 429 below.

[855] It is controversial in what circumstances there can be succession to State responsibility. The draft articles do not address that issue, which is an aspect of the law of succession rather than of responsibility.

[856] Cf. the proposal of Switzerland (para. 418 above).

[857] *Yearbook ... 1998*, vol. II (Part Two), p. 85, para. 424.

[858] See, for example, the 1969 Vienna Convention, art. 4. But there is no equivalent in the Vienna Convention on Diplomatic Relations nor in the Vienna Convention on Consular Relations.