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1992

Volume II
Part One

Documents of the forty-fourth session

UNITED NATIONS



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NOTE

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The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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ABBREVIATIONS

CSCE	Conference on Security and Cooperation in Europe
ECE	Economic Commission for Europe
EEC	European Economic Communities
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILA	International Law Association
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme

*

* *

AJIL	<i>American Journal of International Law</i>
“Chronique. . .”	“Chronique des faits internationaux”, RGDIP
<i>Collected Courses. . .</i>	<i>Collected Courses of The Hague Academy of International Law</i>
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>Keesing’s. . .</i>	<i>Keesing’s Contemporary Archives</i> (up to vol. 32 (1986)) <i>Keesing’s Record of World Events</i> (from vol. 33 (1987))
<i>La prassi italiana. . .</i>	Società italiana per l’organizzazione internazionale: <i>La prassi italiana di diritto internazionale</i> , Dobbs Ferry, N.Y., Oceana Publications
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40-80: beginning in 1931)
<i>Recueil des cours. . .</i>	<i>Recueil des cours de l’Académie de droit international de La Haye</i>
RGDIP	<i>Revue générale de droit international public</i>
United Nations <i>Historical survey. . .</i>	United Nations, <i>Historical survey of the question of international criminal jurisdiction</i> , memorandum by the Secretary-General (Sales No. 1949.V.8)

*

* *

NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/444 and Add.1-3*

Fourth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

[Original: English]
[12 and 25 May and 1 and 17 June 1992]

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* Incorporating document A/CN.4/444/Add.1/Corr.1.

NOTE

Multilateral instruments cited in the present report

	Source
Conventions on the Pacific Settlement of International Disputes (The Hague, 29 July 1899 and 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd edition (New York, 1918), Oxford University Press, p. 41.
Convention respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	<i>Ibid.</i> , p. 100.
Treaty of Mutual Guarantee (Locarno, 16 October 1925)	League of Nations, <i>Treaty Series</i> , vol. LIV, p. 289.
General Treaty for Renunciation of War as an Instrument of National Policy (Paris, 27 August 1928)	<i>Ibid.</i> , vol. XCIV, p. 59.
General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	<i>Ibid.</i> , vol. XCIII, p. 343.
Anti-War Treaty (Non-Aggression and Conciliation) (Rio de Janeiro, 10 October 1933)	<i>Ibid.</i> , vol. CLXIII, p. 393.
Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, p. 295.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, p. 3.
International Covenant on Civil and Political Rights and Optional Protocol (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.
American Convention on Human Rights (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, p. 123.

WORKS CITED

ANZILOTTI, D.

"La responsabilité internationale des États à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, Nos. 1 and 3 (1906), repr. in Società italiana per l'organizzazione internazionale—consiglio nazionale delle ricerche, *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico*, vol. 1, Padua, CEDAM, 1956.

ARANGIO-RUIZ, G.

"The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Collected Courses of The Hague Academy of International Law, 1972-III*, Leiden, Sijthoff, 1974, vol. 137.

"Human rights and non-intervention in the Helsinki Final Act", *Collected Courses of The Hague Academy of International Law, 1977-IV*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, vol. 157.

"State fault and the forms and degrees of international responsibility: questions of attribution and relevance", *Le droit international au service de la paix, de la justice et du développement : Mélanges Michel Virally*, Paris, Pedone, 1991.

BOISSON DE CHAZOURNES, L.

Les contre-mesures dans les relations internationales économiques (thesis presented to Geneva University in 1990, subsequently published by Pedone, Paris in 1993).

BOWETT, D. W.

Self-defence in International Law, Manchester, Manchester University Press, 1958.

"The use of force for the protection of nationals abroad", *The Current Legal Regulation of the Use of Force*, A. Cassese, ed., Dordrecht, Nijhoff, 1986.

BRIERLY, J.

"Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye*, 1936-IV, Paris, Sirey, 1937, vol. 58.

BROWNLIE, I.

International Law and the Use of Force by States, Oxford, Clarendon Press, 1963.

BRUNS, V.

Fontes Juris Gentium, Berlin, Heymanns, 1932.

BUERGENTHAL, T.

"Codification and implementation of international human rights", *Human Dignity: The Internationalization of Human Rights*, L. Henkin, ed., New York, Aspen Institute for Humanistic Studies, 1979.

BURGERS, J. H. and H. DANIELIUS

The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dordrecht, Martinus Nijhoff Publishers, 1988.

CALVO, C.

Le droit international théorique et pratique, 6th ed. rev. and enl., Paris, Guillaumin, 1888, vol. III.

CARDONA LLORENS, J.

"Interés, interés jurídico y derecho subjetivo en derecho internacional público", *Estudios en recuerdo de la Profesora Sylvia Romeu Alfaro*, Valencia, 1989.

"Deberes jurídicos y responsabilidad internacional" (subsequently published in *Hacia un nuevo orden internacional y europeo, Estudios en Homenaje al Profesor Don Manuel Díez de Velasco*, Madrid, Tecnos, 1993).

CASSESE, A.

Il diritto internazionale nel mondo contemporaneo, Bologna, Il Mulino, 1984.

CHARNEY, J. I.

"Third State remedies in international law", *Michigan Journal of International Law* (Ann Arbor, Mich.), vol. 10, No. 1, Winter 1989.

"Third State remedies for environmental damage to the world's common spaces", *International Responsibility for Environmental Harm*, F. Francioni and T. Scovazzi, eds., London, Graham & Trotman, 1991.

CHARPENTIER, J.

Commentaire du paragraphe 3 de l'Article 2 de la Charte, *La Charte des Nations Unies*, 2nd ed. rev. and enl., J. P. Cot and A. Pellet, eds., Paris, Economica, 1990.

COLBERT, E. S.

Retaliation in International Law, New York, King's Crown Press, 1948.

CONFORTI, B.

Trattato istitutivo della Comunità Europea de Carbone e dell'Acciaio: Commentario, vol. I [Commentary on art. 1], R. Cadre, R. Monaco and R. Trabucchi, eds., Milan, Giuffrè, 1970.

DAVIDSON, S.

Grenada: A Study in Politics and the Limits of International Law, Aldershot, Avebury, 1987.

DE GUTTRY, A.

"Le contromisure adottate nei confronti dell'Argentina da parte delle Comunità Europee e dei terzi Stati ed il problema della loro liceità internazionale", *La questione delle Falkland-Malvinas nel diritto internazionale*, N. Ronzitti, ed., Milan, Giuffrè, 1984.

Le rappresaglie non comportanti la coercizione militare nel diritto internazionale, Milan, Giuffrè, 1985.

DENNIS, W. C.

"The settlement of the Nanking incident", *American Journal of International Law* (Washington, D.C.), vol. 22, No. 3, July 1928.

DINSTEIN, Y.

"The right to life, physical integrity and liberty", *The International Bill of Rights: The Covenant on Civil and Political Rights*, L. Henkin, ed., New York, Columbia University Press, 1981.

DOEHRING, K.

Annuaire de l'Institut de droit international, vol. 60, pt. II, Paris, Pedone, 1983.

DOMINICÉ, C.

"Représailles et droit diplomatique", *Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag*, Bern, 1981.

"Observations sur les droits de l'État victime d'un fait internationallement illicite", *Droit international* 2, Paris, Pedone, 1982.

EL KOUHENE, M.

Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme, Dordrecht, Nijhoff, 1985.

FITZMAURICE, G. G.

"The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours de l'Académie de droit international de La Haye*, 1957-II, Leiden, Sitjhoff, 1958, vol. 92.

FORLATI PICCHIO, M. L.

La sanzione nel diritto internazionale, Padua, CEDAM, 1974.

GAJA, G.

"Jus cogens beyond the Vienna Convention", *Collected Courses of The Hague Academy of International Law*, 1981-III, The Hague, Nijhoff, 1982, vol. 172.

"Obligations erga omnes, international crimes and jus cogens: a tentative analysis of three related concepts", *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, J. Weiler, A. Cassese and M. Spinedi, eds., Berlin-New York, de Gruyter, 1989.

GIANELLI, A.

Adempimenti preventivi al ricorso a misure di reazione all'illecito internazionale, Rome University, 1990.

GOODRICH, L. M., E. HAMBRO and A. P. SIMONS

Charter of the United Nations: Commentary and Documents, 3rd. ed. rev., New York, Columbia University Press, 1969.

HACKWORTH, G. H.

Digest of International Law, Washington, D.C., U.S. Government Printing Office, 1943, vol. VI.

HENKIN, L.

"Human rights and 'domestic jurisdiction'", *Human Rights, International Law and the Helsinki Accord*, T. Buergenthal, ed., Montclair, N.Y., Allanheld, Osmun/Universe Books, 1977.

- HILL, D. J.
 "The Janina-Corfu affair", *American Journal of International Law* (Washington, D.C.), vol. 18, No. 1, January 1924.
- HOJER, O.
Le Pacte de la Société des Nations : Commentaire théorique et pratique, Paris, Spes, 1926.
- HUTCHINSON, D. N.
 "Solidarity and breaches of multilateral treaties", *British Year Book of International Law*, 1988 (Oxford), vol. 59, 1989.
- IPSEN, H. P.
 "Über Supranationalität", *Festschrift für Ulrich Scheuner zum 70. Geburtstag*, Berlin, Duncker & Humblot, 1973.
- JENNINGS, R. Y.
 "The *Caroline* and *McLeod* Cases", *American Journal of International Law* (Washington, D.C.), vol. 32, No. 1, January 1938.
- JUSTE RUIZ, J.
 "Las obligaciones *erga omnes* en derecho internacional público", *Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela*, Madrid, Tecnos, 1979, vol. I.
- KAPTEYN, P. J. G. and P. VERLOREN VAN THEMAAT
Introduction to the Law of the European Communities after the Accession of New Member States, London, Sweet & Maxwell, 1973.
- KELSEN, H.
The Law of the United Nations, London, Stevens, 1950.
- KISS, A.-C.
Répertoire de la pratique française en matière de droit international public, Paris, C.N.R.S., 1962, vol. I; 1969, vol. VI.
- LAMBERTI ZANARDI, P.
La legittima difesa nel diritto internazionale, Milan, Giuffrè, 1972.
- LATTANZI, F.
Garanzie dei diritti dell'uomo nel diritto internazionale generale, Milan, Giuffrè, 1983.
- "Sanzioni internazionali", *Enciclopedia del diritto*, Milan, 1989, vol. XLIII.
- LAUTERPACHT, H.
 "The international protection of human rights", *Recueil des cours de l'Académie de droit international de La Haye, 1947-I*, Paris, Sirey, 1948, vol. 70.
- LILICH, R. B.
 "Civil rights", *Human Rights in International Law*, T. Meron, ed., Oxford, Clarendon Press, 1984.
- MADDREY, W. C.
 "Economic sanctions against South Africa: problems and prospects for enforcement of human rights norms", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 22, No. 2, Winter 1982.
- MARCHESE, A.
La tortura e i trattamenti crudeli, inumani e degradanti nel diritto internazionale, doctoral thesis, European University Institute, Florence, 1991.
- MCDUGAL, M. S. and F. P. FELICIANO
Law and Minimum World Public Order: The Legal Regulation of International Coercion, New Haven and London, Yale University Press, 1961.
- MEDINA QUIROGA, C.
The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System, Dordrecht, Martinus Nijhoff Publishers, 1988.
- MERON, T.
 "On a hierarchy of international human rights", *American Journal of International Law* (Washington, D.C.), vol. 80, No. 1, January 1986.
Human Rights and Humanitarian Norms as Customary Law, Oxford, Clarendon Press, 1989.
- MIGLIAZZA, A.
 "L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme", *Collected Courses of The Hague Academy of International Law, 1972-III*, Leiden, Sijthoff, 1974, vol. 137.
- MONCHARVILLE, M.
 "Le conflit franco-turc de 1901", *Revue générale de droit international public* (Paris), vol. 9, 1902.
- MOORE, J. B.
A Digest of International Law, vols. III, V, VI and VII, Washington, D.C., 1906.
- MORELLI, G.
Nozioni di diritto internazionale, 7th ed., Padua, CEDAM, 1967.
 "A proposito di norme internazionale cogenti", *Rivista di diritto internazionale* (Milan), vol. LI, No. 1, 1968.
- NASH, M. L.
Digest of United States Practice in International Law, 1978, Office of the Legal Adviser, Department of State (Washington, D.C., 1980).
- O'BOYLE, M.
 "Torture and emergency powers under the European Convention on Human Rights: Ireland v. the United Kingdom", *American Journal of International Law* (Washington, D.C.), vol. 71, No. 4, October 1977.
- PALMISANO, G.
La "colpa dello Stato" ai sensi del diritto internazionale: problemi preliminari allo studio della colpa nella responsabilità internazionale, doctoral thesis, Milan University, 1992.
- PANZERA, A. F.
 "Raids e protezione dei cittadini all'estero", *Rivista di diritto internazionale* (Milan), vol. LXI, No. 4, 1978.
- PESCATORE, P.
L'ordre juridique des Communautés européennes : Étude des sources du droit communautaire, Liège, Presses universitaires de Liège, 1975.
 "Aspects judiciaires de l'acquis communautaire", *Revue trimestrielle de droit européen* (Paris), vol. 17, No. 4 (October-December 1981).
- PICONE, P.
 "Obblighi reciproci ed obblighi *erga omnes* degli Stati nel campo della protezione internazionale dell'ambiente marino", *Diritto internazionale e protezione dell'ambiente marino, Studi e documenti sul diritto internazionale del mare*, vol. 12, V. Starace, ed., Milan, Giuffrè, 1983.

PILLITU

Lo stato di necessità nel diritto internazionale, Perugia, 1981.

POLITIS, N.

"Les représailles entre États membres de la Société des Nations", *Revue générale de droit international public* (Paris), vol. 31, 1924.

RAMCHARAN, B. G.

"State responsibility in respect of violation of treaty rules in general, and of those creating an 'objective regime' in particular: specific features with regard to the 'first, second and third parameters'", *Indian Journal of International Law*, vol. 26, Nos. 1 and 2, January-June 1986.

REUTER, P. and J. COMBACAU

Institutions et relations internationales, 3rd rev. ed., Paris, Presses universitaires de France, 1985.

RÖLING, B. V. A.

"Aspects of the case concerning United States diplomats and consular staff in Tehran", *Netherlands Yearbook of International Law* (Alphen aan den Rijn), vol. XI, 1980.

RONZITTI, N.

Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity, Dordrecht, Nijhoff, 1985.

ROSENSTOCK, R.

"The Declaration of Principles of International Law concerning Friendly Relations: a survey", *American Journal of International Law* (Washington, D.C.), vol. 65, No. 5, October 1971.

ROSS, A.

A Textbook of International Law, London, Longmans, Green, 1947.

ROSTOW, E. V.

"The politics of force: analysis and prognosis", *The Year Book of World Affairs*, 1982, London, Stevens, 1982.

ROUSSEAU, C.

Droit international public, rev. ed., Paris, Sirey, 1980, vol. IV.

SACHARIEW, K.

"State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review* (Dordrecht), vol. XXXV, No. 3, 1988.

SCHWARZE, J.

"Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen", *Europarecht* (Baden-Baden), vol. 18, No. 1, January-March 1983.

SCHWEISFURTH, T.

"Operations to rescue nationals in third States involving the use of force in relation to the protection of human rights", *German Yearbook of International Law* (Berlin), vol. 23, 1980.

SICILIANOS, L.-A.

Les réactions décentralisées à l'illicite : Des contre-mesures à la légitime défense, Paris, Librairie générale de droit et de jurisprudence, 1990.

SIEGHART, P.

The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights, Oxford, Oxford University Press, 1985.

SIMMA, B.

"Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 20, 1970.

"Self-contained regimes", *Netherlands Yearbook of International Law* (The Hague), vol. XVI, 1985.

"Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Martinus Nijhoff Publishers, 1989.

SØRENSEN, M.

"Eigene Rechtsordnungen—Skizze zu einigen systemanalytischen Betrachtungen über ein Problem der internationalen Organisation", *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift zum 70. Geburtstag von Hans Kutscher*, Baden-Baden, Nomos, 1981.

SPERDUTI, G.

"Les obligations solidaires en droit international", *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague, Martinus Nijhoff Publishers, 1984.

SPINEDI, M.

"Les conséquences juridiques d'un fait internationalement illicite causant un dommage à l'environnement", *International Responsibility for Environmental Harm*, F. Francioni and T. Scovazzi, eds., London, Graham & Trotman, 1991.

STONE, J.

Aggression and World Order: A Critique of United Nations Theories of Aggression, London, Stevens, 1958.

STRUPP, K.

"L'incident de Janina entre la Grèce et l'Italie", *Revue générale de droit international public* (Paris), vol. 31, 1924.

TAOKA, R.

The Right of Self-defence in International Law, Osaka, Osaka University of Economics and Law, 1978.

THOMAS, A. J., Jr. and A. VAN WYNEN THOMAS

The Dominican Republic Crisis 1965: Background Paper and Proceedings of the Ninth Hammarškjöld Forum, Dobbs Ferry, N.Y., Oceana Publications, 1967.

TOMUSCHAT, C.

"Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen", *Vereinte Nationen* (Bonn), vol. 26, 1978.

VISSCHER, C. DE

"L'interprétation du Pacte au lendemain du différend italo-grec", *Revue de droit international et de législation comparée* (The Hague and Paris), 3rd series, vol. V, 1924.

WALDOCK, C. H.

"The regulation of the use of force by individual States in international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1952-II, Paris, Sirey, 1953, vol. 81.

WESTLAKE, J.

International Law, 2nd ed., Cambridge, University Press, 1910, part I.

WHARTON, F.

A Digest of the International Law of the United States, 2nd ed., Washington, D.C., U.S. Government Printing Office, 1887, vols. II and III.

WHITE, G.

"Legal consequences of wrongful acts in international economic law", *Netherlands Yearbook of International Law* (The Hague), vol. XVI, 1985.

WHITEMAN, M. M.

Digest of International Law, Washington, D.C., U.S. Government Printing Office, vol. 8, 1967; vol. 12, 1971.

WRIGHT, Q.

"The meaning of the Pact of Paris", *American Journal of International Law* (Washington, D.C.), vol. 27, No. 1, January 1933.

ŽOUREK, J.

L'interdiction de l'emploi de la force en droit international, Leiden, Sijthoff, 1974.

"La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international*, 1975 (Basel), vol. 56.

Introduction

1. The object of the present document is to submit solutions and draft articles on the various aspects of the legal regime of countermeasures as identified and illustrated in the previous (third) report of the Special Rapporteur on State responsibility.¹ As foreseen in that report, the solutions and draft articles proposed are based on the further study of practice and of the literature.

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

CHAPTER I

Conditions and functions of countermeasures

A. Existence of an internationally wrongful act as a basic condition

2. As explained in the third report,² the most basic requirement for lawful resort to any countermeasure is the existence of an internationally wrongful act which infringes a right of the State taking the countermeasure. Subject to any relevant provisions of existing dispute settlement instruments (see chapter II below, especially paras. 16-26), this does not mean that the existence of such an act and the allegedly injured State's right to take countermeasures have to have been the subject of a prior determination by an arbitral or judicial procedure or of action by a political or fact-finding body. Nor does it mean that there has to have been prior agreement between the allegedly injured State and the alleged wrongdoing State as to the existence of an internationally wrongful act. On the other hand, it would not be sufficient for the allegedly injured State to believe in good faith that an internationally wrongful act has been committed in violation of its right. Any State resorting to countermeasures on the basis of any such presumption of wrongfulness of the other party's conduct will do so at its own risk. The allegedly injured State would run the risk of being held responsible for an internationally wrongful act if the alleged prior violation proved not to have occurred or not to be in violation of its right. All

that can be said in such a case is that the good faith or excusable error of an allegedly injured State which had resorted to countermeasures in the absence of any prior internationally wrongful act would obviously be relevant in evaluating the extent of its responsibility.

B. The function of countermeasures

3. A further point to be considered is the function which general international law assigns, and which the Commission's draft articles should assign, to countermeasures.³ The study of international practice seems to indicate that in resorting to countermeasures injured States affirm that they are seeking and, indeed appear to seek, cessation of the wrongful conduct (in the case of a wrongful act having a continuing character) and/or reparation in a broad sense (possibly inclusive of satisfaction) and/or guarantees of non-repetition.⁴ In other words, the function of countermeasures would not go beyond the pursuit by the injured State either of cessation of the wrongful conduct and guarantees of non-repetition in the interest of the protection of the so-called primary legal relationship, or of *naturalis restitutio*, pecuniary compensation, and the various forms of satisfaction in order to erase the injurious consequences—material or

³ *Ibid.*, pp. 16-17, paras. 39-45.

⁴ The international practice referred to here will be considered throughout the present report.

² *Ibid.*, p. 14, paras. 37-38.

moral—of the infringement of that relationship. As no other aims may lawfully be pursued, any countermeasure designed to go beyond those aims would, in turn, constitute an unlawful act, according to international practice. This is presumably the point that the Institute of International Law intended to make when it emphasized, in article 6, paragraph 5, of its well-known 1934 resolution on reprisals, that an injured State should not *détourner les représailles du but qui en a déterminé initialement l'usage* [deflect reprisals from the original purpose for which they were intended].⁵ It would notably follow from this that in no case could the taking of countermeasures in the form of actions or omissions by an injured State in order to inflict punishment upon the State which committed the internationally wrongful act be lawful. The only lawful punishment that could be inflicted on the latter State would be the material or moral damage deriving either from the injured State's reaction and its coercive effects with regard to cessation or reparation or, possibly, from the self-inflicted harm it incurs in giving satisfaction and guarantees of non-repetition under pressure of the injured State's reaction.

4. It is difficult to express an opinion on the question whether (and possibly to what extent) the above description correctly reflects the state of general international law on this point, or, for that matter, to determine whether the state of the law is satisfactory. It is easy to presume, of course, that any State resorting to countermeasures against a wrongdoing State does not do so without some measure of punitive intent. In most cases such an intent will be so totally subsumed by the intent to seek cessation/reparation that it will not overstep the bounds of perceptible legal relevance. The situation may well appear to be different in cases where the main concern of the injured State is to seek satisfaction and/or guarantees of non-repetition. An intent to chastise may in such cases become more pronounced and, although satisfaction will be a self-inflicted penalty, the harm inflicted by the countermeasure designed to obtain satisfaction will come close to being a penalty inflicted by the injured State.⁶ Another hypothesis is that of a countermeasure taken by one State against another in a situation where no cessation or reparation is sought or possible and the only conceivable function of the reaction is chastisement. In considering international practice it has only been possible to identify a few cases which seem to reveal an explicit punitive intent.⁷ It should be noted, however, that more numerous and more signifi-

cant cases of punitive measures would presumably emerge from the study of practice concerning those types of internationally wrongful acts that draft article 19⁸ places in the fairly clearly defined separate category of international crimes of States. More generally, the cases where a punitive intent may be more apparent are possibly those where the internationally wrongful act is characterized, if not by *dolus*, then by a high degree of fault.⁹ Be that as it may, even if it were found that a punitive intent frequently underlies the decision of injured States to resort to countermeasures, it would be very difficult to conceive of the presence of such an intent as more than a *factual characterization* of the function of countermeasures. As a matter of law—whether *lex lata* or *lex ferenda*—it would not seem appropriate to provide for any permissive rule within the framework of the draft articles on State responsibility to cover such a hypothesis. It is felt that to lay down a rule with the explicit intent of prohibiting any punitive function of countermeasures would be equally inappropriate. The principle of proportionality and the other limitations placed on the injured State's *faculté* of reprisal should be adequate to prohibit any qualitative or quantitative over-reaction on the part of the injured State.

Iranian occupation of three Persian Gulf islands (see De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*, pp. 83-89). A similar function seems to have been attributed by Indonesia to the seizure of Dutch property by way of reaction to the alleged violation by the Netherlands of the "Round-table Conference" agreements concerning the future status of West Irian. The Indonesian Government declared in fact at the United Nations General Assembly on 29 September 1958 that the measures had been adopted because, "being denied the opportunity to negotiate our differences with the Dutch, we are compelled to take other measures short of war" (*Official Records of the General Assembly, Thirteenth Session, Plenary Meetings*, 762nd meeting, para. 83). The Indonesian President himself asserted in connection with the same matter:

"While the Dutch attitude in the case of West Irian is still stubborn, I sound [a] warning that, if, in the question of West Irian, the Dutch remain stubborn, if, in the question of our national claim, they remain headstrong, then all the Dutch capital, including that in mixed enterprises, will bring its story to a close on Indonesian soil." (Speech by the President of the Republic of Indonesia, 17 August 1959, cited in the Netherlands note regarding nationalization of Dutch-owned enterprises of 18 December 1959. Extracts in English in AJIL, vol. 54, No. 2 (April 1960), p. 486.)

A "punitive" aim—that is to say, the mere condemnation of the wrongful act—seems at times to characterize some of the measures taken by States against serious violations of human rights. Subject to further analysis of cases of this kind in due course (namely in connection with international crimes of States), suffice it to recall, for the time being, the measures taken by France against the Central African Empire in May 1979 following the killing of 85 young people by Emperor Bokassa's personal guard ("Chronique . . .", RGDIP (1980), pp. 361 *et seq.*); by the United States of America against China in June 1989 following the Tien An Men incidents (*ibid.* (1990), p. 484); and by Belgium against Zaire in May 1990 following the murder of about 50 students by President Mobutu's personal guard (*ibid.*, p. 1051).

⁸ For the text of articles 1-35 of part I of the draft adopted by the Commission on first reading, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30-34.

⁹ On the impact of fault on the degree of gravity of an internationally wrongful act, see *Yearbook . . . 1989*, vol. II (Part One), pp. 47-55. document A/CN.4/425 and Add.1, paras. 164-190, and Arangio-Ruiz, "State fault and the forms and degrees of international responsibility: questions of attribution and relevance", *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally*, pp. 25 *et seq.* For further developments, particularly with regard to the importance of fault to the characterization of international crimes of States, see Palmisano, *La "colpa dello Stato" ai sensi del diritto internazionale: problemi preliminari allo studio della colpa nella responsabilità internazionale*, chapter XII.

⁵ "Régime des représailles en temps de paix", *Annuaire de l'Institut de droit international*, 1934, p. 710.

⁶ As clearly explained by Morelli:

"The analogy with penalty in municipal law is, in the case of reprisals, stricter than in the case of satisfaction. Indeed, while the latter . . . consists of conduct of the law-breaking State itself, such conduct being the object of an obligation of the said State, reprisal, like penalty, constitutes harm lawfully inflicted on the law-breaking State by another State." (*Nozioni di diritto internazionale*, p. 363 (Trans. by the Special Rapporteur).)

⁷ A "punitive" element seems to characterize, for example, some cases of expropriation of foreign property. One such case was the Cuban expropriation of United States property following the cutback in Cuban sugar import quotas by the United States of America (Whiteman, *Digest of International Law*, vol. 8, pp. 1041-45; *Keesing's . . . 1959-1960*, vol. XII, pp. 16902, 17538, 17542, 17591, and 17787). Another case was the Libyan expropriation of British assets following the allegedly wrongful toleration by the United Kingdom of the

5. In a different sense the function of countermeasures is of relevance to interim measures of protection. As will be shown in the following chapter, resort to such measures may be lawful—subject to limitations—*before* any settlement procedure has been initiated and even in the course of such a procedure.¹⁰ This is the position of the former Special Rapporteur, Willem Riphagen.¹¹ In accepting such a position, however, the present writer dissociates himself from the position of those writers who believe that interim measures of protection are characterized by the *subjective* aim of the State resorting thereto, either to avoid prejudging the possibility of reparation or to induce the other party to submit to a dispute settlement procedure to which it may be committed.¹² Rather, the measures in question—and the special regime to be envisaged for them even in the presence of third-party settlement procedures—are more precisely characterized by the protective function they *objectively* perform within the framework of the relevant settlement procedure. Thus, they will presumably consist of reversible measures, mostly economic in character, and such as to ensure that the injured State receives an amount not exceeding that of the compensation it may claim through the relevant settlement procedure.

C. Protest, intimation, *sommation* and/or demand for cessation and reparation

6. Although scholars generally seem to be inclined to accept the notion that under existing law countermeasures ought in principle to be preceded by some form of protest, intimation, claim, or *sommation*,¹³ they remain exceedingly vague when it comes to both the identification of such requirements and the conditions under which they may vary or be dispensed with.¹⁴ As stated earlier, the indications in the literature concerning the impact of the nature either of the wrongful act or of the measures envisaged need to be tested by further analysis of State practice in order to obtain a more accurate picture.¹⁵

7. Nineteenth century practice concerns mainly those military countermeasures which, while admittedly extreme, were not at that time prohibited by law. The very seriousness of such measures (combined with the fact that they were frequently subject to constitutional requirements within the municipal law of the acting State) forced Governments to exercise some degree of caution.¹⁶ This explains in part the particular care taken by

Governments to emphasize that they had only resorted to force following an unsuccessful demand for cessation and/or reparation.¹⁷ The same practice reveals that a pro-

“... if, when a wrong is committed, retaliation is immediately resorted to by the injured party, the door of pacific adjustment is closed and the means of conciliation are precluded” (Wharton, *A Digest of the International Law of the United States*, vol. III, p. 72).

In 1862, the United States Secretary of State, Seward, declared that the United States would not use armed reprisals in order to obtain damages due for tort to a citizen of the United States by a foreign nation “unless no other mode of prosecution remains” (*ibid.*, p. 100).

In 1883, during a parliamentary debate, the Italian Foreign Minister, Pasquale Stanislao Mancini, stated that reprisals in general constituted “... the last resort that international law allows States, and even a civilized Government is at times constrained to resort to them, but only after having exhausted all the peaceful and amicable means at its disposal” (*La prassi italiana* ..., 1st series (1861-1887), vol. II, p. 905).

¹⁷ It must be noted, however, that the cases in question are examples of so-called gunboat diplomacy. To mention them here does not mean either that such a practice is considered to be a legally admissible countermeasure, or, in particular, that the actions of the allegedly injured States may be assumed to have followed an actual internationally wrongful act. These cases are recalled simply in order to stress that, even where there was resort to this reprehensible policy, the allegedly injured States felt that they could not dispense with the requirement of a prior demand for cessation or reparation and with *sommation*.

In the “*Water Witch*” case (1855-1859) the United States of America demanded reparation from Paraguay for having opened fire on a United States warship, killing a sailor. The United States Congress, at President Buchanan’s request, authorized him “to adopt such measures and use such force as, in his judgment, may be necessary and advisable, in the event of a refusal of just satisfaction by the Government of Paraguay”. The United States envoy in charge of presenting the demand for reparation was escorted by a naval force, and this circumstance persuaded Paraguay to satisfy the United States demands in very short order (Wharton, *op. cit.*, vol. III, pp. 113-114).

In 1861, the United Kingdom demanded reparation from Brazil for the looting of a British ship, the “*Prince of Wales*”, off the Brazilian coast, and for the offences suffered by three British officers. Following Brazil’s refusal to satisfy the requests, the United Kingdom blockaded the port of Rio de Janeiro and confiscated five Brazilian ships. Brazil, while not accepting the British authorities’ version of the facts, made reparation for the damage (Moore, *A Digest of International Law*, vol. VII, pp. 137-138).

In 1865, following an attack on Italian fishermen off the coast of Tunisia, the Italian consul presented a request for reparation to the Tunisian Government. That Government refused, stating that the fishermen who had been the victims of the attack were to be considered responsible. After having insisted upon his request to no avail, the consul arranged for a frigate to be sent in his support. At that point, the Tunisian authorities proceeded to satisfy the Italian requests. (*La prassi italiana* ... (see footnote 16 above), p. 894).

In 1902, Venezuelan authorities arrested seven French nationals who had refused to pay customs duties which they had previously paid to a different revolutionary faction. The commander of a French warship intimated that the local Government should release the French nationals who had been arrested. Following the authorities’ refusal, the commander stopped a Venezuelan warship, and, while keeping it under fire, renewed his request. The French nationals were released very shortly afterwards (“*Chronique* ...”, RGDIP (1902), pp. 628-629).

In 1914, Mexican soldiers arrested an officer and two United States sailors while they were anchoring their ship in the port of Tampico. Notwithstanding the immediate reversal of the steps taken and the apologies offered to the United States of America by General Huerta, the then Head of State, the United States additionally required a salute to the flag accompanied by a volley of cannon shots. Huerta refused, considering the requests to be excessive. The United States Congress authorized the President to employ the armed forces “... to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States”. As a consequence, United States forces took over Vera Cruz (“*Mediation in Mexico*” (editorial comment), AJIL, vol. 8 (1914), pp. 582-585). The armed actions by the United States were followed by a long interruption of diplomatic relations between the two countries. The situation improved as a result of the mediation of certain Latin American countries (*ibid.*).

¹⁰ See paras. 41 and 48 below, and proposed draft article 12, paragraphs 2 (b) and (c), as set out in para. 52 below.

¹¹ See sixth report (*Yearbook* ... 1985, vol. II (Part One), pp. 11-12, document A/CN.4/389), draft article 10, paragraphs 2 (a) and (b) and commentary thereto.

¹² *Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), paras. 56-57.

¹³ *Ibid.*, paras. 46-49.

¹⁴ *Ibid.*, para. 50. An interesting study by Gianelli, entitled *Adempimenti preventivi al ricorso a misure di reazione all'illecito internazionale*, has recently been presented as a doctoral thesis at Rome University.

¹⁵ *Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), para. 51.

¹⁶ For instance, it may be recalled that, in 1807, the British envoy to the United States of America for the “*Chesapeake*” case stated, in general terms, that

test or intimation also precedes such temporary forcible measures as the seizure of vessels or customs buildings by the allegedly injured State by way of an interim or provisional measure against unlawful conduct that has taken or is continuing to take place.¹⁸

8. Even as regards non-forcible measures, nineteenth century cases may be recalled in which an injured State resorted to countermeasures only after its repeated demands for reparation from the allegedly wrongdoing State had been unsuccessful.¹⁹ Reiteration of the demand indicates that a minimum requirement of prior intimation was met.

9. It appears that a protest or intimation was dispensed with in a number of instances of resort to force in order to protect nationals in danger on foreign soil.²⁰ Although

¹⁸ In 1840, within the context of the dispute between the United Kingdom and the Kingdom of the Two Sicilies over the exploitation of Sicilian sulphur mines, it was *only after long and repeated exchanges* between the two Governments and the expiry of a deadline that the United Kingdom proceeded to seize Neapolitan ships at anchor in Malta. The seizure was to be maintained until the British claim was met (Moore, op. cit., p. 132).

In 1901, in response to a number of unlawful acts committed against French nationals and companies in the Ottoman Empire, the French Government decided to seize the Mitilini customs office only *after a protracted period of reiterated demands to obtain reparation and following a precise intimation that in the event of any further refusals or fins de non recevoir France would resort to forcible measures*. The seizure was maintained until the Ottoman Government had met the French demands. In its official declaration, the French Government explained that it had decided to *saisir la douane de Mytilène, de l'administrer et d'en retenir les produits nets jusqu'au jour où le gouvernement du Sultan nous aura accordé toutes les satisfactions devenues nécessaires* (Moncharville, "Le conflit franco-turc de 1901", RGDIP (1902), p. 692).

In 1906, following the murder of an Italian soldier guarding a polling station on the island of Crete, the Italian Government claimed from the local Government, *inter alia*, compensation for the damage suffered. The Government responsible refused. The Italian consul arranged for the seizure of some customs posts with a view to securing direct compensation, but only after the original demand for compensation had been followed by a *fruitless intimation (sommation)* on his part. The seizures were revoked as soon as the local Government had complied with the demand for compensation. (*La prassi italiana* . . . , 2nd series (1887-1918), vol. III, pp. 1703-1704.)

¹⁹ In 1855, it was only after formal protests and after the Chinese authorities had admitted a breach but refused to make good the injury to the United States for the ill-treatment of one of its nationals, that the United States Secretary of State authorized the American Ambassador to withhold any payments due to China up to the amount of the reparation payable. (Wharton, op. cit., vol. II, p. 576).

²⁰ Various of the cases in question concern the United States of America. For example, in 1895, the United States feared that its nationals, missionaries in particular, might be massacred in certain areas of the Ottoman Empire. For this reason the United States Government authorized warships to enter Ottoman territorial waters. The Ottoman Ambassador in Washington asked for an explanation and was told that it was a "long established usage of this Government to send its vessels, in its own discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other Governments . . ." (Moore, op. cit., vol. VI, pp. 342-343).

Other cases concern similar action threatened by Brazil against Uruguay in 1864 (Bruns, *Fontes Juris Gentium*, p. 65) and by Italy against Uruguay in 1875 (*La prassi italiana* . . . , 1st series (see footnote 16 above), vol. II, p. 938). A concerted action by Great Britain, France and Spain against Mexico in 1861 was also motivated by the alleged need to protect nationals in danger (Moore, op. cit., vol. VII, pp. 133-134). Likewise, and probably with more reason, there was the action by various Western Powers which intervened in China at the time of the Boxer uprising in 1891 (*La prassi italiana* . . . , 2nd series (see footnote 18 above), vol. IV, pp. 1782-1783). On this practice see also Gianelli, op. cit., chap. II, No. 6 (b).

it is doubtful whether such cases should be classified under "self-defence", as some scholars maintain,²¹ they are not without interest for the topic: the fact that a protest or an intimation to cease seems to be lacking, may well be justified by the urgency of finding a remedy and the persistence of the injurious conduct. In general, however, the presence of some form of intimation is clearly evident in cases of forcible measures. The awareness on the part of the States taking the action of the legally binding nature of such a requirement is apparently less clear. This uniform pattern, combined with the absence of statements to the contrary, would indicate, nevertheless, that if a customary rule did not yet exist at that time, it was, however, at an advanced stage of development. This is confirmed by later practice.

10. In the twentieth century, the period prior to the Second World War was notorious for attempts to strengthen bilateral and multilateral peaceful settlement obligations.²² It is of interest to note here that, on the one hand, the existence of such obligations subsumes, so to speak, the more basic requirement represented by some form of protest or *sommation* and, on the other hand, that only the latter requirement (unlike that of peaceful settlement obligations) is mandatory under general international law during the period under review. Practice during the period clearly indicates general acceptance of the notion that, under customary international law, an injured State could not lawfully resort to measures without previously making some form of demand for cessation and/or reparation. Indeed, as in the previous century, resort to force was frequently preceded by a demand for reparation and/or cessation. This took place even in the case of the otherwise inexcusably disproportionate measures taken in the Tellini (Janina) case: some aspects of which were referred by the League of Nations to a Committee of Jurists.²³ The binding nature of the requirement had notably been emphasized in the Naulilaa decision,

²¹ See especially Bowett, *Self-Defence in International Law*, pp. 87 *et seq.*; and, for a survey of doctrine on the point, Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, pp. 3 *et seq.* On the legal categorization of this practice, see paras. 14 and 65-68 below.

²² See paras. 25-31 below.

²³ League of Nations, *Official Journal*, 4th year, No. 11 (November 1923), Minutes of the Twenty-sixth Session of the Council (31 August-29 September 1923), pp. 1278 *et seq.* See also Politis, "Les représailles entre États membres de la Société des Nations", RGDIP (1924), pp. 5-16.

Other cases of armed reprisals were the actions taken by France against Germany in 1920-1921. On 2 April 1920, Germany had sent troops into the Ruhr in order to curb disorders in what was a neutral zone. Invoking the neutrality provided for by the Treaty of Versailles, France demanded, to no avail, that the troops should be withdrawn. The French Prime Minister then informed the German Chargé d'affaires that *since the French demand for compliance with the Treaty had been ineffective*, he had ordered the French army to occupy Frankfurt, Hamburg and other German cities. He specified that the occupation *prendra fin aussitôt que les troupes allemandes auront complètement évacué la zone neutre* [will cease as soon as the German troops have been completely withdrawn from the neutral zone] (Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. VI, p. 30). A further French occupation of German cities took place in 1921. The French Premier stated that the measure had been taken after two years of German failure to comply with its obligations under the Treaty of Versailles and after repeated French demands for compliance, including threats of resort to coercive measures. It should be noted that the motivation given by the French

according to which *la représaille n'est licite que lorsqu'elle a été précédée d'une sommation restée infructueuse* [reprisals are lawful only when they have been preceded by a *sommation* that has proved fruitless].²⁴ While rejecting the charge that it had not met that requirement, the accused State did not contest the rule. With regard to the same case, it is also worth noting that the arbitral tribunal stressed in its decision that notification of the injured State's initial reaction should be communicated in an appropriate form to the Government of the State against which measures were to be taken.²⁵ The obligation of the injured State to *[m]ettre au préalable l'État auteur de l'acte illicite en demeure de le faire cesser et d'accorder éventuellement les réparations requises* [first demand cessation by the wrongdoing State and payment of any reparation required] was also stressed by the Institute of International Law in article 6 of its 1934 resolution on reprisals.²⁶ Practice during this period also includes cases of forcible measures of protection of nationals in danger on foreign soil. The fact that an intimation to cease the injurious conduct is not always present,²⁷ would seem to be justified by the urgency of reaction to offences of a serious and continuing character.

11. Having established the state of the law prior to the Second World War and the fact that a prior demand or *sommation* was due at that time as a matter of legal obligation, it is relatively easy to see how the question may stand in law at present. The combined effect of principles such as those embodied in Article 2, paragraphs 3 and 4, of the Charter of the United Nations and of any analogous principles or rules of general international law—not to mention the reiteration and spelling out of

those principles in United Nations resolutions—could not but consolidate the binding force of the requirement for a prior demand for reparation (and *sommation*) as a condition of lawful resort to measures against internationally wrongful acts. This seems to be clearly confirmed by the prevailing practice.

12. It is significant, to take a first set of examples, that even in the cold war period, despite the large number of disputes between States belonging to the rival blocs with regard to violations of their air space, resort to reprisals was almost always avoided. This was precisely because the initial representations, in the form of demands for reparation or satisfaction, were followed by a search for a negotiated or arbitral solution, the pursuit and attainment of which allowed States to avoid resort to unilateral measures.²⁸ It is equally significant that, in the period under review, not only acts of reprisal²⁹ but also acts of retortion by way of reaction to an internationally wrongful act have often been preceded by a demand for reparation.³⁰

13. Further evidence of the belief that a prior *sommation* is required if resort to measures is to be admissible may be found in the official positions taken by States in a number of well-known disputes or situations. For example, in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council*,³¹ while Pakistan complained that the measures taken by India had been put into effect “simultaneously with the demand for compensation”,³² India insisted that since “no positive and satisfactory response was made by the Respondent”, it had felt obliged to adopt the contested measure.³³ In the well-known *Air Service Agreement* case, France, in an attempt to demonstrate the unlawfulness of United States

(Footnote 23 continued.)

Prime Minister indirectly extends to less serious situations not requiring the use of force. According to him, the action was an expression of *un droit qui n'a jamais été contesté, qui a toujours été pratiqué dans tous les pays et qui permet à un créancier non payé d'exercer sur son débiteur de mauvaise foi les coercitions nécessaires* [a right that has never been contested, that has always been exercised in all countries and which enables an unpaid creditor to use the requisite coercion in regard to a debtor who acts in bad faith] (*ibid.*, vol. I, p. 131).

A further confirmation of this principle is to be found in a United States Naval War College textbook of 1938, where it was stated with regard to reprisals in time of peace that “[f]orce is not justified legally unless there has been a *refusal to make redress after due notice*” (*Hackworth, Digest of International Law*, vol. VI, p. 152).

²⁴ *Portuguese Colonies case* (Naulilaa incident), United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1027.

²⁵ *Ibid.*, pp. 1027-1028.

²⁶ See footnote 5 above.

²⁷ For example, in March 1927, during the civil strife in China a United States national was killed in Nanking, another wounded, and the United States consulate attacked. United States troops, who were on board ships anchored in the harbour, immediately intervened and opened fire on the soldiers and on the crowd which, at the same time, was continuing to attack a group of Americans. The American citizens were brought to safety on board the ships. The United States Government later demanded complete reparation and full satisfaction. It should be noted that the Chinese authorities, while accepting the United States Government's demand, requested the Government to apologize for having opened fire. The United States final response was that “its naval vessels had no alternative to the action taken, however deeply it deplores that circumstances beyond its control should have necessitated the adoption of such measures for the protection of the lives of its citizens at Nanking” (Dennis, “The settlement of the Nanking incident”, *AJIL* (1928), pp. 593-599, particularly p. 596). Similar cases are described in Gianelli, *op. cit.*, chap. III, No. 7.

²⁸ On the episodes in question, *ibid.*, chap. IV, sect. II, paras. 9-11 (c).

²⁹ For example, in view of the rough treatment to which Indian residents were being subjected by South Africa, India, following protests and contacts, declared itself authorized to adopt countermeasures and sent South Africa advance notice of the termination of a 1945 trade agreement (*Keesing's ... 1948-1950*, vol. VII, pp. 9859-9860).

³⁰ In 1963, following the nationalization of oil plants belonging to United States companies in Ceylon, the Department of State declared that it would suspend the aid to Ceylon which had already been planned unless “adequate compensation” was paid. The United States did actually suspend such aid for two years (*Keesing's ... 1963-1964*, vol. XIV, p. 19667 and *Keesing's ... 1965-1966*, vol. XV, p. 20868).

In 1967, during anti-Chinese demonstrations in Burma the office of the Chinese press agency, as well as houses and shops belonging to Chinese nationals, were attacked. The national emblem was also destroyed. The Chinese Government protested, demanding various forms of satisfaction. As it was not satisfied with the Burmese authorities' attitude following the events, China suspended its aid programme to that country (*Keesing's ... 1967-1968*, vol. XVI, p. 22277).

In 1981, the European Community, after repeatedly warning the Turkish Government of the negative consequences the deterioration of democratic institutions and the suspension of some fundamental freedoms in that country would have on its relations with the Community, suspended the granting of a loan package (*Keesing's ... 1982*, vol. XXVIII, p. 31287).

³¹ *I.C.J. Reports* 1972, p. 46. The case was brought following the suspension of overflights of its territory by Pakistani civil aircraft, which Pakistan claimed was in breach of two treaties. The suspension had taken place following the hijacking and destruction of an Indian aircraft in Lahore in February 1972. India accused Pakistan of favouring the hijackers and of failing to do everything necessary to save the aircraft (*Keesing's ... 1971-1972*, vol. XVIII, pp. 24561-24562).

³² *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p. 73, para. 12.

³³ *Ibid.*, p. 7, para. 11.

measures, cited the international rule that an unsuccessful formal request for reparation was an indispensable prerequisite for lawful resort to reprisals³⁴ (based on the *Naulilaa* decision).³⁵ Commentators have noted that the United States, for its part, while maintaining that the theory of reprisals as represented by France only applied to armed reprisals,³⁶ contended that it had nevertheless complied with the requirements which France deemed to be indispensable before implementing the measures in question. Within the context of the case concerning *United States Diplomatic and Consular Staff in Tehran*,³⁷ the United States took the trouble to specify before ICJ that the United States Chargé d'affaires in Tehran had protested to the Iranian Government immediately after the taking of the hostages and had demanded full protection for the embassy and its staff. Also, according to the United States, representations had been made for days³⁸ before the political and economic measures of reprisal and retortion referred to in paras. 34, 39, 79 and 106 below were undertaken. Furthermore, the conclusions reached by the American Law Institute in its *Restatement of the Law Third* should not be overlooked. According to the comment to section 905, devoted to "Unilateral Remedies":

... countermeasures in response to a violation of an international obligation are ordinarily justified only when the accused State wholly denies the violation or its responsibilities for the violation; rejects or ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiations or third-party resolution.³⁹

14. It must also be recognized that, notwithstanding the prohibition of the use of force contained in the Charter of the United Nations, armed reactions to internationally wrongful acts of a continuing character which threaten to place the nationals of a State on foreign soil in serious personal danger have, in a few cases, continued to take place. These cases, however, differ significantly from similar cases in the previous period in so far as the injured State has usually resorted to forcible action only *after* an intimation of cessation or reparation addressed to the wrongdoing State has proved fruitless.⁴⁰

³⁴ *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 427, para. 17.

³⁵ See footnote 24 above.

³⁶ See *Case concerning the Air Service Agreement* (footnote 34 above), p. 428, para. 18. The United States notably maintained that it had unsuccessfully demanded that France should discontinue its air traffic treaty violation and that an ad hoc agreement for arbitration should be concluded (Nash, *Digest of United States Practice in International Law*, 1978, p. 773).

³⁷ *I.C.J. Reports* 1980, p. 3.

³⁸ Two days after the taking of the hostages, a special envoy of the United States Government arrived in Tehran in order to negotiate their release. Despite the prohibition by the Iranian Head of State of any contact with the United States envoy, the latter was able to engage in telephone conversations with senior Iranian officials and lodged the unequivocal protest of his Government at the events. Attempts to make contact with the Iranian Government continued for another four days (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, pp. 260-261).

³⁹ *Restatement of the Law Third—The Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), pp. 380-381.

⁴⁰ This is what happened in the "*Mayaguez*" dispute of 1975, in which the United States of America resorted unsuccessfully to military action in order to rescue the crew of a ship detained by Cambodian troops. The United States action was preceded by a 24-hour

15. The cases considered in the preceding paragraph—as well as some of those considered in paragraph 7 above—obviously involve problems related to the lawfulness of resort to armed force. From the point of view of the subject-matter of the present chapter they do nevertheless demonstrate the belief of States that, even in cases characterized by a high degree of wrongfulness and continuity, and which call for very urgent remedy, resort to measures on the part of the injured State must be preceded, under the law of responsibility, by appropriate demands, *sommations* or intimations.

16. On the other hand, examples of resort to measures where no prior communication or intimation is apparent may also be found in contemporary practice, such as the freezing of assets of the wrongdoing State which are within the reach of the injured State. Such measures are in general characterized by their temporary nature (although the freezing of some assets has lasted for decades) and by their purely economic targets (usually bank deposits).⁴¹ It is these features of those reactions which are generally referred to in the literature as interim (or provisional) measures of protection and with regard to which a number of writers take the view that no intimation is required. It is apparently for this reason that the previous Special Rapporteur excluded an obligation of either intimation or prior resort to settlement procedures

ultimatum transmitted to Cambodia through the Chinese liaison office in Washington and was carried out only after the expiry of the ultimatum (*Keesing's ... 1975*, vol. XXI, pp. 27239-27240). The United States also resorted to military action in its attempt to rescue its citizens held hostage in Tehran. In this case, while the United States Government had tried and was still trying to settle the matter through peaceful means, it also announced, through a Presidential statement, that in view of the unsuccessfulness of the attempts at peaceful settlement and of the ineffectiveness of the economic measures, forcible action appeared to represent the only possible remedy. On this case, see Ronzitti, *op. cit.*, pp. 41-49. United States interventions in Grenada (1983) and Panama (1989) too were partially justified by that Government as actions to protect United States citizens abroad. On the Grenada case, see Davidson, *Grenada: A Study in Politics and the Limits of International Law*. On the Panama action, see official statements of President Bush and the State Department as reported in *AJIL*, vol. 84 (1990), pp. 545-549.

⁴¹ Among the examples of resort to such measures are the freezing of bank deposits and other assets of Bulgaria, Hungary, Poland and Romania by the United States of America shortly after the Second World War (*Keesing's ... 1948-1950*, vol. VII, p. 10623). The freezing of Romanian assets was revoked in 1959 (*Keesing's ... 1959-1960*, vol. XII, p. 17349), that of Polish assets in 1960 (*ibid.*, p. 17559), and that of Hungarian assets in 1973 (*Keesing's ... 1973*, vol. XIX, p. 25827), following the conclusion of the respective lump-sum agreements; see also Whiteman, *op. cit.*, vol. 8, pp. 1126-1128). Other examples are those relating to the Albanian gold seized by the United Kingdom (*Keesing's ... 1948-1950*, vol. VII, p. 10426, *Keesing's ... 1950-1952*, vol. VIII, p. 11294, and *Keesing's ... 1952-1954*, vol. IX, p. 13634) and to the freezing of Iranian bank deposits and other assets by the United States following the taking of the hostages in Tehran (*I.C.J. Reports* 1980 (see footnote 37 above), pp. 16 *et seq.* and pp. 43 *et seq.*). Although this case refers to unlawful conduct generally characterized as a crime, the freezing of Iraqi assets by the United States, the United Kingdom and France immediately following the announcement of the invasion of Kuwait in 1990 should also be recalled. These measures were adopted simultaneously with Security Council resolution 660 (1990) of 2 August 1990 condemning the invasion but before resolution 661 (1990) of 6 August 1990 adopting measures envisaged in Article 51 of the Charter against Iraq. A case where, instead, measures were carried out only after repeated protests, is that of the freezing of French assets by Ghana in 1960 in protest at nuclear tests carried out by France in the Algerian Sahara (*Keesing's ... 1959-1960*, vol. XII, p. 17280).

with regard to measures of this kind.⁴² It should be noted, however, that the measures taken by Cuba against the assets of United States nationals in response to the cutback in sugar imports by the United States⁴³ and those taken by the Libyan Arab Republic against British assets in response to the United Kingdom's withdrawal from certain islands in the Persian Gulf are not really significant.⁴⁴ The absence of any prior intimation may be explained, *inter alia*, by the fact that the measures in question were resorted to within the context of an actual, open dispute in the course of which the States involved had already exchanged charges and arguments. The circumstances rendered any intimation superfluous.

17. The draft articles proposed in 1986 by the former Special Rapporteur deal with the matter within the framework of part 3.⁴⁵ Article 10 of part 2⁴⁶ only deals with those dispute settlement procedures to which resort is had prior to the measures contemplated in draft article 9⁴⁷ (other than the so-called reciprocal measures which are covered by draft article 8),⁴⁸ with the exception of certain kinds of "interim measures of protection".⁴⁹ He dealt with the problem of conditions, under discussion here, in articles 1 and 2 of part 3. Draft article 1 provided that:

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Draft article 6 of part 2⁵⁰ provided for pecuniary compensation and guarantees of non-repetition. With regard to countermeasures, draft article 2, paragraph 1, of part 3 provided for another notification:

1. 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 prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.⁵¹

Draft article 3 of part 3 provided that if objection was raised by the State alleged to have committed the internationally wrongful act the parties (without prejudice to

their rights and obligations under any provisions in force between them with regard to the settlement of disputes) "... shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations" or the further means provided for under draft articles 4 and 5 of part 3 and the annex thereto. The former Special Rapporteur explained that the exchanges between the parties carried out according to the said "notification/objection" mechanism would "serve to narrow the issues" and allow alleged wrongdoing States to consider the situation and possibly accede to the allegedly injured State's demands.⁵² He further explained, however, that there could be cases of special urgency in which the injured State immediately had to protect its interests and which required such urgent remedy as to justify immediate resort—without any prior notification—to the kind of (interim) measures contemplated in his draft article 10, paragraph 2 (a) of part 2.⁵³

18. In its debate on these proposals, the Commission found that draft article 10 of part 2 placed too heavy a demand upon the injured State and was thus too lenient towards the wrongdoing State.⁵⁴ With regard to draft articles 1 and 2 of part 3, some members expressed the view that the system envisaged would not rule out the possibility of prior exchanges other than the proposed notifications. Other members thought that a system based on a double notification was too burdensome. Some demanded a higher degree of precision with regard to the hypothesis of particular urgency.⁵⁵

19. The present writer, beginning with his preliminary report, has from the outset expressed the opinion that the so-called implementation or *mise en œuvre* in a narrow sense should not be combined with the provisions of part 3 concerning the settlement of disputes arising over the interpretation and application of the articles on State responsibility.⁵⁶ Any duties to be fulfilled by the injured State as a condition of lawful resort to countermeasures are a part of the consequences of an internationally wrongful act and must be covered as such within the framework of part 2 of the draft. This applies in particular to any protest or any claim for cessation or reparation and any intimation, *sommation* or notification. It could be argued that an ad hoc provision could be dispensed with, the duty to demand cessation or reparation being subsumed under the duty of prior compliance with dispute settlement obligations. However, a specific rule appears to be preferable, for several reasons. In the first place a dispute might not even arise if the wrongdoing State acknowledged wrongdoing and met the injured State's demands totally or in part (a possibility not to be

⁴² *Yearbook* ... 1984, vol. I, 1867th meeting, para. 34.

⁴³ Whiteman, *op. cit.*, vol. 8, pp. 1041-1045; *Keessing's* ... 1959-1960, vol. XII, pp. 17538, 17542 and 17591.

⁴⁴ De Guttry, *op. cit.*, pp. 83-89.

⁴⁵ For texts of articles proposed for part 3, see *Yearbook* ... 1986, vol. II (Part Two), pp. 35-36, footnote 86.

⁴⁶ For text, see *Yearbook* ... 1985, vol. II (Part Two), pp. 20-21, footnote 66.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ This exception covered the measures "taken by the injured State within its jurisdiction, until a competent international court or tribunal ... has decided on the admissibility of such interim measure of protection" (art. 10, para. 2 (a)) and the "measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal" (*ibid.*, para. 2 (b)).

⁵⁰ See footnote 46 above.

⁵¹ Riphagen had previously expressed the view that no prior notification was required by the Vienna Convention on the Law of Treaties in respect of the suspension or termination of the operation of a treaty (*Yearbook* ... 1983, vol. II (Part One), p. 19, document A/CN.4/366 and Add.1, para. 101).

⁵² Sixth report (*Yearbook* ... 1985, vol. II (Part One) (footnote 11 above)), para. 15; and seventh report (*Yearbook* ... 1986, vol. II (Part One), p. 4, document A/CN.4/397 and Add.1), commentary to article 2 of part 3.

⁵³ Seventh report (see footnote 52 above), para. 2 of the commentary to article 2 of part 3.

⁵⁴ Statements by Flitan (*Yearbook* ... 1985, vol. I, 1893rd meeting, para. 3); Tomuschat (*ibid.*, 1896th meeting, para. 39); and Mahiou (*ibid.*, 1897th meeting, para. 13).

⁵⁵ *Yearbook* ... 1986, vol. II (Part Two), paras. 51-54.

⁵⁶ *Yearbook* ... 1988, vol. II (Part One) p. 10, document A/CN.4/416 and Add.1, para. 19. See also Arangio-Ruiz's comments on part 3 of the draft as envisaged by Riphagen (*Yearbook* ... 1985, vol. I, 1900th meeting, paras. 26-27).

ruled out).⁵⁷ In addition, it would be improper not to give an alleged wrongdoing State a chance to answer the allegation before a possibly "public" settlement procedure was resorted to and the situation may have further deteriorated. A prior direct exchange between the parties might reduce the possibility of an early escalation of the dispute. Moreover, stringent third-party settlement procedure obligations might not exist between the parties.

20. The precise content and form of the provision is less easy to define. First of all, a decision has to be made whether or not to specify the channel of the required communication (diplomatic channels, transmission of the document by post or other means). Although the realities of international relations indicate that States often communicate less formally, legal certainty might require a written form. However, it is opined that the draft should not take a stand in that regard.

21. In so far as the substance of any communication is concerned, Riphagen, as already mentioned (para. 17 above), envisaged two notifications: one for "the measures required to be taken" (cessation, restitution in kind, etc.) "and the reasons therefor"; the other for the intention of the injured State "to suspend the performance of its obligations" with the indication of the "measures intended to be taken". A less cumbersome solution might be to impose upon the allegedly injured State the duty to submit its protest or demands to the alleged wrongdoing State together with the indication of the essential facts and any suitable warning of possible countermeasures.

The injured State would of course remain at liberty to make any additional communications or specifications it may deem useful in the light of the nature of the wrongful act, of the condition of its relations with the alleged wrongdoer, and any other circumstances it may judge to be relevant. It is believed that the injured State should also remain free to choose whether or not to specify the measures envisaged.

22. Another problem is whether any specific time limits should be indicated by the injured State. It is believed that the articles should not go beyond the indication of the possibility of setting such a limit, the limit depending on the nature and the circumstances of the case. It might be indicated that any time limit should be reasonable.

23. As regards the problem of possible exceptions to the requirement of a prior demand for cessation or reparation and of timely notification/intimation, the question could arise with respect to interim measures of protection.⁵⁸ However, while it is believed that measures of such a nature could actually constitute an exception in so far as the impact of dispute settlement obligations upon the admissibility of countermeasures is concerned,⁵⁹ they should not be exempted from meeting the minimum prerequisite in question. The obvious reason is that the State which has committed the internationally wrongful act should be given the possibility of complying spontaneously with its obligations of cessation and/or reparation (*lato sensu*) before the "countermeasures stage" is reached.

⁵⁷ On this hypothesis, see Gianelli, *op. cit.*, introduction, para. 3.

⁵⁸ On this notion, see para. 5 above.

⁵⁹ See para. 48 below.

CHAPTER II

The impact of dispute settlement obligations

A. State practice prior to the First World War

24. The impact of the availability of dispute settlement procedures upon the lawfulness of resort to countermeasures does not emerge with any significant degree of clarity from international practice preceding the First World War. Of course, there are cases, even in that period, in which the injured State recognized at least the political expediency, if not a legal obligation, not to resort to countermeasures prior to an unsuccessful attempt at a mutually agreed or, more rarely, at an arbitral solution.⁶⁰ In no instance, however, did a State contest the lawfulness of a reprisal of which it was the target on account of the fact that the counterpart had omitted previously to

attempt a dispute settlement procedure. Two of the reasons for this state of affairs may have been the total freedom that persisted for States to resort to forcible action, including war, in the pursuit of their rights or interests, and the scarcity (as compared to the subsequent period) of relatively effective third-party dispute settlement procedures. In any event, significant elements relating to the impact of dispute settlement procedures upon the liberty of States to resort to unilateral measures do not seem to emerge from the dispute settlement instruments of the first two decades of the present century.⁶¹

⁶⁰ In the case between the United Kingdom and Greece (1847-1851), concerning acts of violence committed on Greek territory against a British subject (Don Pacifico) (Wharton, *op. cit.*, vol. III, pp. 100-101), the United Kingdom pursued *diplomatic exchanges* unsuccessfully with Greece for more than two years. Finally, claiming that it had tried unsuccessfully all the amicable means at its disposal to obtain reparation, it presented Greece with a 24-hour ultimatum and then sent a naval force to blockade ports and seize Greek vessels.

It is worth recalling that, as a result of French good offices, the British naval commander suspended the blockade and maintained only the seizures. However, following the lack of success of the French interposition, the blockade was resumed (Calvo, *Le droit international théorique et pratique*, p. 524). On this point see also para. 7 above.

⁶¹ Reference is made to the numerous general arbitration treaties concluded prior to 1917, to the Hague Conventions of 1899 and 1907, to the Drago-Porter Convention, and to the so-called Bryan conciliation treaties. (For discussion of the Bryan treaties, see the report of the Secretary-General on methods of fact-finding (A/5694) of 1 May 1964, paras. 62-78.)

B. State practice between the wars

25. Treaty practice subsequent to the First World War reveals some progress. In 1925, for example, in addition to negative obligations regarding resort to force,⁶² the Locarno treaties also introduced positive peaceful settlement obligations for legal disputes in order to prevent resort to unilateral action by the injured State before the settlement procedure had been tried.⁶³ Some provisions also envisaged the possibility for the competent "third party" to indicate interim measures of protection. The parties in dispute were actually bound to accept such an indication and to

... abstain from all measures likely to have repercussions prejudicial to the execution of the decision or arrangements proposed by ... the Council of the League of Nations, and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute.⁶⁴

In addition to the well-known renunciation of war as a means of resolving international disputes, the Briand-Kellogg Pact of 1928 provided in article II that:

... the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them [the high contracting parties], shall [never] be sought except by pacific means.⁶⁵

Certainly the Pact's principal aim was to condemn direct resort to unilateral use of armed force on the part of the injured State. But it would perhaps not be too difficult to assume that it also condemned direct resort to means other than the use of armed force in the presence of other means of settlement, especially if it is considered that, at that time, "pacific means" also included those forcible measures which, because they did not lead to a state of war, were characterized as coercive measures "short of war".⁶⁶ Some of the provisions of the so-called Saavedra Lamas treaty, signed in 1933 by a number of Latin American States, are also significant. In addition to condemning wars of aggression, article I of that instrument stated that:

... the settlement of disputes and controversies shall be effected only through the pacific means established by international law.⁶⁷

Furthermore, the treaty envisaged a conciliation procedure for any kind of dispute and article XIII prohibited for the duration of the conciliation process

⁶² See, for example, article 2 of the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy.

⁶³ The parties generally undertook to submit to arbitration or to PCIJ legal disputes not resolved by diplomacy. If the parties did not manage to conclude a special agreement (*compromis*) each party could submit the matter to PCIJ unilaterally. The "losing" State was obliged to refrain from reacting unilaterally even in the case of non-compliance with the Court's decision. It would have to refer the matter to the Council of the League of Nations for the latter to decide the measures to be adopted with binding effect.

⁶⁴ Article 19 of the Arbitration Convention between Germany and Belgium (League of Nations, *Treaty Series*, vol. LIV, p. 303). A very similar provision was introduced, only for legal disputes, in article 33 of the 1928 General Act (Pacific Settlement of International Disputes).

⁶⁵ General Treaty for Renunciation of War as an Instrument of National Policy.

⁶⁶ On the controversial meaning of "pacific means", as used at the time, see *inter alia*, Forlati Picchio, *La sanzione nel diritto internazionale*, pp. 116-117; Brownlie, *International Law and the Use of Force by States*, pp. 84-88; Žourek, *L'interdiction de l'emploi de la force en droit international*, p. 41.

⁶⁷ Anti-War Treaty (Non-Aggression and Conciliation).

... any measure prejudicial to the execution of the agreement that may be proposed by the commission and, in general, ... any act capable of aggravating or prolonging the controversy.⁶⁸

26. The stipulations considered in paragraph 25 above would seem to indicate the existence, between the wars, of a tendency on the part of States to condemn unilateral reaction to an internationally wrongful act—whether involving armed force or not—when the case was actually subject to a conciliation or arbitral procedure. At the same time, the fact that this was the only restriction of the right of reprisal to be explicitly covered by treaty provisions would appear to suggest that the restriction was not implied by the mere existence of dispute settlement obligations. It is opined that this was particularly the case for measures not involving armed force.

27. A look at other elements of State practice in the same period on the whole confirms, although not without inconsistencies, the evidence drawn from treaty instruments. A case in point is the Tellini (Janina) case between Italy and Greece. It was—and still is—generally agreed that, despite the gravity of the incident, the demands of the Italian Government were unreasonable and the forcible measures excessive. As pointed out by Greece before the Council of the League of Nations:

If the engagements entered into under the Covenant are to be respected ... steps should be taken to stop the measures of coercion which have begun ...

[...]

... between Members of the League of Nations there was no longer any place for measures such as an ultimatum and coercion.

According to article 12, the Members of the League of Nations have entered into a solemn undertaking to follow a judicial procedure or a political procedure before the Council at their own discretion. There is nothing outside these alternative procedures.⁶⁹

28. While conforming with the Italian wish that the conflict should be left in the hands of the Allied Ambassadors' Conference, the Council referred to a Committee of Jurists the well-known issue about the admissibility, under the Covenant, of measures short of war.⁷⁰ The answer was that:

Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.⁷¹

⁶⁸ Ibid. The latter prohibition, already present in the Locarno treaties and in the 1928 General Act (see footnote 64 above), appears in a number of bilateral arbitration treaties concluded in the period 1924-1931. These instruments frequently introduced the so-called optional clause of compulsory jurisdiction, under which matters could be brought before PCIJ unilaterally. See references in Gianelli, *op. cit.*, chap. III, sect. I, para. 3.

⁶⁹ League of Nations, *Official Journal* (see footnote 23 above), p. 1281. The Italian side maintained that the measures taken had been "pacific", admissible as such by both general international law and the Covenant, only war being condemned by the latter (*ibid.*, pp. 1313-1314).

⁷⁰ "Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?" (*Ibid.*, p. 1351.)

⁷¹ Ibid., 5th Year, No. 4, Minutes of the Twenty-eighth Session of the Council (10-15 March 1924), p. 524.

Despite this bland opinion, however, the majority of commentators contested the admissibility of any armed reprisals in the context of the peaceful settlement obligations set forth in the Covenant of the League of Nations.⁷² The whole episode nevertheless shows that even within a context such as that of the Covenant—a relatively advanced legal instrument in comparison with general law—the Governments of that time were, to say the least, reluctant unambiguously to admit the existence of obligations under which resort to unilateral measures short of war—whether or not involving armed force—would be subject to prior resort to, and exhaustion of, amicable settlement procedures.

29. The opinion expressed in 1928 by the Swiss Département politique was decidedly progressive and very clear. According to Swiss diplomacy (with reference to the Covenant of the League of Nations):

... les représailles ne peuvent être envisagées que si la procédure d'arbitrage prévue par l'article 13 a été proposée en vain. Toutefois, le refus de la procédure d'arbitrage ... n'autorise pas encore l'exercice de représailles; car l'article 15 prévoit l'appel au Conseil de la Société des Nations [...]. reprisals may be envisaged only if the arbitration procedure provided for in Article 13 has been proposed in vain. However, rejection of the arbitration procedure ... still does not authorize the use of reprisals, for Article 15 provides for an appeal to the Council of the League of Nations].⁷³

The same Département, with reference to arbitration commitments in general, further stated that for resort to reprisals to be lawful:

Il faut admettre ici également que la condition prévue par le droit des gens n'est pas remplie si l'on n'a pas essayé vainement de résoudre le différend selon la procédure prévue. La conclusion de traités stipulant l'arbitrage obligatoire pour les différends juridiques exclura les représailles. [It should also be acknowledged here that the requirement under the law of nations is not fulfilled unless an attempt has been made, to no avail, to settle the dispute in accordance with the procedure established. Concluding treaties by stipulating compulsory arbitration for a legal dispute will rule out reprisals].⁷⁴

30. Important, albeit less coherent, statements were to be made two years later in reply to the questions put to States in preparation for the Conference for the Codification of International Law. Belgium, for example, replied that a State could lawfully resort to reprisals if it could show that it would not have been possible "to obtain satisfaction by pacific means".⁷⁵ Denmark affirmed that "reprisals would be entirely excluded" if the parties were bound by treaty not to exacerbate their disputes.⁷⁶ More cautious, the United Kingdom expressed the view that "[w]ith the improved machinery now provided by international agreements for the investigation and pacific solution of disputes, the cases where resort to acts of reprisals would be legitimate must be very few".⁷⁷

⁷² See, *inter alia*, Politis, loc. cit., pp. 5-16; Hill, "The Janina-Corfu Affair", comment in AJIL (1924), pp. 98-104; De Visscher, "L'interprétation du Pacte au lendemain du différend italo-grec", *Revue de droit international et de législation comparée* (1924), pp. 213-230; Hoijer, *Le Pacte de la Société des Nations*, p. 218. A contrary view is taken by Strupp, "L'incident de Janina entre la Grèce et l'Italie", *RGDIP* (1924), pp. 255-284.

⁷³ *Répertoire suisse de droit international public*, Documentation concernant la pratique de la Confédération en matière de droit international public, 1914-1939 (Basel), vol. III, p. 1787.

⁷⁴ *Ibid.*, p. 1788.

⁷⁵ League of Nations, *Conference for the Codification of International Law: Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, p. 128.

⁷⁶ *Ibid.*, pp. 128-129.

⁷⁷ *Ibid.*, p. 129.

31. In brief, the period *between the wars* seems to offer two sets of indications. On the one hand, the rather vague language of treaty provisions dealing expressly with the impact of dispute settlement obligations upon the liberty of States to resort to unilateral measures⁷⁸ seems to confirm the reluctance of States to recognize the existence of legal limits to their liberty to resort to measures short of war, despite the availability of more amicable means of settlement. On the other hand, there was apparently a *growing current of opinion* during that same period, not only in the literature but also in the context of diplomatic exchanges, to the effect that whenever treaty-based settlement procedures were available an injured State could not lawfully resort to reprisals—whether amicable or forcible—without first trying and exhausting the available procedures.

C. Principles and rules emerging after the Second World War

32. Following the entry into force of the Charter of the United Nations, a certain, albeit limited, degree of clarification seems to have been achieved:

(a) In the first place, as noted earlier, the combined effect of the sweeping language and spirit of Article 2, paragraph 4, and the pronouncements which will be referred to in this section (para. 33) has, at least in principle, dispelled any doubt as to the unlawfulness of armed reprisals,⁷⁹ despite the contradictions mentioned above which emerge from the practice of a number of States, and with the exception, of course, of self-defence measures.⁸⁰

(b) Secondly, it would appear that the above prohibition, based as it is exclusively on the letter and spirit of Article 2, paragraph 4, of the Charter of the United Nations, does not represent the full extent of the efforts of the drafters of the Charter (and their successors) to reduce the scope of the discretion given to States with regard to the choice of unilateral remedies. If the specific provision of Article 2, paragraph 3, of the Charter is to have any significance other than merely to render Article 2, paragraph 4, redundant, it must perhaps be recognized that the Charter does not really confine itself to the prohibition of armed measures (for which Art. 2, para. 4 is sufficient). By virtue of the letter and spirit of Article 2, paragraph 3, and the whole of Chapter VI (Arts. 33-38), it would seem to extend to any unilateral measures which may endanger—if not "friendly relations" and "cooperation"—international peace and security, *and justice*. It follows that even measures not in-

⁷⁸ As indicated, these provisions were intended to condemn resort to unilateral measures when the dispute was *sub judice* and the competent body was empowered to order interim measures of protection.

⁷⁹ It is worth recalling that in addition to Article 2, paragraphs 3 and 4, due account must be taken of Article 1, paragraph 1, according to which it is one of the purposes of the United Nations

"to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

⁸⁰ See paras. 58-69 below.

volving *resort to armed force*, if not prohibited, are subject to some kind of "legal control";⁸¹

(c) Thirdly, it is presumably not just by chance that in opening Chapter VI, on settlement of disputes, Article 33, paragraph 1, firmly states that parties to a dispute "*shall, first of all*", seek a solution . . ." by one or more of the various means listed thereafter. It seems reasonable to infer, at least from that phrase and its context, that there is some duty to negotiate and that, failing a negotiated solution, an *attempt* to use any other of the means listed in Article 33, paragraph 1, should in principle *precede* any resort to unilateral measures if the latter are to be lawful. The opinion of the Swiss Département politique cited in paragraph 29 above is at least as valid for the procedures before the United Nations Security Council and the General Assembly.

33. The major General Assembly resolutions concerning peaceful settlement lend some support to the kind of interpretation of the Charter indicated in paragraph 32 (c) above. Reference is made to the formulation of the principle of peaceful settlement contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁸² Despite its grave inadequacies⁸³—including with respect to the matter under discussion here—that formulation felicitously adds to the important injunction ("*shall first of all*") contained in Article 33, paragraph 1, of the Charter the further duty of the parties to "refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security". The same duty to refrain from measures which may "make more difficult or impede the peaceful settlement of the dispute", is referred to—albeit in different language—in section I, paragraph 8, of the more recent (and more articulate) Manila Declaration on the Peaceful Settlement of International Disputes.⁸⁴ Although both

these resolutions could have usefully set forth more specific conditions to be complied with by an injured State before resorting to unilateral measures, they both lend support to an interpretation of the Charter provisions on peaceful settlement under which resort to unilateral remedial measures would, at least in principle, be subject to the compliance with stricter *onera* of the injured party with regard to the prior use, or bona fide attempt to make use, of available settlement procedures.

34. Although the Charter does not explicitly deal with the impact of its general dispute settlement provisions on the conditions of resort to unilateral measures,⁸⁵ it can nevertheless be argued that the regime of peaceful settlement in the law of the United Nations does, indirectly, mark a progressive development in the matter.

(a) First, based on the letter and spirit of Article 2, paragraph 3, of the Charter, the condemnation of unilateral measures extends to any reactions likely to endanger "peace and security, and justice", even in the absence of any treaty-based settlement obligations going beyond Article 2, paragraph 3, and Article 33, paragraph 1. This certainly does not mean that an injured State has no means at its disposal to protect its infringed rights. It simply means that whenever the procedures listed in Article 33, paragraph 1, or unilateral measures compatible with Article 2, paragraph 3, designed to induce the other party to accept resort to such procedures, have been taken to no avail, no *further* unilateral action shall be taken without prior resort to the procedure envisaged in Articles 34 to 38 of the Charter;

(b) Secondly, where the internationally wrongful act is of such a nature as to create a danger to international peace and security, a Member State of the United Nations may not resort to any kind of measures—even those not likely to endanger international peace and security (except, of course, for self-defence measures under Art. 51)—unless it has first attempted to obtain cessation and reparation in a broad sense through any of the means listed in Article 33, paragraph 1, which are available to it. The expression "first of all" in paragraph 1 of Article 33 needs to be stressed;

(c) Thirdly, based on the tenor of the relevant Articles of the Charter, as supported by the *lex lata* or *lex ferenda* of section I, paragraph 8, of the Manila Declaration, the United Nations system may be assumed to embody the principle which was set forth in some of the dispute settlement instruments predating the Second World War,⁸⁶ namely that pending the actual initiation of the procedures envisaged or pending the outcome of an initiated procedure, the injured State (*a fortiori*, of course, the wrongdoing State) is under the obligation to refrain from any action (whether reprisal or retortion) likely to "make more difficult or impede" the settlement which is to be sought by the relevant procedure or procedures. The very general obligation of Member States, set forth in Article 2, paragraph 3, of the Charter of the United Nations, to settle disputes in a manner such as not to endanger "justice", as well as peace and security, could also be fruitfully seen in this light.

⁸¹ On this point see Gianelli, *op. cit.*, chap. IV, sect. I, para. 6, and the literature cited therein, and especially: Kelsen, *The Law of the United Nations*, pp. 359 *et seq.*; Goodrich, Hambro and Simons, *Charter of the United Nations*, pp. 41-43; and Charpentier, *Commentaire du paragraphe 3 de l'Article 2*, in *La Charte des Nations Unies*, pp. 103-113.

By placing upon States the *positive* obligation it enunciates, Article 2, paragraph 3, could hardly be considered as condoning the adoption by States of lines of conduct which, in addition to endangering "justice", might jeopardize friendly relations (Art. 1, para. 2) or create threats to the peace (*ibid.*, para. 1).

⁸² General Assembly resolution 2625 (XXV), annex. A similar formulation is included in Principle V of the Final Act of the Conference on Security and Cooperation in Europe, adopted at Helsinki on 1 August 1975:

"Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult." (Lausanne, *Imprimeries réunies*, n.d., p. 79).

⁸³ See, for example, the Italian representative's statement in the Report of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, 31 March-1 May 1970 (*Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18 (A/8018)*, paras. 125 *et seq.*).

⁸⁴ General Assembly resolution 37/10, annex. This text, which is almost identical with the Helsinki formulation, reads:

"States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international

peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations."

⁸⁵ On this point, see Gianelli, *op. cit.*, chap. IV, sect. I, para. 8.

⁸⁶ See paras. 25-26 above.

D. State practice since the Second World War

35. The contemporary practice of States conforms, at least in part, with the legal developments subsequent to the Second World War as described in section C above.

(a) An example which conforms to the regime briefly outlined above is to be found in a United States Government statement of 1954. A Chinese military tribunal had imposed penalties involving detention on a group of American airmen captured in Manchuria and charged them with espionage. The United States of America protested at the allegedly unlawful action, stating that those involved were members of the United Nations forces engaged in military operations in Korea and adjacent areas, and the United States Senate suggested a blockade of the whole Chinese coast, with or without the consent of the United Nations. The United States Administration, however, rejected the Senate's idea, recalling the obligation deriving from the Charter of the United Nations to "try to settle international disputes by peaceful means in such a manner that international peace is not endangered, and stated that "*our first duty is to exhaust peaceful means*" of sustaining our international rights and those of our citizens rather than resort to war action such as naval and air blockade of red China".⁸⁷

(b) Another interesting example is that of the so-called cod war between Iceland and the United Kingdom.⁸⁸ In August 1971 Iceland extended its exclusive fishing zone from 12 to 50 miles and notified the United Kingdom of its position with regard to the abrogation of the agreement reached by the 1961 exchange of notes. The extension was immediately characterized as internationally unlawful by the United Kingdom which, following unsuccessful exchanges with the other party, presented a joint application to ICJ with the Federal Republic of Germany, including a request for interim measures. It is well known that while Iceland decided not to appear, the Court did proceed to the indication of interim measures of protection to the effect, *inter alia*, that the 12-mile limit should remain in force pending the Court's final decision. Iceland refused to comply and contested the Court's jurisdiction. Only then, and following the *negative outcome of further exchanges with the other party*, did the United Kingdom engage in naval operations. A temporary settlement was subsequently reached between the two States on the fishing rights within the Icelandic 50-mile zone. Respect for the principles in question (negotiation, *sommatio* and resort to available means of settlement) seems to have been clearly demonstrated by the United Kingdom.

⁸⁷ *Keesing's ... 1952-1954*, vol. IX, pp. 13927-13928. The United States brought the case to the United Nations General Assembly, where a resolution entrusting the Secretary-General with the task of trying to obtain release of the airmen was adopted (General Assembly resolution 906 (IX)). The frequency, in the cold war period, of cases where resort to settlement procedures has helped to avoid resort to unilateral measures has already been noted in para. 12 above. See also Gianelli, *op. cit.*, chap. IV, sect. II, paras. 9-11 (c).

⁸⁸ On the numerous episodes of this "war", see *Keesing's ... 1957-1958*, vol. XI, pp. 12760, 15251 and 16478-16480; *Keesing's ... 1959-1960*, vol. XII, pp. 17314 and 17476; *Keesing's ... 1961-1962*, vol. XIII, p. 18109; *Keesing's ... 1971-1972*, vol. XVIII, pp. 25234-25236; *Keesing's ... 1973*, vol. XIX, pp. 25869-25877, 26028-26032 and 26237-26239; and *Keesing's ... 1976*, vol. XXII, pp. 27511-27515, 27637-27639 and 27824-27825.

(c) The well-known position taken by ICJ in the case of *United States Diplomatic and Consular Staff in Tehran* with respect to the attempt by United States military units to rescue the hostages is equally significant. The Court disapproved of the operation because it was contrary to its previous Order that no action was to be taken by either party "which may aggravate the tension between the two countries" and, mainly, because "an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations".⁸⁹ It is particularly significant in this case that, despite the military nature of the operation, the Court felt it necessary to emphasize not the fact that the measure could be envisaged as a violation of the prohibition of the use of armed force, but that resort to the action in question was not in conformity with the obligation of a State not to jeopardize the outcome of a settlement procedure to which the injured State itself had submitted.

36. There are, however, a number of cases in which, on the contrary, the requirement of prior resort to a settlement procedure, and abstention from reprisals pending the conclusion of such a procedure, has not been complied with. These cases involved measures which were unlikely to affect significantly either the respective positions of the injured and wrongdoing State, or the maintenance of peace.

37. Typical examples are measures which involve the freezing of assets of the alleged wrongdoing State or of its nationals. For instance, the United States of America has repeatedly resorted to the freezing of bank deposits in response to the nationalization by other States of the assets of United States nationals without compensation. These measures have not been preceded by attempts at amicable dispute settlement.⁹⁰ Another instance is that of the British and French measures to freeze assets, adopted without any prior attempt at peaceful settlement, in response to the Egyptian nationalization of the Suez Canal Company in 1956, as well as other measures concerning French and British nationals.⁹¹ A similar case concerns the expropriation of British property by the Libyan Arab Republic in 1971 by way of reaction to the allegedly wrongful act committed by the United Kingdom in withdrawing from a number of islands in the Persian Gulf and thus allowing their occupation by Iran. The Libyan measure was adopted without any *prior contact or communication*.⁹² Reference should also be made to the freezing of Iranian property and deposits following the taking of American hostages in Tehran in 1979. These measures were taken *prior* to the application to ICJ and *simultaneously* with attempts at negotiation and the request for a meeting of the Security Council. It is well known that, with regard to that course of action, the

⁸⁹ *I.C.J. Reports 1980* (see footnote 37 above), p. 43, para. 93. Judge Lachs in his separate opinion was more categorical:

"... the Applicant *having instituted proceedings*", is precluded from taking unilateral action, *military or otherwise*", as if no case is pending" (*ibid.*, p. 48).

It should be recalled, however, that the United States resorted to armed action by way of *ultima ratio*, following the failure of various previous attempts at a solution by peaceful means (see para. 13 above).

⁹⁰ On these cases, see para. 16 above.

⁹¹ Whiteman, *op. cit.*, vol. 12, pp. 320-321.

⁹² See para. 16 above.

Court did not express the same disapproval as it did with regard to the rescue operation carried out later by the United States. ICJ thus implicitly indicated that it did not consider the measures in question to be reprehensible in the context within which they had been taken.⁹³

38. Although the measures considered in paragraph 37 above are frequently adopted without any prior settlement attempt, there are nevertheless some instances, even where the measures appear unlikely to endanger the maintenance of peace, where the parties believe that some steps towards a peaceful settlement are required. In 1948, for example, Yugoslavia protested vehemently against the freezing of Yugoslav assets by the United States of America as a reaction to the expropriation of United States assets in Yugoslavia. The allegedly wrongdoing State claimed the unconditional revocation of the United States measure, release of the assets which, according to Yugoslavia, constituted an *indispensable condition for the continuation of the negotiations* (which were already under way) *concerning the compensation due to dispossessed American nationals*. Had the release not been granted, the Yugoslav Government threatened to submit the matter to the United Nations or to ICJ.⁹⁴ Following the French nuclear explosion in the Algerian desert in 1960, Ghana proceeded to freeze French assets in its territory. But before doing so, the Ghanaian Government had *repeatedly protested* to the French Government and *brought the question before the United Nations General Assembly*, which had adopted a resolution demanding cessation of nuclear tests.⁹⁵ The well-known cases of measures taken in the course of the last decade by States not materially affected by the infringement of *erga omnes* obligations are equally interesting. These include the measures taken by the member States of the European Community against Iran during the hostages' crisis; by the same States and the United States of America against the Union of Soviet Socialist Republics following the latter's intervention in Afghanistan; by British Commonwealth and European Community members and the United States of America against Argentina during the Falkland Islands (Malvinas) conflict, and by some NATO States and Japan against the Soviet Union following the tragedy involving a Korean airliner.⁹⁶

39. Although these cases concerned measures of little gravity (retortion or suspension of specific treaty obligations), the reacting States, while not resorting to settlement procedures in the true sense, have often submitted the issue to international institutions in an attempt to reach a solution in a diplomatic context. There have been one or more pronouncements by the Security Council and the General Assembly in the Tehran hostages case,⁹⁷ and in the cases of Afghanistan⁹⁸ and the Falkland

Islands (Malvinas) war.⁹⁹ In the Korean airliner case the Security Council resolution was vetoed by the Soviet Union.

40. An opposing position—according to which even existing dispute settlement obligations do not have any restrictive impact upon the injured State's *faculté* to take unilateral measures under general international law—emerges rather firmly from the 1978 award in the *Air Service Agreement* case. According to France, the unilateral measures taken by the United States of America:

... could have taken place [under both the theory of reprisals and the law of treaties] only if the injured State had had no other means to ensure respect [for the rights infringed by an internationally wrongful act].¹⁰⁰

The United States maintained that the French argument was valid only for *armed* reprisals. In any other case it would represent a drastic change from the existing state of customary international law and:

... could not be accepted until institutions of international adjudication have evolved to the point where there are international tribunals in place with the authority to take immediate interim measures of protection.¹⁰¹

The United States did

not accept the proposition that an injured party must defer all action until after the outcome of an arbitration. This proposition finds no support in the theory of non-forcible reprisals ... and is likewise unsupported by treaty-law doctrine.¹⁰²

The arbitral tribunal, for its part, based itself on the assumption that:

Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties. ... [a] State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "countermeasures".¹⁰³

The tribunal concluded in particular that: (a) "it is not possible [in the presence of a mere obligation to negotiate] to lay down a rule prohibiting the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute";¹⁰⁴ (b) no rule of general international law prohibits unilateral measures in cases "where there is arbitral or judicial machinery which can settle the dispute". Only "[i]f the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations", the justification of countermeasures will undoubtedly disappear, but *owing to the existence of that framework** rather than solely on account of the existence of arbitral or judicial proceedings as such;¹⁰⁵ (c) in cases where a special agreement (*compromis*) between the parties is required for an arbitral procedure to be set into motion, "it must be conceded that under present-day international law States

⁹³ *I.C.J. Reports 1980* (see footnote 37 above), pp. 16, 28 and 43-44.

⁹⁴ *Keesing's ... 1946-1948*, vol. VI, p. 9097 and *Keesing's ... 1948-1950*, vol. VII, p. 9416. The United States, however, maintained its position and an agreement was ultimately reached concerning compensation for the expropriations and release of the frozen assets.

⁹⁵ General Assembly resolution 1379 (XIV). See also *Keesing's ... 1959-1960*, vol. XII, p. 17280.

⁹⁶ Some of these cases might be considered to be examples of international crimes, according to article 19 of part I of the draft (see footnote 8 above). This practice will be discussed further when dealing with the consequences of crimes.

⁹⁷ Security Council resolution 457 (1979) of 4 December 1979.

⁹⁸ General Assembly resolution ES-6/2.

⁹⁹ Security Council resolutions 502 (1982) and 505 (1982) of 3 April and 26 May 1982 respectively.

¹⁰⁰ See *Case concerning the Air Service Agreement* (footnote 34 above), p. 428, para. 17.

¹⁰¹ *Ibid.*, para. 18.

¹⁰² Nash, *op. cit.*, p. 774.

¹⁰³ See *Case concerning the Air Service Agreement* (footnote 34 above), p. 443, para. 81.

¹⁰⁴ *Ibid.*, p. 445, para. 91.

¹⁰⁵ *Ibid.*, para. 94.

have not renounced their right to take countermeasures . . . [T]his solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures";¹⁰⁶ (d) when the adjudicating body is "in a position to act" and to the extent that it has the actual power to order *interim measures of protection*, "the disappearance of the power to initiate countermeasures" must be accepted, as well as "an elimination of existing countermeasures to the extent that the tribunal so provides as an interim measure of protection".¹⁰⁷ The tribunal adds: "As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain countermeasures, too, may not disappear completely."¹⁰⁸

E. Conclusion

41. The uncertainty surrounding the status of practice and jurisprudence, combined with the generality—and frequent vagueness—of treaty language, does not permit the drawing of easy conclusions with respect to the precise impact of dispute settlement obligations on the liberty of States to resort to reprisals. The following inferences can, however, be drawn from the practice in terms of *lex lata*:

(a) In the first place an injured State must refrain from unilateral measures that may jeopardize an amicable solution until it becomes clear that the means of settlement, other than negotiation, at the disposal of the parties¹⁰⁹ have failed to bring about or are unlikely to bring about any concrete result;

(b) Secondly, whenever a settlement procedure likely to lead to a binding decision is under way before an international body, an injured State must refrain from any unilateral measure other than interim measures of protection until that body has reached its decision and the wrongdoing State has failed to comply with it. Where the international body in question is empowered to indicate or order interim measures of protection, the injured State must refrain from unilaterally adopting any such measures until that body has given its decision on the request for interim measures;

(c) It is doubtful however whether the injured State is also required to refrain from unilateral measures by the fact that it is legally entitled to resort unilaterally to a binding or non-binding third-party settlement procedure.

42. The time has come to turn to the views expressed and proposals made so far on this matter by the former Special Rapporteur and the Commission.

43. According to draft article 10 of part 2, as proposed by the former Special Rapporteur,¹¹⁰ it would be unlawful for the injured State to resort to reprisals (as distinguished from reciprocity) "until it has exhausted the international procedures for peaceful settlement of

the dispute available to it". This prohibition excluded "interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection" (para. 2 (a)) as well as the "measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal" (para. 2 (b)). He thus accepted the view of the arbitral tribunal in the *Air Service Agreement* case regarding the admissibility of measures favouring the effective submission of the dispute to third-party settlement.¹¹¹

44. The Commission's reactions to the proposed draft article 10 varied. Some members were in favour of excluding the settlement procedure requirement for reprisals performing a preventive function,¹¹² some agreed with the Special Rapporteur's position,¹¹³ while others considered this position too favourable to the "author" State (in view of the fact that the outcome of the procedure was not necessarily binding).¹¹⁴ Some members felt that the provisions of Article 33 of the Charter of the United Nations and of other contemporary instruments were such that an obligation of prior resort to means of settlement existed in all cases. Furthermore, they believed that an express reference to the competence of the Security Council should also be added.¹¹⁵ Finally, a number of members took the view that greater precision was indispensable in order to specify that procedure and the kind of settlement obligations to be considered relevant under the article.¹¹⁶

45. In the light of the foregoing analysis of international practice, the Commission may, in particular, wish to articulate the relevant provision more clearly, a solution which the present writer would be inclined to favour. It is proposed that the following elements should be taken into account in such an endeavour:

(a) the strength of the relevant settlement obligation and the extent of the availability of the procedure contemplated;

¹¹¹ See fourth report (*Yearbook* . . . 1983, vol. II (Part One) (footnote 51 above), paras. 104 *et seq.* Riphagen also mentioned the resolution of the Institute of International Law (see footnote 5 above) in support of draft art. 5. See also his comment to draft article 10, in sixth report (*Yearbook* . . . 1985, vol. II (Part One) (footnote 11 above), p. 12).

¹¹² Barboza (*Yearbook* . . . 1983, vol. I, 1778th meeting, para. 2).

¹¹³ McCaffrey (*ibid.*, 1779th meeting, para. 36); Lacleta Muñoz (*Yearbook* . . . 1985, vol. I, 1899th meeting, para. 27), linking parts 2 and 3 of the draft and envisaging genuine means of settlement; Jagota (*ibid.*, 1901st meeting, para. 10), recommending explicit reference to the effectiveness of settlement procedures in the article.

¹¹⁴ Flitan (*ibid.*, 1893rd meeting, para. 8), commenting on the Special Rapporteur's view "that the fact that a compulsory third-party dispute settlement procedure did not provide for a final and binding decision by the third party did not take away the compulsory character of the procedure itself", said that "that was something that did not by any means follow from article 10. The question was, in that instance, why the compulsory character of the procedure itself should be maintained". Mahiou (*ibid.*, 1897th meeting, para. 13) suggested allowing measures which expedited the settlement of disputes.

¹¹⁵ Díaz González (*ibid.*, para. 47).

¹¹⁶ Arangio-Ruiz (*ibid.*, 1900th meeting, para. 19).

¹⁰⁶ *Ibid.*, para. 95.

¹⁰⁷ *Ibid.*, p. 446, para. 96.

¹⁰⁸ *Ibid.*

¹⁰⁹ Including inquiry, good offices, mediation, conciliation, resort to international institutions, arbitration or judicial settlement.

¹¹⁰ See footnote 46 above.

(b) the degree of effectiveness; and

(c) the nature and objective function of the measure envisaged.

46. As regards the first element, the strongest settlement obligation is, of course, achieved when the procedure is conceived in such a way as to be set in motion, when necessary, by a mere unilateral application by the allegedly injured party. This is the case of institutional procedures available by virtue of instruments of a general character or by the combined effect of such instruments and further bilateral or multilateral instruments. The first hypothesis is represented by the Security Council or General Assembly mediation/conciliation procedure governed by Articles 35 to 38 of the Charter of the United Nations. The second is represented by that of a judicial settlement before ICJ under the general rules set forth in the Court's Statute, in combination with agreements (arbitration clauses or general treaties) allowing for the possibility of a unilateral application, or with the declarations made under the so-called Optional Clause. With reference to judicial settlement, the possibilities for unilateral initiative which exist by virtue of provisions of the ICJ Statute contemplating accessory functions for the Court, such as those endowing the Court with *compétence de la compétence* (Art. 36, para. 6), with the power to indicate interim measures of protection (Art. 41), and others, should not be overlooked. A third possibility for unilateral initiative is represented by the infrequent cases where the obligation to resort to arbitration is accompanied by devices intended to ensure that—failing the *compromis* which is otherwise normally indispensable—the arbitral procedure is set in motion by a demand addressed by one of the parties to some permanent body to set up the tribunal. In such a situation the arbitral tribunal, once constituted, could also be unilaterally requested to indicate or to order interim measures. Finally, the statutes of a number of international bodies do envisage settlement or quasi-settlement procedures that may be initiated unilaterally.¹¹⁷

47. The second element—the effectiveness of the procedure—is present in a high degree in all “third-party” settlement procedures leading to a binding result. This is the case, of course, of arbitration and judicial settlement, the latter never, and the former only very rarely, including the possibility of indicating interim measures with binding force. A lesser degree of effectiveness is obviously to be found in those numerous and varied mediation/conciliation procedures, the most illustrious

(although not the most frequently used) of which are the procedures before the two main political bodies of the United Nations. The traditional good offices and mediation procedures, ad hoc inquiries, and the various regional dispute settlement systems show varying degrees of effectiveness. Dispute settlement or quasi-settlement procedures operating within the framework of specialized, worldwide or regional international institutions are common, albeit not always highly effective.¹¹⁸

48. The third element—the nature and the objective function of the measure envisaged—should be taken into account in at least two respects:

(a) First, countermeasures the nature and impact of which would be likely to jeopardize a just solution should be inadmissible as long as amicable settlement or quasi-settlement procedures are available, however ineffective. In any event, those measures which are in contradiction with the general obligation not to endanger international peace and security, and justice, as provided for by Article 2, paragraph 3, of the Charter of the United Nations, would also be inadmissible.

(b) In the second place, special attention should be paid to those measures which, owing to their *nature* and *function*, are referred to as “interim measures of protection”, that is to say, measures designed to protect the injured State against the risk of not obtaining reparation (*lato sensu*) or, when a wrongful act of a continuing character has not yet ceased, to prevent the continuation of the unlawful conduct.¹¹⁹ The adoption of such measures would not be in contradiction with the requirement of “previous exhaustion of available settlement procedures”, at least not until an international body had ruled on the admissibility and content of interim measures of protection under an applicable settlement procedure.¹²⁰

49. The incidence of compliance with settlement obligations upon the lawfulness of reprisals is obviously not unrelated to the dispute settlement provisions to be adopted—as arbitration clauses—within the framework of part 3 of the draft articles. With respect to the contents of those provisions, a considerable difficulty will admittedly have to be faced in view of the “naturally” very

¹¹⁷ See, for example, the case of the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, which at the time of writing is still before ICJ. The case was brought by the Islamic Republic of Iran, *inter alia*, on the basis of the violation by the United States of article 84 of the Convention on International Civil Aviation establishing ICAO. This article states that:

“... if any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within 60 days of receipt of notification of the decision of the Council.”

¹¹⁸ An example is given in footnote 117 above.

¹¹⁹ See, on this point, para. 5 above.

¹²⁰ “Objective” qualifications such as the ones just mentioned (measures likely to be detrimental to a just settlement or likely to endanger peace, security and justice; and interim measures of protection) could offer more reliable criteria than those distinctions based on the subjective aim pursued by the injured State, such as the distinction between coercive, protective and executive measures. Indeed, the available data does not offer any defensible criteria as to the relevance of any distinctions between the aims or purposes—protective, coercive or executive—in pursuance of which measures may be taken by the injured State, in the light of the impact of settlement obligations upon the lawfulness of unilateral measures. As a matter of fact, any given measure may simultaneously pursue two or more such aims. No specific cases have been identified in which the evaluation of the lawfulness of a measure (in its relationship with a dispute settlement obligation) was clearly made dependent upon the aim pursued by the injured State. To be sure, the phrase “interim measures of protection” does appear in the *Air Service Agreement* award (see footnotes 34 and 103 above). That phrase is, however, used with reference to the action of the adjudicating body and not with reference to the injured party's action. It indicates a distinct act, phase or purpose of the arbitral procedure. The “objective” meaning of interim measures of protection as understood in this report has already been discussed in para. 5 above.

extensive area that would be covered by the arbitration clauses eventually to be embodied in the codification of a convention on State responsibility. Everybody is aware of the fact that such a convention would cover *any subject matter* which may suffer an alleged breach of an international obligation. It is therefore likely that States will, in principle, be more reluctant to undertake far-reaching third-party settlement obligations than they would be with reference to any *specific* area of the law of nations codified so far. The fact that any settlement obligations provided for in part 3 would obviously limit the area in which the freedom of an allegedly injured State to resort to reprisals would be affected by the requirement of prior resort to available settlement procedures is bound to make States more reluctant to broaden their third-party and other settlement commitments. Every effort will be made to take due account of these easily foreseeable difficulties under the relevant articles of part 2 and in part 3.

50. On the other hand, the very factor considered in paragraph 49 above makes it all the more important to attempt to develop adequately the law of dispute settlement within the framework of parts 2 and 3 of the draft articles. States must be made to realize that the law of State responsibility will not achieve the greater fairness, balance and effectiveness, which are indispensable, unless they accept substantial improvements in the field of amicable settlement procedures. Unilateral measures are long bound to remain the core of the legal regime of State responsibility, in the absence of institutional remedies. The effective implementation of such consequences of internationally wrongful acts as cessation and reparation will, in the final analysis, rest on reprisals. Implementation, however, must not only be effective, it must also be just: and for justice to be secured at the stage of implementation the system of reprisals must be mitigated by adequate settlement procedures. This is in the interest of both parties. The alleged wrongdoing State must find in settlement procedures a guarantee against unfounded or unreasonable claims on the part of the allegedly injured State. The latter must find in settlement procedures a guarantee of early cessation of the wrongful conduct and of adequate reparation of the effects thereof. Both have a clear interest in making settlement procedures as effective as possible, whatever the instinctive general reluctance of all States to commit themselves.

51. The considerations set forth in paragraph 50 above should be taken into account, most particularly by the Governments of those States—the great majority—whose economic, political or military weakness puts them at a disadvantage, whether they are in the position of allegedly injured State or of alleged wrongdoing State. The Commission should therefore do its best, in dealing with the problem of dispute settlement in parts 2 and 3, not only to draw as much as possible on the commitments embodied in the Charter of the United Nations and other instruments, but also to proceed more imaginatively to the highest possible degree of progressive development. Contemporary trends at the worldwide and

regional levels do seem to show a few encouraging, albeit modest, signs.¹²¹

¹²¹ In addition to the developments described in para. 33, it is perhaps useful to recall the prospects which seem to emerge from the Conference on Security and Cooperation in Europe. See, for example, the Principles for dispute settlement and provisions for a CSCE procedure for peaceful settlement of disputes adopted at the Meeting of Experts on Peaceful Settlement of Disputes of the Conference on Security and Cooperation in Europe held at Valletta from 15 January to 8 February 1991 (*Official Records of the General Assembly, Forty-sixth Session*, agenda items 127 and 131, document A/46/335, annex). Of particular interest here are paragraphs 4 (Dispute prevention), 5 (Dispute management) and 6 (Dispute solution):

"4. The participating States will seek to prevent disputes and to develop, utilize, and improve mechanisms designed to prevent disputes from occurring, including, as appropriate, arrangements and procedures for prior notification and consultation, regarding actions by one State likely to affect significantly the interests of another State.

"5. Should disputes nevertheless occur, the participating States will take particular care not to let any dispute among them develop in such a way that it will endanger international peace and security, and justice. They will take appropriate steps to manage their disputes pending their settlement. To that end, the participating States will:

"(a) address disputes at an early stage;

"(b) refrain throughout the course of a dispute from any action which may aggravate the settlement of the dispute;

"(c) seek by all appropriate means to make arrangements enabling the maintenance of good relations between them, including, where appropriate, the adoption of interim measures which are without prejudice to their legal positions in the dispute."

"6. As laid down in the Helsinki Final Act and subsequent relevant documents, the participating States will endeavour in good faith and in a spirit of cooperation to reach a rapid and equitable solution of their disputes on the basis of international law, and will for this purpose use such means as negotiation, inquiry, good offices, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice, including any settlement procedure agreed to in advance of disputes to which they are parties. To that end, the participating States concerned will in particular:

"(a) consult with each other at as early a stage as possible;

"(b) in case they cannot settle the dispute among themselves, endeavour to agree upon a settlement procedure suited to the nature and characteristics of the particular dispute;

"(c) where a dispute is subject to a dispute settlement procedure agreed upon between the parties, settle the dispute through such procedure, unless they agree otherwise;

"(d) accept, in the context of the CSCE Procedure for Peaceful Settlement of Disputes and its scope of applicability, the mandatory involvement of a third party when a dispute cannot be settled by other peaceful means."

(More generally, for interesting analyses of the issue of peaceful settlement of international disputes in Europe, see *The Peaceful Settlement of International Disputes in Europe: Future Prospects, Workshop, The Hague, 6-8 September 1990* (Dordrecht, Martinus Nijhoff Publishers, 1991).)

A further source of inspiration is the statement made by the President of ICJ, Sir Robert Jennings, to the General Assembly (*Official Records of the General Assembly, Forty-sixth Session, Plenary Meetings*, 44th meeting). After having drawn attention to the full docket of the Court (11 cases at that time), he pointed out how the Court could perform an even more active role in the settlement of disputes if its advisory jurisdiction were more widely utilized by States and by organs of the United Nations. He stressed that even disputes that were predominantly political in nature, such as the Iraq-Kuwait dispute before the invasion, often had a legal component, and a non-binding pronouncement in such cases might facilitate their solution by such means as negotiation and mediation. His suggestion was gladly accepted by the Secretary-General (*ibid.*).

CHAPTER III

Proposed draft articles

52. The following draft articles are proposed:

Article 11. Countermeasures by an injured State

An injured State whose demands under articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following articles, not to comply with one or more of its obligations towards the said State.

Article 12. Conditions of resort to countermeasures

1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

(a) the exhaustion of all the amicable settlement procedures available under general international law,

the Charter of the United Nations or any other dispute settlement instrument to which it is a party; and

(b) appropriate and timely communication of its intention.

2. The condition set forth in subparagraph (a) of the preceding paragraph does not apply:

(a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;

(b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure;

(c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body.

3. The exceptions set forth in the preceding paragraph do not apply wherever the measure envisaged is not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered.

CHAPTER IV

Proportionality of countermeasures

53. As indicated in the third report,¹²² the relevance of proportionality in the regime of countermeasures is widely accepted both by scholars and in jurisprudence.¹²³ It is necessary however to clarify the precise content of the principle, namely how rigid or how flexible it is, and the criterion by which proportionality should be assessed.

54. In so far as the *first* point (content) is concerned, it is rather unusual in the context of inter-State practice for reference to be made, either by the reacting State or by the State against which measures are being taken, to equivalence or proportionality in a narrow sense.¹²⁴

¹²² *Yearbook* . . . 1991, vol. II (Part One) (see footnote 1 above).

¹²³ *Ibid.*, paras. 63-68.

¹²⁴ An example could perhaps be the tariff measure adopted by the United States of America in 1987 with regard to Japanese electronic goods following an alleged failure by Japan

" . . . to honour a five-year bilateral accord on the pricing of semi-conductors (microchips). . . . The action followed the adoption of unanimous resolutions by both House and Senate calling for retaliation for violation of the accord. . . . In announcing the tariffs . . . the United States Secretary of Commerce remarked that Japan was an 'ally and a friend' and that 'nobody in the administration is very happy about having to do this'. Japan stated that it would challenge the imposition of the tariffs under the rules of the [General Agreement on Tariffs and Trade]. . . ." (*Keesing's* . . . 1987, vol. 33, p. 35331.)

Considering that the function of the principle is to avoid the possible inequitable result of the use of countermeasures, it is understandable that a rigid notion of proportionality should have been found unsuitable. The "negative" formulations adopted in the *Naulilaa* and *Air*

President Reagan on 8 June 1987 announced a reduction of US\$ 51 million in the value of merchandise affected by the measure, "this reduction being described as 'strictly proportional' * to the degree to which Japanese manufacturers had adjusted their prices in accordance with the United States concept of 'fair value' ". More generally, a rigid assessment of proportionality of measures and countermeasures seems to be the one provided for by the GATT system. On this point, see Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques*, chap. III. Cases in which States appear to apply the principle of proportionality in a narrow sense are considered to be those in which they adopt "reciprocal measures" (see *Yearbook* . . . 1991, vol. II (Part One) (footnote 1 above), paras. 28-32). However, the admissibility in these cases not only of "reciprocal measures" but also of measures "not strictly proportional" (equivalent) to the wrongful act and—as indicated in chaps. I and II above—the absence of any difference, from the point of view of the impact of dispute settlement obligations, in the requirement of a previous demand for reparation or of a previous intimation, between "reciprocal measures" on the one hand, and measures "not strictly proportional" on the other hand, lead the present writer to agree with those who consider "reciprocal measures" to be no different from other forms of countermeasures and subject to the same conditions and limitations (*ibid.*, para. 31).

Service Agreement awards, for instance, are therefore preferable.¹²⁵ The former Special Rapporteur seems to have relied on the same understanding of the principle, according to paragraph 2 of his proposed draft article 9 of part 2, a countermeasure "shall *not**, in its effects, be manifestly *disproportionate** to the seriousness of the . . . act".¹²⁶ On the other hand, the doubts expressed by a number of representatives in the Sixth Committee of the General Assembly concerning the use of the term "manifestly" are valid.¹²⁷ While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the influence of the term "manifestly" could have the effect of introducing an element of uncertainty and subjectivity into the construction and application of the principle.¹²⁸ Expressions such as "out of proportion" or simply "disproportionate" would seem to be preferable.¹²⁹

¹²⁵ According to the award in the *Naulilaa* case,

"... on devrait certainement considérer comme excessives et partant illicites, des représailles hors de toute proportion (emphasis added) avec l'acte qui les a motivées" (*Portuguese Colonies* (see footnote 24 above, p. 1028)).

In the *Air Service Agreement* award (see footnote 34 above) the arbitrators held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France*" (p. 444, para. 883). In the Commission, Calero Rodrigues came out clearly in favour of the inclusion of a "negatively" formulated requirement of proportionality in the draft articles concerning countermeasures (*Yearbook* . . . 1982, vol. I, 1733rd meeting, para. 36).

¹²⁶ Sixth report (*Yearbook* . . . 1985, vol. II (Part One) (see footnote 11 above)), p. 11, draft article 9, para. 2, and commentary thereto.

¹²⁷ See, in particular, the statements made by the representatives of France (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 38th meeting, para. 14), Greece (*ibid.*, 40th meeting, para. 45), Finland (*ibid.*, 45th meeting, para. 5), Algeria (*ibid.*, 48th meeting, para. 32), and Morocco (*ibid.*, 50th meeting, para. 34).

¹²⁸ The same holds true for the expressions *hors de toute proportion* used in the *Naulilaa* award and "clearly* disproportionate" in the *Air Service Agreement* award (see footnote 125 above).

¹²⁹ The same line is taken in section 905, para. 1 (b), of the *Restatement of the Law Third* (see footnote 39 above), p. 904, according to which an injured State

"may resort to countermeasures that might otherwise be unlawful, if such measures . . . (b) are not out of proportion to the violation and the injury suffered".

55. The *second* issue to be considered concerns the criteria of proportionality. For the same reasons given above, namely the need to ensure that the adoption of countermeasures does not lead to any inequitable results, proportionality should be assessed by taking into account not only the purely "quantitative" element of damage caused, but also what might be called "qualitative" factors, such as the importance of the interest protected by the rule infringed and the seriousness of the breach.¹³⁰ This appears to be in line with the position emerging from the 1934 resolution of the Institute of International Law on reprisals¹³¹ and, more recently, from the award in the *Air Service Agreement* case¹³² and the proposals made by the former Special Rapporteur.¹³³

56. A different matter is the possible relevance of the aims pursued by the allegedly injured State in resorting to countermeasures. Although, as explained in chapter I of this report (paras. 3-5 above), the aims—or rather the functions—of an act of reprisal could be of relevance in deciding whether and to what extent the measure is lawful, this issue is different from that of proportionality. Proportionality, even if not understood in a strictly "quantitative" sense, is in any event a relationship between the two evils represented by the breach and the reaction thereto. It is not to be measured, therefore, on the basis of the likelihood of the reaction achieving a particular aim.

¹³⁰ On this, the present writer shares Riphagen's opinion, according to which "quantitative" and "qualitative" proportionality would not be separable (see preliminary report (*Yearbook* . . . 1980, vol. II (Part One), pp. 127-128, document A/CN.4/330, paras. 94-95)).

¹³¹ According to art. 6, para. 2, of the resolution (see footnote 5 above), the acting State must *proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi* (p. 710).

¹³² See footnote 34 above. In that award the arbitrators held that "it is essential, in a dispute between States, to take into account *not only the injuries suffered** by the companies concerned but also the *importance of the questions of principle** arising from the alleged breach" (p. 443).

¹³³ According to his draft article 9, para. 2 (see footnote 126 above): "2. The exercise of [the right to resort to reprisals] by the injured State shall not, *in its effects**, be manifestly disproportionate to the *seriousness of the internationally wrongful act** committed."

CHAPTER V

Prohibited countermeasures

57. The third report summed up the main issues arising with regard to countermeasures, namely (a) the prohibition of the use of force; (b) respect for human rights; (c) diplomatic law; and (d) *jus cogens* and *erga omnes* rules.¹³⁴ Although some of the issues under (a), (b) or (c) are covered by *jus cogens* or *erga omnes* rules, it is preferable to continue to deal with them separately in view of the importance that the prohibition of the use of force and

the protection of human rights in particular have acquired in recent times.

A. Countermeasures and the prohibition of the use of force

58. Although the present writer is not fully convinced that the prohibition of the use of force under Article 2, paragraph 4, of the Charter of the United Nations has really acquired the status of a rule of general international

¹³⁴ *Yearbook* . . . 1991, vol. II (Part One) (see footnote 1 above), paras. 96-102.

law, in line with the pronouncements of ICJ and the virtually unanimous view of scholars,¹³⁵ it is essential to work from the assumption that such is the case. If it were not the case, such a general rule would, in any event, have to be affirmed as a matter of progressive development of the law of State responsibility.

59. The move towards the restriction of resort to armed reprisals, which had already emerged before the Covenant of the League of Nations and the Briand-Kellogg Pact, may be considered to have achieved its aim at the treaty-law level with the entry into force of those two "anti-war" treaties. Notwithstanding some ambiguities in the relevant rules—particularly in the Covenant—those two treaties may reasonably be interpreted as restricting, in the former case, and forbidding, in the latter case, resort to "forcible measures short of war" prior to exhaustion of peaceful means of redress.¹³⁶ This appears to be a correct interpretation of the combined effect of the provisions of the two treaties concerning the prohibition of force, on the one hand, and the obligation to attempt a peaceful settlement, on the other. This interpretation of the treaty-law situation is confirmed by the practice of the period between the wars. Unlike previously, States resorting to armed measures declared that they were acting in self-defence.¹³⁷ It must be further recalled that resort to force was also being condemned in the Americas, albeit under the different term "forcible intervention",¹³⁸ for instance by the so-called Saavedra Lamas Treaty of 1933.¹³⁹

¹³⁵ Ibid. (especially footnotes 190-212).

¹³⁶ Of course, the Covenant did not explicitly refer to measures "short of war". More specifically, it condemned resort to war: (a) prior to the experiment of one of the peaceful means envisaged in the Covenant (arbitration or judicial settlement (Art. 12)); (b) during the three months following an arbitral award or a judgment of PCIJ or a report of the Council of the League (ibid.); (c) against a member which complies with the arbitral award or Court decision (Art. 13); and (d) against any party to the dispute which complies with a unanimous report of the Council or a qualified majority report of the Assembly (Art. 15). Except in those cases, and subject to the controversial impact of the duty to respect and preserve the territorial integrity of all the members (Art. 10), war was not unlawful (see Forlati Picchio, op. cit., pp. 108-109 and footnote 17). It was, however, held by a number of authorities that the prohibition of war in the cases mentioned included the prohibition of military measures "short of war". See, for example, Brierly, "Règles générales du droit de la paix", *Recueil des cours* . . . , 1936-IV, p. 124, and, for a survey of opinions, Brownlie, op. cit., pp. 220 *et seq.* This position apparently found some support in the opinion of the Committee of Jurists consulted by the League following the Tellini (Janina) case (see footnote 23 above), where the admissibility of forcible measures short of war was made conditional upon a decision of the Council (in the light of Arts. 13-15 of the Covenant).

As for the Briand-Kellogg Pact (see para. 25 and footnote 65 above), it condemned war in articles I and II and prescribed the settlement of disputes by peaceful means.

¹³⁷ Brownlie, op. cit., pp. 19 *et seq.*; Lamberti Zanardi, *La legittima difesa nel diritto internazionale*, pp. 39 *et seq.*, and particularly p. 87.

¹³⁸ On the parallelism of this development *mutatis mutandis* with the European anti-war trend, see, *inter alia*, Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Collected Courses* . . . , 1972-III, pp. 547 *et seq.*

¹³⁹ See para. 25 and footnote 67 above. Article I of that treaty provided:

"... that the settlement of disputes or controversies of any kind that may arise among them shall be effected only through the pacific means established by International Law."

while article III specified that

"in no case shall [the Contracting Parties] resort to intervention either diplomatic or armed".

60. It is well known that while the Covenant of the League of Nations restricted resort to force, the Charter of the United Nations firmly prohibits it altogether, except in self-defence under Article 51. The drafters of the Charter certainly intended to condemn—and in fact did condemn—the use of force even if resort to force was in pursuit of rights.¹⁴⁰ It is therefore impossible to espouse the view that armed reprisals would not be condemned in so far as they were used not against the territorial integrity and political independence of any State (or in any manner incompatible with the purposes of the United Nations) but for the restoration of an injured State's right.¹⁴¹

61. States have made explicit pronouncements on the subject of the prohibition of armed countermeasures under Article 2, paragraph 4, of the Charter of the United Nations, principally in the well-known Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,¹⁴² by which the General Assembly unanimously proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force".¹⁴³ This position is implicitly confirmed by the General Assembly's Definition of Aggression,¹⁴⁴ where it is specified in article 5, paragraph 1, that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". This is believed to mean that not even a legal consideration such as the pursuit or protection of a right would justify resort to one of the actions referred to in article 3 of the Definition.¹⁴⁵ During the drafting of the

The Declaration of American Principles approved by the Eighth International Conference of American States, held in Lima in 1938, is also very clear in reiterating the unlawfulness of all use of force, including armed reprisals. It states "once again" that "All differences of an international character should be settled by peaceful means" and that "The use of force as an instrument of national or international policy is proscribed" (AJIL, vol. 34, *Supplement*, No. 4 (October 1940), p. 201).

¹⁴⁰ On the proceedings of the San Francisco Conference, see Lamberti Zanardi, op. cit., pp. 143 *et seq.*, and Taoka, *The Right of Self-defence in International Law*, pp. 105 *et seq.*

¹⁴¹ On the doctrine in question, originally formulated by Colbert and especially by Stone, see *Yearbook* . . . 1991, vol. II (Part One) (footnote 1 above), para. 98 and footnote 193.

¹⁴² See footnote 82 above.

¹⁴³ For a discussion of the Declaration, see Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: a survey", AJIL (1971), p. 713 *et seq.*, especially p. 726.

The prohibition is reiterated in the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, which refers to:

"The duty of a State to refrain from armed intervention, subversion, military occupation or any other form of intervention and interference, overt or covert, directed at another State or group of States, or any act of military, political or economic interference in the internal affairs of another State, including acts of reprisal involving the use of force" (General Assembly resolution 36/103, annex, sect. II, para. (c)).

¹⁴⁴ General Assembly resolution 3314 (XXIX), annex.

¹⁴⁵ That article lists the forms of aggression. These may be summarized as follows: invasion or attack by the armed forces of a State of the territory of another State; bombardment; blockade of ports or coasts; attack on military forces of another State; the use of armed forces of one State which are in the territory of another State, without the consent of the latter; the action of a State allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force (amounting to any of the acts of aggression listed).

resolution on the Definition of Aggression, an attempt was made—without success—to broaden the concept of armed attack, and consequently of self-defence, in order to include as exceptions the protection of nationals abroad, on the one hand, and intervention in favour of the self-determination of dependent peoples, on the other. Neither of these cases, however, involves the protection of a State's rights by means of reprisals.¹⁴⁶ The condemnation of armed reprisals is also present, albeit indirectly, in the assertion by ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* of the customary nature of the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations condemning the use of force.¹⁴⁷

62. There is of course the question whether the failure to implement the core of the United Nations collective security system which is represented by Articles 42 to 47 of the Charter might not justify an "evolutive" interpretation not only of the Charter, but also of the corresponding general rule of international law with regard to condemnation of the use of force. This refers to the doctrine according to which the persistence of that failure would justify an interpretation under which the prohibition laid down in Article 2, paragraph 4, of the Charter would be subject not only to the exception envisaged in Article 51, but also to other exceptions not expressly provided for therein.¹⁴⁸ It will be seen, however, that such a doctrine (whether it is accepted or not) would only cover those cases in which resort to force might be justified by those grave emergency situations for which Articles 42 to 51 of the Charter were devised, situations which may call for a broadening of the concept of self-defence, but not for an exception to the prohibition of armed countermeasures against an internationally wrongful act. This seems to be demonstrated by practice, which will be considered in the following paragraphs. While this practice does seem to have a bearing on the concept of self-defence—in the sense of broadening it in order to fill the gap left by the failure to complete the implementation of the collective security system—it appears less likely to justify the notion that armed force may be lawfully resorted to by way of reprisal.¹⁴⁹

¹⁴⁶ They concern rescue or other operations to assist nationals or peoples in danger or under duress. The same trend has emerged more recently within the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. In 1987 the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations was finally adopted, according to which: "No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter." (General Assembly resolution 42/22, annex, sect. I, para. 3.)

¹⁴⁷ *I.C.J. Reports 1986*, p. 99, para. 188.

¹⁴⁸ *Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), para. 98.

¹⁴⁹ This position has recently been supported by Sicilianos, *Les réactions décentralisées à l'illicite : Des contre-mesures à la légitime défense*, pp. 398 *et seq.*

According to the *Restatement of the Law Third* (see footnote 39 above):

"The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter ..." (sect. 905 (2), p. 380).

63. The prohibition of armed reprisals is further evidenced by the fact that States resorting to force do not attempt to demonstrate the lawfulness of their conduct by qualifying it as a reprisal: they refer instead to self-defence. This was the position France and the United Kingdom appeared to take during the Suez crisis of 1956, for example.¹⁵⁰ A similar position was taken by the United Kingdom in 1964 in order to justify the bombardment of a locality in Yemen following a violation by that country of the airspace of the South Arabian Federation. Before the Security Council, which explicitly condemned the action as an armed reprisal, the British Government used a plea of self-defence; this was rejected for lack of immediacy of the reaction.¹⁵¹ It is interesting to note that the United Kingdom refrained from vetoing the Council's resolution and declared that it did not object to paragraph 1, which condemns reprisals as incompatible with the purposes and principles of the United Nations, since "the action [in question] was not a reprisal or retaliation".¹⁵² The representative of the United Kingdom went on to say that:

The purpose of our action at Harib fort which ... we regard as falling under Article 51 of the Charter, was wholly defensive in order to prevent further attacks against the territorial integrity of the South Arabian Federation and its inhabitants.¹⁵³

It also specifies that:

"... a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered" (ibid.).

¹⁵⁰ Both Governments took the position that as the main users of the canal, their vital interests would be endangered if free passage was interrupted. (See the relevant statements in *Official Records of the Security Council, Eleventh Year*, 751st meeting, paras. 46 and 61.) On this occasion the United States declared that the circumstances prevented speaking of self-defence and that it was a case of armed attack (*Official Records of the General Assembly, First Emergency Special Session, Plenary Meetings*, 561st meeting, paras. 140 and 150).

¹⁵¹ Security Council resolution 188 (1964) of 9 April 1964, in which the Council:

"1. Condemns reprisals as incompatible with the purposes and the principles of the United Nations;

"2. Deplores the British military action at Harib on 28 March 1964".

The discussion which took place is reported in *Official Records of the Security Council, Nineteenth Year*, 1106th-1111th meetings.

Numerous cases may be cited of violation of national airspace by military aircraft of States belonging to the opposing blocs which occurred during the early years of the cold war. In a number of these cases, the aircraft was shot down. In the well-known U2 case, for instance, a United States military aircraft was shot down by Soviet forces in 1960. The case was brought before the Security Council by the Soviet Union (ibid., 860th meeting). It is doubtful how such cases should be categorized. On the one hand, the existence of a territorial violation is clear but, on the other, it is more doubtful whether such a violation constitutes real aggression and justifies an immediate armed reaction. It is important to stress here that the States concerned did not invoke the notion of reprisal in support of their armed reaction to the violation of their airspace, but referred instead to self-defence. Unfortunately, some incidents have concerned civil aircraft as well (the Israeli commercial airliner shot down by Bulgaria in 1955; the forced landing—and consequent dismantling—of a Libyan civilian aircraft by Israel in 1973; and the South Korean airliner shot down in 1983 by the Soviet Union). In these cases, reference to self-defence is much more debatable. On this practice, see Gianelli, *op. cit.*, chap. IV, No. 10, I (a) and (c).

¹⁵² See *Official Records of the Security Council, Nineteenth Year*, 1111th meeting, para. 29.

¹⁵³ Ibid., para. 30. On this occasion the representative of the United States of America expressed his Government's disapproval of "provocative acts and retaliatory raids in situations such as that before us" (ibid., para. 4).

64. In many cases armed force appears to have been resorted to by way of reaction to terrorist acts. Despite the absence of the immediacy requirement—action having been taken in some instances months after the attack or even to prevent future attacks—the States taking the forcible action almost invariably invoke self-defence in order to justify it. Israeli incursions into neighbouring States in the late 1960s and early 1970s have inspired discordant doctrinal positions.¹⁵⁴ Whatever the merits of these episodes from other points of view, it must be stressed that here again, as in the cases considered earlier in this chapter, the justification given by the acting State before the Security Council—a highly questionable justification from the legal point of view—was the right of “self-defence”: where self-defence was understood as the right to protect the life and security of nationals within the country against attacks launched from bases situated in foreign territory.¹⁵⁵ The same line of reasoning has been adopted with respect to more recent episodes, such as the raid against the headquarters of the Palestine Liberation Organization in Tunis in 1985.¹⁵⁶ While rejecting the “self-defence” justification, the Security Council condemned the actions, characterizing them explicitly either as armed reprisals or, more generally, as military actions.¹⁵⁷ Following the bombardment of Libyan localities by the United States in 1986, the

¹⁵⁴ *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), para. 98.

¹⁵⁵ See the statement by the Israeli representative (*Official Records of the Security Council, Twenty-third Year, 1407th meeting* para. 215), relating to some incidents which had occurred in Jordan; the statements by the Israeli representative (*ibid.*, 1460th meeting, para. 59, and 1462nd meeting, para. 121), concerning the attack against the civilian airport in Beirut; and the letter from the Permanent Representative of Israel to the United Nations of 11 April 1973 (*ibid.*, *Twenty-eighth Year, Supplement for April, May and June 1973*, document S/10912), concerning the incursion into Lebanon. See also *Report of Practice of United Nations Organs, Supplement No. 2*, vol. I (United Nations publication, Sales No. 64.V.5), p. 112, para. 156. Episodes concerning Israeli actions brought before the Security Council are numerous and have led to a number of resolutions of condemnation, at times formulated in a contradictory manner, such as Security Council resolutions 101 (1953); 111 (1956); 228 (1966); 265 (1969); 270 (1969); 279 (1970); 280 (1970); 285 (1970); 294 (1971); 313 (1972); 316 (1972); 332 (1973); 347 (1974); 425 (1978); and 509 (1982).

On this practice, see Sicilianos, *op. cit.*, pp. 413 *et seq.*

¹⁵⁶ See the statement of the Israeli representative in the Security Council (*Official Records of the Security Council, Fortieth Year, 2615th meeting*) justifying the violation of Tunisian sovereignty:

“The PLO got in Tunisia an extraterritorial base from which they conducted their terrorist operations. We have struck only at this base ... Tunisia knew very well what was going on in this extraterritorial base, the planning that took place there, the missions that were launched from it, and the purposes of those missions; repeated armed attacks against my country and against innocent civilians around the world”.

The Israeli representative went on to say that his Government was concerned “with the prevention of future crimes” and further indicating its “aim to weaken and to destroy the nerve-centre of world terror” (*ibid.*).

¹⁵⁷ On other occasions the Council was unable to adopt any decision. For an analysis of the Council’s resolutions, see Sicilianos, *op. cit.*, pp. 413 *et seq.*, who considers that it is not possible to conclude from the Council’s practice that armed reprisals are found to be admissible or at least are tolerated, in the presence of certain prerequisites. He notes that, on the contrary, several States have expressly ruled out the lawfulness of armed reprisals. See, for instance, the statement by the representative of Pakistan during the debate concerning an Israeli raid in Jordan:

United States Government stated that it had acted under Article 51 of the Charter in response to terrorist acts.¹⁵⁸

South Africa, for its part, justified incursions into the territories of its African neighbours in the 1980s as reactions to acts of terrorism.¹⁵⁹ It is quite clear that the States engaging in such acts of violence did not attempt to justify them as reprisals or countermeasures. They preferred a plea of self-defence, this concept being in their view applicable in the case of use of force to protect vital interests.

65. The tendency to broaden the scope of self-defence to include a reaction to an armed attack against a State merits further analysis, especially with respect to armed intervention for reasons of humanity in a state of necessity. Actions of this nature are usually undertaken by a State for the protection of its nationals in situations where there is a serious risk to life, regardless of the nature of the act or fact giving rise to the danger,

“The Security Council cannot tolerate military reprisals, much less a massive armed attack by a Member State on another Member State on the pretext of retaliation against alleged acts of terrorism or sabotage.” (*Official Records of the Security Council, Twenty-third Year, 1407th meeting*, para. 61.)

Paraguay used similar terms with reference to the situation in the Middle East:

“We do not accept the doctrine of the right of reprisal whereby a State can presumably arrogate to itself the right to carry out military operations of the kind now being considered by the Council in the territory of the other State.” (*Ibid.*, *Twenty-fourth Year, 1470th meeting*, para. 37.)

¹⁵⁸ The bombing, which took place on 15 April, followed the explosion of a bomb, on 5 April, in a discothèque in West Berlin largely patronized by United States military personnel, which caused deaths and injuries. The Embassy of the Libyan Arab Jamahiriya in Berlin is alleged to have announced the act in advance. On 27 December 1985, other attacks had taken place at airports in Rome and Vienna. The United States stated that it had proof of Libyan responsibility and described the action—directed against terrorist bases—as a case of self-defence which was perfectly consistent with Article 51 of the Charter of the United Nations (letter from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (*ibid.*, *Forty-first Year, Supplement for April, May and June 1986*, document S/17990)). The United Kingdom took the same position, remaining isolated however, even within the Western group (other Western countries simply adopted measures of retortion against the Libyan Arab Jamahiriya). While during the Security Council debate several States strongly criticized the United States action (see, for instance, the statements by the representative of Yugoslavia, who “condemns most strongly this armed attack” (*Official Records of the Security Council, Forty-first Year, 2676th meeting*), and of Hungary, according to whom “the isolated suggestion that the armed attack carried out by the United States was an act of self-defence is nothing but an ill-conceived attempt to justify the illegitimate and to misinterpret another clear rule of law” (*ibid.*, 2677th meeting), the General Assembly condemned the attack in resolution 41/38 on the Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People’s Libyan Arab Jamahiriya by the present United States Administration in April 1986 (adopted by 79 votes in favour, 28 against, with 33 abstentions).

¹⁵⁹ Reference is made to a number of episodes. Actions were usually directed against bases of the African National Congress of South Africa. With reference to the Maseru incursion of 19 December 1985, when nine people with links to that organization were killed, South Africa stated before the Security Council that its action was justified by “terrorist violence emanating from Lesotho’s territory” (*Official Records of the Security Council, Fortieth Year, 2639th meeting*). Mention may be made also of the incursions into Botswana, Zimbabwe and Zambia (19 May 1986); Swaziland (14 December 1986); Zambia (25 April 1987); Mozambique (28 May 1987); and Botswana (28 March and 21 June 1988).

whether it be an internationally wrongful act of a State or the behaviour of private parties over which the territorial State has no control. The relevant practice includes the actions which the United Kingdom proposed to carry out in Iran in 1946 and 1951, the Belgian intervention in the Congo in 1960, the United States action in the Dominican Republic in 1965, the "Mayaguez" affair in 1975, the Entebbe raid by Israel in 1976, the Egyptian intervention in Larnaca in 1978, the United States attempted rescue of hostages in Iran in 1980 and its interventions in Grenada and Panama in 1983 and 1989 respectively.¹⁶⁰ On such occasions the States concerned frequently resorted to the plea of self-defence as a justification for their action.¹⁶¹ In a few instances they referred to state of necessity.¹⁶²

66. There are also instances of armed intervention to protect nationals of the territorial State itself. This seems to have been the case of the Arab States' intervention in Palestine in 1948, India's intervention in Bangladesh in 1971, Viet Nam's intervention in Cambodia in 1978, and the United Republic of Tanzania's intervention in Uganda in 1979.¹⁶³

67. The lawfulness of armed intervention to protect nationals in danger abroad generally appears to be accepted not so much under Article 51, as a reaction to an armed attack against a State in the person of its nationals or against the nationals of an ally of the intervening State,¹⁶⁴ but rather on the basis of a plea of self-defence

as understood in the practice of common-law countries,¹⁶⁵ that is to say, self-defence in a broad sense, encompassing self-defence *stricto sensu* and necessity.¹⁶⁶ Some evidence of this interpretation may be inferred from the ICJ *dictum* in the case of *United States Diplomatic and Consular Staff in Tehran*¹⁶⁷ with reference to the United States rescue operation. By condemning that action for the reason that it appeared to be incompatible with the respect due to the judicial process,¹⁶⁸ the Court seems to have accepted by implication that the United States action might have been lawful if a judicial procedure had not been under way.

68. The justification of armed intervention for humanitarian purposes in favour of the nationals of the territorial State is more problematic. If some (perhaps the majority) of writers do not find any justification for intervention of this kind¹⁶⁹ on the basis of positions taken by Governments,¹⁷⁰ others consider this practice to be lawful,¹⁷¹ arguing, *inter alia*, on the basis of the work carried out by the Commission on article 33 of part 1 of the draft.¹⁷² For the time being, there is no need to take a stand on this issue, though the problem may have to be tackled in relation to the consequences of so-called inter-

¹⁶⁰ On this practice, see Ronzitti, *op. cit.*, pp. 21 *et seq.*, Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, pp. 163 *et seq.*, and, more recently, Sicilianos, *op. cit.*, pp. 449 *et seq.* In particular, on the Belgian intervention in the Congo, see *Official Records of the Security Council, Fifteenth Year*, 879th meeting; on the United States action in the Dominican Republic (*ibid.*, *Twentieth Year*, 1200th meeting, para. 19); for the other cases cited, see the footnotes which follow. The protection of nationals in danger was also invoked as a justification, together with vital interests, for the British and French intervention in Egypt in 1956 (see para. 63 above). In the Grenada case the protection of nationals was only one of the various reasons invoked as justification (*Official Records of the Security Council, Thirty-eighth Year*, 2491st meeting, paras. 51-77). No mention is made here of cases where the State taking the action had also tried, by some means or another, to secure the consent of the territorial State (the validity of such consent being questionable however).

¹⁶¹ See statements before the Security Council by the United States of America in the Panama case (*ibid.*, *Forty-fourth Year*, 2902nd meeting) and in the "Mayaguez" case (*ibid.*, *Thirtieth Year, Supplement for April, May and June 1975*, document S/11689, pp. 24-25); by Israel on the Entebbe raid (*ibid.*, *Thirty-first Year*, 1939th meeting, para. 111); by the United States on the Tabas raid (*ibid.*, *Thirty-fifth Year, Supplement for April, May and June 1980*, document S/13908, pp. 28-29).

¹⁶² Statement by Belgium on the Congo intervention (*ibid.*, *Fifteenth Year*, 879th meeting, para. 151).

¹⁶³ Ronzitti, *op. cit.*, pp. 89 *et seq.*; and Sicilianos, *op. cit.*, pp. 166 *et seq.* In addition to humanitarian reasons, the acting States also invoked self-defence. See, for instance, the Indian Government's position in the Bangladesh case (*ibid.*, *Twenty-sixth Year*, 1606th meeting, paras. 160 *et seq.*); Viet Nam's position on its intervention in Cambodia (*ibid.*, *Thirty-fourth Year*, 2109th meeting, para. 126).

¹⁶⁴ In this vein, see Bowett, *op. cit.*, pp. 91 *et seq.* (but see also footnote 155 above); "The use of force for the protection of nationals abroad", *The Current Legal Regulation of the Use of Force*, pp. 40 *et seq.*; Thomas and Thomas, *The Dominican Republic Crisis 1965*, pp. 13 *et seq.*; Rostow, "The politics of force: analysis and prognosis", *The Year Book of World Affairs*, p. 50.

¹⁶⁵ In this vein, see Ross, *A Textbook of International Law*, pp. 247 *et seq.*; Waldock, "The regulation of the use of force by individual States in international law", *Recueil des cours* ..., 1952-II, p. 503 (who seems to speak of "self-protection"); Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours* ..., 1957-II, pp. 172-173; Panzera, "Raids e protezione dei cittadini all'estero", *Rivista di diritto internazionale*, pp. 759 *et seq.*; Pillitu, *Lo stato di necessità nel diritto internazionale*, especially pp. 263 *et seq.*; and Ronzitti, *op. cit.*, pp. 52 *et seq.*, who believes that a customary rule is emerging according to which such intervention would be lawful.

A contrary opinion (against the lawfulness of armed intervention in favour of nationals in danger abroad, except to protect human rights) is expressed by Sicilianos, *op. cit.*, pp. 453 *et seq.*; and Schweisfurth, "Operations to rescue nationals in third States involving the use of force in relation to the protection of human rights", *German Yearbook of International Law*, pp. 159 *et seq.*

¹⁶⁶ See, among others, Westlake, *International Law*, vol. I, p. 299; Wright, "The meaning of the Pact of Paris", *AJIL* (1933), pp. 53 *et seq.*; and Jennings, "The *Caroline* and *McLeod* cases", *ibid.*, pp. 83 *et seq.* See also the doctrine cited by Zourek, "La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international*, 1975, p. 20; Brownlie, *op. cit.*, p. 43; Lamberti Zanardi, *op. cit.*, pp. 9 *et seq.* Along somewhat different lines, see Bowett, *op. cit.*, p. 89, who distinguishes "necessity" from "self-defence", including the defence of nationals abroad under the latter; and Ross, *op. cit.*, pp. 247 *et seq.*

¹⁶⁷ See footnote 37 above.

¹⁶⁸ *I.C.J. Reports* 1980, p. 43, para. 93:

"The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries."

¹⁶⁹ Ronzitti, *op. cit.*, pp. 89 *et seq.* and pp. 108 *et seq.*, who also refers to the less recent literature. Brownlie, *op. cit.*, pp. 341-342 and Lauterpacht, "The international protection of human rights", *Recueil des cours* ..., 1947-I, pp. 5 *et seq.*, appear to be undecided.

¹⁷⁰ Ample study of this practice is to be found in Ronzitti, *op. cit.*, pp. 93 *et seq.*

¹⁷¹ On this point, see Lattanzi, *op. cit.*, pp. 464 *et seq.*

¹⁷² See footnote 8 above; and Ago, Addendum to eighth report, *Yearbook* ... 1980, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7.

national crimes of States. It is essential, however, for the present purposes, to note that such instances of armed humanitarian intervention—whether in favour of the intervening State's nationals or those of the territorial State—consist of reactions to situations which, albeit different from an armed attack, present a degree of urgency calling for immediate, direct armed action. They do not undermine, therefore, the prohibition of the use of force by way of countermeasure.

69. The conclusions reached so far find support in the Commission's comments on article 30 of part I¹⁷³ of the draft. In dealing with countermeasures as part of the circumstances precluding wrongfulness, the Commission stated that "forms of reaction which were permissible under 'classical' international law, such as armed reprisals, are no longer tolerated in peacetime".¹⁷⁴ This position was explicitly supported by various States during the discussion which took place in the Sixth Committee of the General Assembly.¹⁷⁵

B. The problem of economic and political measures as forms of coercion

70. The third report contains a brief outline of various scholarly opinions regarding the unlawfulness of certain economic and political countermeasures.¹⁷⁶ In order to reach a conclusion on possible limitations to the admissibility of economic and political measures, it is now necessary to examine the practice of States.

71. It is well known that during the San Francisco Conference the Latin American States put forward a proposal that would have extended the scope of Article 2, paragraph 4, of the Charter of the United Nations to the condemnation of economic and political force. The pro-

posal was defeated.¹⁷⁷ This fact alone is not sufficient, however, to conclude that most of the States present at the Conference were categorically opposed to the prohibition of actions of such nature. Opposition to the proposal may have been motivated by its excessively broad definition of economic and political force. Moreover, the attitude of States may have changed since then (as has the membership of the United Nations). Certain General Assembly resolutions and regional instruments are relevant to the issue.

72. General Assembly resolution 2131(XX) on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns the use of economic and political force. Paragraph 1 of that resolution not only prohibits armed intervention, but also "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements". It goes on to state in paragraph 2 that:

2. No State may use or encourage the use of economic, political or any type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind* . . .

Similarly, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations¹⁷⁸ proclaims that:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind* . . .

It must be stressed that owing to the opposition of Western countries, the prohibition of intervention was not dealt with under the principle of the prohibition of the threat or use of force in international relations. A further effort to link a condemnation of economic coercion to the prohibition of force in Article 2, paragraph 4, of the Charter was made by Latin American and socialist countries during the long *travaux préparatoires* of the resolution on the Definition of Aggression.¹⁷⁹ The resolution did not, however, consider economic coercion. The Special Committee on the Question of Defining Aggression declared that a provision in that sense would have been

¹⁷³ See footnote 8 above.

¹⁷⁴ *Yearbook* . . . 1979, vol. II (Part Two), p. 116, para. 5.

¹⁷⁵ See the statements by Australia (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 47th meeting, para. 34); Egypt (*ibid.*, 51st meeting, para. 24); Kenya (*ibid.*, 43rd meeting, para. 4); and Mexico (*ibid.*, 41st meeting, para. 46), according to which the Commission should consider the possibility of stipulating in an additional paragraph that article 30 should not be interpreted as authorizing exceptions to the prohibition on the use of force other than those specified in the Charter of the United Nations. Riphaen had not proposed a specific provision prohibiting armed reprisals. His view was that the clauses of the Definition of Aggression and of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations safeguarding the powers of the Security Council under the Charter "seem[ed] to exclude any automatic assumption that all international obligations 'essential for the protection of fundamental interests of the international community' [among which he included the prohibition of armed force], or even all th[o]se obligations the breach of which, in isolation, is 'recognized as a crime', are immune under international law from being justifiably breached" (*Yearbook* . . . 1980, vol. II (Part One) (see footnote 130 above), pp. 126-127, para. 90). Notwithstanding these reflections, on other occasions States have called in the Sixth Committee of the General Assembly for a provision explicitly prohibiting armed reprisals. See, for example, the statements by Czechoslovakia (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 43rd meeting, para. 29), Sweden (*ibid.*, *Fortieth Session, Sixth Committee*, 28th meeting, para. 66) and Algeria (*ibid.*, 31st meeting, para. 48).

¹⁷⁶ See *Yearbook* . . . 1991, vol. II (Part One) (footnote 1 above), paras. 101 *et seq.*

¹⁷⁷ See *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. VI, pp. 558-559 for the text of the amendment proposed by Brazil, and pp. 334-335 for the discussion in Commission I of 4 June 1945. The attempt by the Latin American countries to prohibit the use of non-armed force has its origin at the end of the last century, within the context of the principle of non-intervention, but has not succeeded in establishing itself in the same way as the prohibition of the use of military force. For a bibliography on the principle of non-intervention in the Americas, see Rousseau, *Droit international public*, vol. IV, pp. 53 *et seq.*

¹⁷⁸ See footnote 82 above.

¹⁷⁹ See the proposal put forward by Bolivia in 1952, according to which

"... unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy, thus jeopardizing the security of that State or rendering it incapable of acting in its own defence and cooperating in the collective defence of peace"

should have been considered a form of aggression. (Draft resolution submitted to the Sixth Committee of the General Assembly at its sixth session (A/C.6/L.211).)

an obstacle to the adoption of the resolution by *consensus*.¹⁸⁰ It is nevertheless interesting to note that the opposition was mainly a result of the extremely broad definition proposed.¹⁸¹ Prohibitions rather similar to the ones just recalled are to be found in General Assembly resolutions concerning permanent sovereignty over natural resources,¹⁸² the new international economic order,¹⁸³ and other topics, such as strict observance of the prohibition of the threat or use of force in international relations and of the right of peoples to self-determination;¹⁸⁴ and economic measures as a means of political and economic coercion against developing countries.¹⁸⁵

73. At the regional level mention must be made of the OAS Charter,¹⁸⁶ which formulates the principle of non-intervention in the very broad terms which were later to appear in General Assembly resolutions 2131 (XX) and 2625 (XXV), including the prohibition of the "use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind" (article 16). A formally non-binding, but none the less very significant, instrument containing a similar prohibition is the Final Act of the Conference on Security and Cooperation in Europe.¹⁸⁷ Here too the prohibition is expressed in the same terms as in the General Assembly resolutions and under the specific title of non-intervention.¹⁸⁸

¹⁸⁰ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr.1)*. Here again the Western States opposed an express provision on economic coercion.

¹⁸¹ Statement by the representative of the United Kingdom of Great Britain and Northern Ireland (*Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54, document A/2211, para. 447).

¹⁸² General Assembly resolutions 1803 (XVII) and 3016 (XXVII).

¹⁸³ General Assembly resolutions 3281 (XXIX) and 3201 (S-VI). See also Arangio-Ruiz, "Human rights and non-intervention in the Helsinki Final Act", *Collected Courses* . . . , 1977-IV, pp. 272 *et seq.*

¹⁸⁴ General Assembly resolution 2160 (XXI).

¹⁸⁵ General Assembly resolution 40/185. In paragraph 2 thereof, the General Assembly:

"2. Reaffirms that developed countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions, incompatible with the provisions of the Charter of the United Nations and in violation of undertakings contracted, multilaterally and bilaterally, against developing countries as a form of political and economic coercion which affects their economic, political and social development."

¹⁸⁶ Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324). Article 15 forbids intervention

"... directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."

and therefore prohibits

"... not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements".

¹⁸⁷ See footnote 82 above.

¹⁸⁸ *Ibid.* Principle VI provides, in its third paragraph, that the participating States

"... will ... in all circumstances refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind".

See Arangio-Ruiz, "Human rights and non-intervention ...", *loc. cit.*, pp. 274 *et seq.*

74. All the instruments mentioned condemn resort to economic or political coercion when it infringes the principle of non-intervention.¹⁸⁹ Armed and non-armed forcible measures are thus subject to different regimes. As there is a general prohibition of armed coercion, armed countermeasures are unlawful in any case. The prohibition of economic or political coercion only covers non-armed measures with specifically reprehensible aims, such as the "subordination of the exercise of [the target State's] sovereign rights", or the effort to secure "advantages of any kind".¹⁹⁰ Clearly, the condemnation of non-armed coercion only covers those measures of an economic/political nature the consequences of which are likely to cause very serious or even catastrophic disruption to the State against which they are taken.

75. This conclusion is supported by other elements of State practice. While economic measures are very frequently resorted to, the complaints of States which have frequently been the target of economic measures have concerned not so much the nature of the action *per se*, but rather the fact that the action amounted to "economic strangulation" or produced otherwise catastrophic effects. A few examples will be provided, but without going into the merits of the cases with regard to the lawfulness of the measures adopted.

76. Although the actions involved did not qualify as countermeasures proper,¹⁹¹ the positions taken by Bolivia with regard to the sea-dumping of tin by the Soviet Union in 1958¹⁹² and by Cuba with regard to the drastic cutback in United States sugar imports in 1960 are significant.¹⁹³ Also of interest are the complaints of some Latin American States, including Argentina,¹⁹⁴ which al-

¹⁸⁹ Likewise, ICJ, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see footnote 147 above), pp. 108 *et seq.*, particularly para. 209 acknowledged the unlawfulness of economic measures only in the context of the principle of non-intervention.

¹⁹⁰ It is true that this perspective does not imply consequences which differ in any way from the economic/political measures considered unlawful to the extent that they include the use of armed force: this has led to the conclusion that the effort to distinguish the two hypotheses in any practical, meaningful way has failed. In this vein, with regard to General Assembly resolution 2625 (XXV), see Arangio-Ruiz, "The normative role of the General Assembly ...", *loc. cit.*, pp. 528-530.

¹⁹¹ It is not clear whether the State adopting the measure was reacting against a prior unlawful act. However, even in the absence of a prior unlawful act, the statements referred to appear to be relevant, because they highlight the conditions under which the use of economic force is considered unlawful. It must also be borne in mind that in economic matters the borderline between retaliation and reprisal is not always easily discernable, as the rights and duties are usually treaty-based and their interpretation is often debatable.

¹⁹² Quoted in McDougal and Feliciano, *Law and Minimum World Public Order—The Legal Regulation of International Coercion*, p. 194, footnote 165.

¹⁹³ AJIL, vol. 55, No. 3 (July 1961), pp. 822 *et seq.* Cuba described this action as "constant aggression for political purposes against the fundamental interests of the Cuban economy".

¹⁹⁴ The official position of Argentina was made clear to the Italian Government in a document submitted by the Argentine Embassy in Rome on 14 April 1982 entitled "Reazioni del Governo argentino sulle misure restrittive adottate dalla CEE sull'importazione di suoi prodotti", quoted in De Guttry, "Le contromisure adottate nei confronti dell'Argentina da parte delle Comunità Europee e dei terzi Stati ed il problema della loro liceità internazionale", *La questione delle Falkland-Malvinas nel diritto internazionale*, p. 357, footnote 38. According to Argentina, the measures adopted by the European Community would amount to an act of economic aggression openly violating the principles of international law and of the United Nations.

leged (before the Security Council) the unlawfulness of the trade sanctions resorted to by Western countries following the outbreak of the Falkland Islands (Malvinas) crisis. The Latin American States in question described the measures as acts of "economic aggression carried out in blatant violation of all international law".¹⁹⁵ The Soviet Union accused the United States of America of "using trade as a weapon against our country" with regard to the measures adopted following the Polish crisis in 1981-1982.¹⁹⁶ In this case the United States maintained that it was not seeking "to bring the Soviet Union to its knees economically".¹⁹⁷ The United States, which is traditionally opposed to a broad interpretation of Article 2, paragraph 4, of the Charter of the United Nations, declared during the debates in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations that the pressure exerted by the Soviet Union on Poland, which led to the declaration of martial law in the latter country, was precisely a case of unlawful resort to force.¹⁹⁸ The concept of economic coercion used in order to influence another country's conduct has also been resorted to by some States. This concept has been used to describe the measures adopted by South Africa towards neighbouring countries which gave shelter to members of the African National Congress of South Africa, action which South Africa alleged to be in violation of international law.¹⁹⁹ It is also useful to recall some of the official comments by States on the Commission's draft Code of Crimes against the Peace and Security of Mankind. A number of States, while not always clearly distinguishing between crimes of States and crimes of individuals, have stated that the Commission should bear in mind that economic measures could in some instances amount to aggression.²⁰⁰

77. To conclude, it is quite obvious that a great variety of forms of economic or political reaction are frequently resorted to and are considered perfectly admissible as countermeasures against internationally wrongful acts.²⁰¹ Their admissibility, however, is not totally unlimited.

¹⁹⁵ Statement by Venezuela (*Official Records of the Security Council, Thirty-seventh Year, 2362nd meeting, paras. 48-108*). See also the statements by Ecuador (*ibid.*, 2360th meeting, paras. 194 *et seq.*), El Salvador (*ibid.*, 2363rd meeting, paras. 104-119); and Nicaragua (*ibid.*, paras. 26-48).

¹⁹⁶ Statement by the Minister of Foreign Trade of the Union of Soviet Socialist Republics, as reported in *Financial Times*, 17 November 1982, p. 1.

¹⁹⁷ Statement by Thomas N.T. Niles, Deputy Assistant Secretary, in hearing before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs, *United States House of Representatives, 97th Congress, Second session, 10 August 1982* (Washington, D.C., U.S. Government Printing Office, 1982), p. 8.

¹⁹⁸ These pressures did not build up to the point of open military action (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 41(A/37/41)*, para. 50).

¹⁹⁹ See the statements by Yugoslavia, Madagascar and Thailand (*Official Records of the Security Council, Forty-first Year, 2660th meeting*).

²⁰⁰ See the statements by Sierra Leone (*Official Records of the General Assembly, Fortieth Session, Sixth Committee, 23rd meeting, para. 73*) and Suriname (*ibid.*, 34th meeting, para. 108).

²⁰¹ The admissibility of economic countermeasures has already been maintained by the Commission. In the commentary to article 30 of part I of the draft, the Commission stated that:

"... modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act (*economic reprisals**, for example)" (see footnote 174 above).

Although the State practice considered does not appear to warrant the conclusion that certain forms of economic and/or political coercion are equivalent to forms of armed aggression, such practice none the less reveals a trend towards the prohibition of economic or political measures which jeopardize the territorial integrity or the political independence of the State against which they are taken.²⁰²

C. Countermeasures and respect for human rights

78. Although originally confined to belligerent reprisals, limitations of the right of unilateral reaction to internationally wrongful acts on humanitarian grounds have, in recent times, thanks to the unprecedented development of human rights law, acquired a restrictive impact which is second only to the prohibition of the use of force.²⁰³ It is nevertheless much more difficult to determine the precise extent of limitations motivated by humanitarian concerns.

79. The practice considered in the third report may be usefully supplemented by a few recent cases which support the unanimous attitude of writers. During the Falkland Islands (Malvinas) crisis, the United Kingdom froze Argentine assets in the country, but with the specific exception of the funds which would normally be necessary for "living, medical, educational and similar expenses of residents of the Argentine Republic in the United Kingdom" and for "[p]ayments to meet travel expenditure by residents of the Argentine Republic leaving the United Kingdom".²⁰⁴ In declaring, in 1986, a total blockade of trade relations with the Libyan Arab Jamahiriya by way of countermeasures, the United States of America prohibited the export to Libya "of any goods, technology (including technical data or other information) or services from the United States except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes".²⁰⁵ Fol-

²⁰² See, for example, the statement of the Ethiopian representative in the Sixth Committee on article 30 of part I of the draft, according to which article 30 deserved more study with regard to economic measures "in view of the possibility that economically strong States could use the rule to the detriment of weaker States under the pretext of legitimate countermeasures" (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee, 43rd meeting, para. 19*).

²⁰³ The development of limitations to the right to take reprisals based on humanitarian concerns is amply illustrated by Lattanzi, *op. cit.*, pp. 295-302.

²⁰⁴ Notice issued by the Bank of England on 13 April 1982 (*British Year Book of International Law*, vol. 53 (1982), p. 511).

²⁰⁵ Executive Order No. 12543 dated 7 January 1986, sect. 1, reproduced in AJIL, vol. 80, No. 3 (July 1986), p. 630. A very similar provision is contained in Executive Order No. 12722, under which the United States took measures against Iraq following the invasion of Kuwait (sect. 2 (b) (AJIL, vol. 84, No. 4 (October 1990), p. 903). It is appropriate to recall the much earlier example of the "Martens Clause" in the preamble to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907, which reads:

"... the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".

lowing the murder of an Italian researcher in Somalia, the Foreign Affairs Committee of the Italian Parliament approved, on 1 August 1990, the suspension of any activities in Somalia "not directly aimed at humanitarian assistance".²⁰⁶ It is, on the other hand, well known that in cases such as those just described, the State taking the action frequently combines reprisals proper with merely retaliatory measures (retortion), the distinction between the two not always being apparent. A rigorous distinction does not, however, appear to be essential. The fact that limitations motivated by humanitarian concerns are taken into account by States even in applying measures of mere retortion (in view of the fact that they consider the interest infringed not to be legally protected) makes the limitation even more significant than it would be if it were confined to reprisals proper.

80. As regards the scope of humanitarian interests within which the limitation is to operate, indications may be drawn from the relevant international instruments. Both the International Covenant on Civil and Political Rights (art. 4, para. 1) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (art. 15, para. 1) envisage the possibility of the application of most of their rules being suspended in case of a public emergency which threatens the life of the nation. The possibility of suspension is, however, excluded, according to the Covenant, for the right to life (art. 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), the right not to be held in slavery or in servitude (art. 8), the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (art. 11), the right expressed by the principle *nulla poena sine lege* (art. 15), the right to recognition as a person before the law (art. 16), and the right to freedom of thought, conscience and religion (art. 18).²⁰⁷ The literature on the subject is also useful for the purpose of identifying those human rights which are usually considered to be the "most essential". According to Buergethal:

This provision testifies to the existence of a core of *lois de l'humanité* which places a restriction on the conduct of war by the parties. It is noteworthy, as a further example, that in a speech to the National Assembly on 13 December 1949, the then French Minister for Foreign Affairs, Robert Schuman, maintained with regard to a dispute that had arisen with Poland that the French Government

"... ne pouvait pas penser que, dans un pays démocratique, les autorités eussent le droit d'arrêter des ressortissants étrangers sans aucun motif et sans qu'aucun chef d'inculpation soit retenu contre eux, simplement pour faire pression sur un autre gouvernement" [... could not believe that in a democratic country the authorities had the right to arrest foreign nationals without cause and without bringing any charges against them, simply in order to exert pressure on another Government] (Kiss, op. cit., vol. VI, p. 16).

With regard to the Convention on the Prevention and Punishment of the Crime of Genocide, Sir Hartley Shawcross, representing the United Kingdom before ICJ in 1951, declared that "[t]he Convention ... contain[s] absolute obligations, not subject to any consideration of reciprocity at all" (*I.C.J., Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p. 388). Furthermore, following the killing of 85 young people in Bangui on 18 April 1979 by Emperor Bokassa's personal guard, France suspended a financial cooperation agreement with the Central African Empire in retaliation, with the exception of food, educational and medical assistance programmes ("Chronique ...", RGDIP (1980), p. 364).

²⁰⁶ As reported in *La Repubblica*, 2 August 1990, p. 14.

²⁰⁷ On treaty-based rights from which no derogation is permissible, see Lattanzi, op. cit., pp. 15 *et seq.*

... an international consensus on core rights is to be found in the concept of "gross violations of human rights" and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations.²⁰⁸

In El Kouhene's opinion there is a *minimum irréductible des droits de la personne humaine* which comprises at least the right to life, the right not to be subjected to torture or degrading treatment and the right not to be reduced to slavery or servitude.²⁰⁹ Medina Quiroga also believes that some human rights qualify as "core rights" or "basic rights",²¹⁰ and Meron does not exclude the possibility of distinguishing various categories of human rights, although he warns that "... except in a few cases (e.g., the right to life or to freedom from torture), to choose which rights are more important than other rights is exceedingly difficult".²¹¹ It would actually seem that the most basic of the human rights ("core rights" or *minimum irréductible*) are those the promotion of and respect for which have become part of customary international law.²¹²

81. It is not considered appropriate, however, for the draft articles to include any enumeration of the "core" human rights which would be immune from countermeasures or the effects thereof. Any enumeration would "crystallize" a rule that must be left open to the evolution of human rights law.

82. The question now is to consider whether any of the human rights not usually included among the so-called core rights, and which may therefore be described in a sense as "less essential", should also remain immune from countermeasures.²¹³ Some scholars are of the opin-

²⁰⁸ "Codification and implementation of international human rights", *Human Dignity: The Internationalization of Human Rights*, p. 17.

²⁰⁹ *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme*, p. 109.

²¹⁰ *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, p. 13.

²¹¹ "On a hierarchy of international human rights", *AJIL* (1986), p. 4.

²¹² For instance, the customary nature of the prohibition of torture is maintained, *inter alia*, by Doehring, the rapporteur on new problems of extradition at the Cambridge session of the Institute of International Law (*Yearbook of the Institute of International Law*, vol. 60, part II (1983), p. 253) as well as by Lillich ("Civil rights", *Human Rights in International Law*, p. 127), Sieghart (*The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, p. 60); Meron (*Human Rights and Humanitarian Norms as Customary Law*, pp. 95-96); Burgers and Danelius (*The United Nations Convention against Torture*, p. 1); and the *Restatement of the Law Third* (see footnote 39 above), sect. 702, pp. 161-175). The view that the prohibition of torture is a matter of *jus cogens* is put forward by Dinstein ("The right to life, physical integrity and liberty", *The International Bill of Rights*, p. 122); O'Boyle ("Torture and emergency powers under the European Convention on Human Rights: Ireland v. the United Kingdom", *AJIL* (1977), p. 687); and Migliazza ("L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme", *Collected Courses...*, 1972-III, p. 190). On the characterization of the right not to be subjected to torture as an "essential" human right and on the prohibition of torture by a norm of general international law, see Marchese, *La tortura e i trattamenti crudeli, inumani e degradanti nel diritto internazionale*, chap. IV.

²¹³ The possible limitations to countermeasures presently deriving from *multilateral treaty norms* concerning specific human rights which are not included in what has been referred to as *le minimum irréductible* are an entirely different matter. The violation, by way of

ion that such a limitation would apply not only to the treaties and rules on human rights or to the rules of the humanitarian law of armed conflict, but also to any rules intended in any way to protect human beings. It would follow that an injured State could not suspend, by way of countermeasure, forms of assistance aimed at improving the condition of the population of the wrongdoing State.²¹⁴ According to this opinion, any obligation concerning, *inter alia*, development cooperation should not be infringed by way of countermeasure. Such a broad notion of a limitation based on humanitarian grounds is not, however, shared by a significant number of writers nor is it sufficiently supported by practice. Furthermore, to accept it within the framework of the draft articles on State responsibility would appear to be in contradiction with the need for an overall balance between the introduction of essential limitations to countermeasures, on the one hand, and the need not to deprive States of the possibility to react to breaches of international obligations, on the other.

83. Among suggestions to extend the scope of the limitation of resort to countermeasures which infringe human rights is a proposal that the property rights of foreign nationals should be immune from lawful measures.²¹⁵ However, the human rights which should be considered inviolable by countermeasures—the “more essential” human rights—are not understood to include property rights. Recent State practice presents not only cases of expropriation of foreign property by way of countermeasure, but also rather frequent cases where the assets of foreign nationals have been “frozen” by way of reaction to a prior allegedly wrongful act by their State.²¹⁶ It is not considered, therefore, that the provision concerning humanitarian limitations should either explicitly include or be read as referring to property rights. This obviously does not imply, however, that the limitations to countermeasures in the area of property rights (and especially to countermeasures of a definitive nature) could not come about through the operation of different rules (such as the general rule of proportionality).

D. The question of the inviolability of diplomats and other specially protected persons

84. The main doctrinal positions on this issue and that of the former Special Rapporteur, as reflected in his draft

(Footnote 213 continued.)

countermeasure, of those norms which establish obligations qualifying as *erga omnes* obligations within the framework of the treaty would constitute a violation of the right not only of the State alleged to have committed the wrongful act against which the measure is adopted, but also of the other States parties to the treaty. This feature is not unique to human rights norms, but concerns all norms establishing indivisible obligations. It will therefore be dealt with separately, in paras. 92-95 below. In the light of this clarification, draft article 11, paragraph 1 (c), of part 2, as proposed by the former Special Rapporteur (see footnote 46 above) is not entirely satisfactory, in so far as it appears to consider the humanitarian restriction to the right to adopt countermeasures only within the context of multilateral treaty norms.

²¹⁴ See, for example, Cassese, *Il diritto internazionale nel mondo contemporaneo*, p. 271.

²¹⁵ *Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), paras. 111-112.

²¹⁶ This practice is referred to, *passim*, throughout the present report. See, for example, footnote 7 above.

article 12 (a),²¹⁷ are summarized in the third report.²¹⁸ During the thirty-seventh session the members of the Commission expressed a variety of views on this point. Some favoured the proposed draft article 12 (a),²¹⁹ while others suggested a broadening of its scope.²²⁰ A third group of members found the limitation to be totally unjustified,²²¹ while a fourth expressed the view that the limitation in question should only apply to a small number of diplomatic immunities.²²²

85. It was hoped to draw more significant, if not decisive indications from recent practice, but in fact it appears to be short on cases of non-compliance by way of countermeasures with obligations affecting the treatment of diplomatic envoys.²²³ For example, in 1966 Ghana arrested the members of the Guinean delegation to the OAU Conference, including the Foreign Minister. The arrest, which took place on board a United States commercial aircraft in transit at Accra, was justified by the Government of Ghana as a means to secure reparation for a number of wrongful acts committed by Guinea, including a raid on the premises of the Ghanaian Embassy at Conakry and the arrest of the Ambassador and his wife.²²⁴ Another example is the arrest by Ivorian authorities, in 1967, of the Foreign Minister of Guinea and the Guinean Permanent Representative to the United Nations during a forced interruption of their flight to Guinea. The Ivorian Foreign Minister stated that:

This arrest ... is a consequence of the arbitrary detention of several Ivory Coast nationals in the Republic of Guinea, and the Ivory Coast keenly regrets being obliged ... to detain the group of Guineans on Ivory Coast soil until the release of Ivory Coast nationals.²²⁵

86. The basis for the limitation would seem to be found in the very *raison d'être* of the rules on diplomatic relations. The *ratio* for the immunity of diplomatic envoys from countermeasures may, in other words, be identified with the “great importance attached to unhindered international communication”. Riphagen, for his part, referred to the concept of a “self-contained regime”, implying that the only lawful forms of counter-

²¹⁷ See footnote 46 above.

²¹⁸ *Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), paras. 114 *et seq.*

²¹⁹ Calero Rodrigues (*Yearbook* ... 1985, vol. I, 1892nd meeting, para. 39), Barboza (*ibid.*, 1897th meeting, para. 30), Razafindralambo (*ibid.*, 1898th meeting, para. 21) and Lacleta Muñoz (*ibid.*, 1899th meeting, para. 28).

²²⁰ Flitan (*ibid.*, 1893rd meeting, para. 10), Balanda (*ibid.*, 1894th meeting, para. 44) and Yankov (*ibid.*, 1899th meeting, para. 41).

²²¹ Sucharitkul (*ibid.*, 1891st meeting, para. 41), Sinclair (*ibid.*, 1895th meeting, para. 7) and Njenga (*ibid.*, 1896th meeting, para. 28).

²²² Tomuschat (*ibid.*, 1896th meeting, para. 41), Al-Qaysi (*ibid.*, 1899th meeting, para. 18), Arangio-Ruiz (*ibid.*, 1900th meeting, para. 21) and Jagota (*ibid.*, 1901st meeting, para. 13).

²²³ As for less recent practice, it should be recalled that the necessity of preserving diplomatic relations at all costs was repeatedly emphasized in the course of the debates on the amendment of Article 16 of the Covenant of the League of Nations with regard to the regulation of economic measures as sanctions against aggression (League of Nations, *Reports and Resolutions on the subject of Article 16 of the Covenant, Memorandum and Collection of Reports, Resolutions and References prepared in Execution of the Council's Resolution of December 8th, 1926*, Geneva, 13 June 1927 (League of Nations publication, V.Legal, 1927.V.14 (document A.14.1927.V)), p. 11).

²²⁴ *Keesing's* ... 1965-1966, vol. XV, pp. 21738-21740.

²²⁵ *Official Records of the Security Council, Twenty-second Year, Supplement for July, August and September 1967*, document S/8120 and Add.1-2, annex IV, pp. 176-177.

measure would be those envisaged by the regime itself.²²⁶ He thus seemed to share the position expressed by ICJ in the case of *United States Diplomatic and Consular Staff in Tehran*, according to which

The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.²²⁷

This *dictum* was rightly found to be lacking in precision.²²⁸

87. It is submitted that the only rationale for any restriction of the *faculté* to take countermeasures affecting diplomatic envoys can be that of securing the normal channels of communication among States (*ne impediatur legatio*). Certainly, the possibility of effective, uninterrupted communication is an essential requirement of international relations both in times of crisis and under normal conditions. It is precisely from the identification of this element that the Commission should try to determine the impact of the restriction in question. It is evident that the obligations that should not be infringed by way of countermeasures could not include *all* the international obligations deriving from the rules of diplomatic law without distinction, but only those with which it is essential to comply in order to preserve the normal operation of diplomatic channels.

88. It is legitimate to ask, of course, whether any limitation of the *faculté* to take countermeasures in the area of diplomatic relations may perhaps have been subsumed by limitations of a different nature, such as those relating to the protection of human rights, on the one hand, and, where they do not overlap with the latter, those deriving from peremptory rules, on the other hand. Some of the basic rules affecting specially protected persons overlap with rules protecting human rights in general, particularly with any such rules of a peremptory character. It seems reasonable to assume, however, that the rules on the inviolability of diplomatic envoys (and other protected persons) have a specific *raison d'être* of their own. They actually came into existence long before the rules on the protection of human rights and the rules of *jus cogens*. It would therefore seem correct to maintain the specific corresponding limitation of the *faculté* to adopt countermeasures, at least as a residual limit.

E. The relevance of *jus cogens* and *erga omnes* obligations

89. This report has thus identified the limitations to the lawfulness of countermeasures which derive from (a) the prohibition of the use of armed force and of any economic or political coercion which endangers the territorial integrity or the political independence of the State

against which it is directed; (b) the inviolability of fundamental human rights; and (c) norms aimed at ensuring the "normal processes of bilateral or multilateral diplomacy". It seems unnecessary at this point to elaborate at any length on the existence of that other general limitation which derives from the legal necessity to comply with any peremptory rule of general international law.²²⁹

90. It is essential to recall, however, that the Commission has implicitly recognized the existence of the restriction in question, in part I of the draft articles, first, by including among the circumstances precluding wrongfulness the fact that "the act constitutes a *measure legitimate under international law** . . . in consequence of an internationally wrongful act . . ." (art. 30);²³⁰ secondly, by stressing the inviolability of peremptory norms even when there is the *consent* of the State in favour of which the infringed obligation exists (art. 29, para. 2);²³¹ and thirdly, in case of a *state of necessity* (art. 33, para. 2).²³² The special attention paid by the Commission to the norms in question confirms the conclusion clearly emerging from the adoption, by a large majority, of articles 53 and 64 of the Vienna Convention on the Law of Treaties,²³³ namely that "the very existence of such a category of norms implies that there is a general interest in international society that they should be respected as much as possible".²³⁴ It is therefore deemed appropriate to include in the draft a provision analogous to the one proposed by the former Special Rapporteur in draft article 12 (b)²³⁵ prohibiting resort to any countermeasure which is "inconsistent with a peremptory rule of general international law". It is difficult not to agree with those who believe that "it would be illogical . . . at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation".²³⁶

91. Considering the object of some of the limitations described in the previous sections of this chapter (such as, for example, the prohibition of resort to armed force and the obligation to respect fundamental human rights),

²²⁹ Ibid., paras. 118-120.

²³⁰ See footnote 8 above.

²³¹ Ibid.

²³² Ibid.

²³³ Article 53 (adopted with 87 votes in favour, 8 against and 12 abstentions) reads:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Article 64 (adopted with 84 votes in favour, 8 against and 16 abstentions) reads:

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

²³⁴ Gaja, "Jus cogens beyond the Vienna Convention", *Collected Courses* . . . , 1981-III, p. 297.

²³⁵ Riphagen, sixth report (*Yearbook* . . . 1985, vol. II (Part One) (see footnote 11 above), draft article 12 and commentary thereto, p. 13).

²³⁶ Gaja, loc. cit., p. 297. On this point see also third report (*Yearbook* . . . 1991, vol. II (Part One) (see footnote 1 above)), para. 119.

²²⁶ The opinion of the former Special Rapporteur is recalled in para. 115 and footnote 237 of the third report (*Yearbook* . . . 1991, vol. II (Part One) (see footnote 1 above)).

²²⁷ I.C.J. Reports 1980 (see footnote 37 above), p. 40, para. 86.

²²⁸ Röling (*Netherlands Yearbook of International Law* (1980), p. 147) quoted in the third report (*Yearbook* . . . 1991, vol. II (Part One) (see footnote 1 above)), para. 115, footnote 235. The same view seems to be shared by Dominice (ibid.).

a provision concerning the *jus cogens* limitation would presumably end up applying to cases covered by those limitations. However, not all the limits referred to in the preceding sections may be considered as deriving from rules of *jus cogens*; nor, conversely, is the *jus cogens* limit exhausted by the specific limitations envisaged so far. On the one hand, the *jus cogens* limitation already covers subject-matters not included in the specific limitations mentioned (for example, the prohibition of countermeasures deriving from the peremptory rule on self-determination of peoples). On the other hand, in view of its historically relative nature, the *jus cogens* limitation could extend, reduce, or modify its scope in the course of time. In order to complete the picture of the limitations, it is therefore necessary to adopt ad hoc provisions relating to each of the "substantive limitations" considered in the preceding sections, as well as one on the general limit deriving from *jus cogens*.

92. For a number of reasons the draft articles should include, in addition to the limitation to countermeasures deriving from *jus cogens*, a further limitation based on the *erga omnes* structure of certain international legal obligations.²³⁷ It is well known—and will be further explained later²³⁸—that the concept of *erga omnes* obligation is not characterized by the importance of the interest protected by the norm (as is typical of *jus cogens*) but rather by the "legal indivisibility" of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations).²³⁹

93. The consequence of the legal structure of *erga omnes* rules with regard to the regime of unilateral reactions to internationally wrongful acts is that any measure adopted by a State *vis-à-vis* a wrongdoing State infringes not only the right of the latter but also the rights of all the other parties to which the *erga omnes* rule that has been infringed applies. This inequitable consequence was expressly envisaged, for example, in the course of the debates on what was to become article 60 of the Vienna Convention on the Law of Treaties. Paragraph 5 of that article does not allow the termination or suspension of treaty provisions relating to the protection of the human person contained in treaties of a humanitarian character. During the *travaux préparatoires*, while some States declared that this eventuality was already covered by articles 43 (Obligations imposed by international law independently of a treaty) and 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)), the prevailing opinion was that the exception to the normal rules on termination and suspension of treaties (art. 57) on humanitarian grounds was connected with the *erga omnes* structure of the rules in question.²⁴⁰

²³⁷ Ibid., para. 121.

²³⁸ See chap. VIII below.

²³⁹ See *Yearbook* ... 1991, vol. II (Part One) (footnote 1 above), para. 121, and chap. VIII below.

²⁴⁰ *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United

94. The problem of restricting countermeasures infringing *erga omnes* obligations was considered by Riphagen in draft article 11, paragraphs 1 (a) and (b) and 2, of part 2. According to these provisions:

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights of the performance of obligations of all other States parties to the treaty; or

(b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty;

...

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (a) and (b) do not apply to the extent that such decision so determines.²⁴¹

95. While agreeing with the previous Special Rapporteur on the need to include a provision forbidding countermeasures in violation of *erga omnes* obligations, at least by way of progressive development and for the protection of "innocent" States,²⁴² it is felt, however, that paragraphs 1 (a) and (b) and 2 of draft article 11 do not provide a satisfactory solution. Apart from the lack of a clear distinction between the three hypotheses covered by the paragraphs quoted, which overlap in many respects, the provisions in question only consider *erga omnes* obligations provided for in multilateral treaties. They ignore those *erga omnes* obligations presently in existence and likely to undergo further development in the future which have not attained the status of peremptory norms but derive from norms of general, customary or unwritten law.²⁴³ It is therefore believed that the provision on the inadmissibility of measures in violation of *erga omnes* obligations—or, at any event, of the rights of States other than the wrongdoing State—should be drafted in such terms as to cover all *erga omnes* obligations, whether treaty-based or customary.

Nations publication, Sales No. E.68.V.7), pp. 352 *et seq.*, and *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6), pp. 111 *et seq.* The provision goes back to a Swiss proposal and was based on the concern of the International Committee of the Red Cross that non-compliance with the Conventions on humanitarian law of armed conflicts should be excluded. This explains the reference in the article to treaties on humanitarian law. However, the reasons given for the inclusion of such a provision in article 60 indicate that it was not the subject-matter (humanitarian law), but the structure of the rules in question that was found to be most relevant.

²⁴¹ *Yearbook* ... 1985, vol. II (Part One) (see footnote 11 above), article 11 and commentary thereto, p. 12.

²⁴² It is useful to recall that the Institute of International Law, as early as 1934, had proposed, in article 6, paragraph 3, of its well-known resolution entitled "Régime des représailles en temps de paix" (see footnote 5 above) to

"*Limitier les effets des représailles à l'État contre qui elles sont dirigées, en respectant, dans toute la mesure du possible, tant les droits des particuliers que ceux des États tiers*" (emphasis added).

²⁴³ See chap. VIII below.

CHAPTER VI

Proposed draft articles

96. The following draft articles are proposed:

Article 13. Proportionality

Any measure taken by an injured State under articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof.

Article 14. Prohibited countermeasures²⁴⁴

1. An injured State shall not resort, by way of countermeasure, to:

²⁴⁴ This is the reformulation of the draft article submitted by the Special Rapporteur. The original version read:

"Article 14. Prohibited countermeasures"

"An injured State shall not resort, by way of countermeasure to:

"(a) the threat or use of armed force in breach of the Charter of the United Nations;

"(b) any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken;

"(c) any conduct which:

"(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

(a) the threat or use of force [in contravention of Article 2, paragraph 4, of the Charter of the United Nations];

(b) any conduct which:

(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

(iii) is contrary to a peremptory norm of general international law;

(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.

2. The prohibition set forth in paragraph 1 (a) includes not only armed force but also any extreme measures of political or economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.

"(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

"(iii) is contrary to a peremptory norm of general international law;

"(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act."

CHAPTER VII

The so-called self-contained regimes

97. As indicated in the third report, the so-called self-contained regimes are characterized by the fact that the substantive obligations they set forth are accompanied by special rules concerning the consequences of their violation.²⁴⁵ The analysis of international practice reveals that such rules, which are mostly, if not exclusively, treaty rules, are not infrequent in multilateral treaties, particularly in the instruments establishing international organizations or isolated organs. As regards the forms of reaction against violations envisaged, they do not differ in substance from the forms of unilateral reaction usually resorted to by States under general international law. Their main feature is that their implementation frequently involves an international body which has the role either of monitoring compliance or of intervening to some degree in the determination, direct application or authorization of measures.²⁴⁶ Whatever the variations,

the main question is whether the rules constituting the so-called self-contained regime affect, and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law.²⁴⁷ As it is difficult to deal with the issue *in abstracto*, the best course of action is to look at some of the allegedly self-contained regimes.

98. The most important instance of an allegedly "self-contained" regime appears to be the system represented by the "legal order" of EEC.²⁴⁸ With regard to this sys-

²⁴⁵ *Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), paras. 84-88.

²⁴⁶ The various possibilities are illustrated by Lattanzi, "Sanzioni internazionali", *Enciclopedia del diritto*, pp. 559 *et seq.*, and by the literature referred to therein.

²⁴⁷ As noted in the third report, the problem might also arise with regard to the substantive consequences of a violation of the rules of the so-called self-contained regime (*Yearbook* ... 1991, vol. II (Part One) (see footnote 1 above), paras. 86-88).

²⁴⁸ References to the EEC system as a "self-contained regime" are made, *inter alia*, by Riphagen, in his third report (*Yearbook* ... 1982, vol. II (Part One), document A/CN.4/354 and Add.1-2, paras. 72-73 and footnote 53) and fourth report (*Yearbook* ... 1983, vol. II (Part One) (see footnote 51 above), para. 120); Reuter and Combacau, *Institutions et relations internationales*, p. 386; Sørensen, "Eigene

tem, the notion that the member States have forfeited their liberty to resort to unilateral measures under the general international law of countermeasures has been repeatedly asserted by the Court of Justice of the European Communities, the most interesting pronouncements being consolidated cases 90-91/63 against Belgium and Luxembourg²⁴⁹ and case 232/78 against France.²⁵⁰ Some writers share the Court's view.²⁵¹ Others, however, maintain that the *faculté* to resort to the remedies afforded by general international law cannot be excluded whenever the EEC machinery has been used to no avail.²⁵²

(Footnote 248 continued.)

Rechtsordnungen—Skizze zu einigen systemanalytischen Betrachtungen über ein Problem der internationalen Organisation", *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit, Festschrift zum 70. Geburtstag von Hans Kutscher*, p. 431; and Simma, "Self-contained regimes", *Netherlands Yearbook of International Law* (1985), pp. 125 *et seq.*

²⁴⁹ In this case the Court rejected the argument of Belgium and Luxembourg according to which the inactivity of the Commission in regulating certain aspects of dairy products trade would constitute a violation of the obligations established by the Treaty; a violation which would, in turn, justify the violation by the latter of obligations set forth in the same Treaty. According to the Court, the EEC Treaty

"establishes a new legal order which regulates the powers, rights and duties of such persons [the persons to whom the Treaty applies], as well as the necessary procedure for determining and adjudicating upon any possible violation thereof".

In consequence ... *en dehors des cas expressément prévus, l'économie du traité comporte interdiction pour les États membres de se faire justice eux-mêmes* [... save in the cases expressly provided for, the terms of the Treaty prohibit the Member States from taking the law into their own hands] (*Commission of the European Economic Community v. the Grand Duchy of Luxembourg and the Kingdom of Belgium*, judgement of 13 November 1964 (Cour de justice des Communautés européennes, *Recueil de la jurisprudence de la Cour*, 1964, Luxembourg, pp. 1217 *et seq.*) Judgement published in French only. For account of the cases in English, see *Common Market Law Reports* [1965], vol. 4 (London), Consolidated cases 90-91/63 (Import of milk products), *EEC Commission v. Luxembourg and Belgium*, pp. 58 *et seq.*)

²⁵⁰ In this case, which concerns the institution by France, in violation of the Treaty, of a national regime for the production of lamb meat, the Court sums up its opinion as follows:

"The French Republic cannot justify the existence of such a system with the argument that the United Kingdom, for its part, has maintained a national organization of the market in the same sector. If the French Republic is of the opinion that that system contains features which are incompatible with Community law it has the opportunity to take action, either within the Council, or through the Commission, or finally by recourse to judicial remedies with a view to achieving the elimination of such incompatible features. A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty" (*Commission of the European Communities v. French Republic*, "Mutton and lamb", judgement of 25 September 1979 (Court of Justice of the European Communities, *Reports of Cases before the Court* 1979-8 (Luxembourg), p. 2739)).

²⁵¹ Compare, *inter alia*, Schwarze, "Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen", *Europarecht* (1983), pp. 1-39; Ipsen, "Über Supranationalität", in *Festschrift für Ulrich Scheuner zum 70. Geburtstag*, 1973, pp. 211 *et seq.*; Pescatore, *L'ordre juridique des Communautés européennes: Étude des sources du droit communautaire*, p. 165, and "Aspects judiciaires de l'acquis communautaire", *Revue trimestrielle de droit européen*, 1981, pp. 617-651, particularly pp. 626-628.

²⁵² As explained by Simma:

"According to what is probably the leading view in [the] literature, however, measures of reprisal or an *exceptio non adimpleti contractus* (article 60 of the Vienna Convention on the Law of Treaties) would not become admissible even at this point [namely,

99. It must be stressed that the only case-law available is that of the Court of Justice of the European Communities itself, that is to say, of a judicial body which is an integral part of the allegedly self-contained system. No occasion has arisen, so far, for any pronouncement by an external judicial body. It is significant, furthermore, that a full espousal of the Court's view has so far come mainly from scholars specially concerned with European Community law. By contrast, scholars whose principal interest lies with public international law hold the opposite view. It is legitimate to wonder whether the hypothesis in question is only conceivable within the framework of the Community "legal system", or, more precisely, within the framework of the international legal relationships set up among the participating States by the European Community treaties.²⁵³ Looked at from outside, from the viewpoint of general international law, these treaties do not differ in essence from any other treaties. They remain subject to all the rules of the law of treaties. The element of reciprocity is not set aside, and even the choice of the contracting States to be the members of a "community" cannot, as a matter of international law, be considered to be irreversible (at least as long as those States remain sovereign entities and legal integration is not achieved).

100. It would seem to follow that the EEC system does not really constitute a self-contained regime, at least not for the purposes of the regime of countermeasures against violations under general international law. The claim that it would actually be legally impossible for the States belonging to the Community to "fall back" upon the measures afforded by general international law even in case of failure of the institutional EEC remedies does not really seem to be justified, at least from the viewpoint of general international law. White's belief that the claim rests upon a prevalence of "policy considerations" over "legal reasoning" would appear to be correct.²⁵⁴

after the Court of Justice of the European Communities had found a Member State in violation of an obligation arising from a previous judgement of the Court]. Other authors are more cautious and consider, though with marked hesitation, a fall-back on the countermeasures provided in general international law as an *ultima ratio* after all the legal and political means within the EEC system have been exhausted to no avail." (Loc. cit., p. 126.)

The more cautious authors include Simma himself, according to whom "... the general regime of State responsibility can only be again called to the foreground after all remedies provided in the 'subsystem' have been exhausted without any positive results and when further tolerance of the imbalance of costs and benefits caused by non-performance can no longer bona fide be expected from an injured party. Thus, not even in the case of EEC law do we find the total and final 'decoupling' of a 'self-contained regime' for the general rules" (ibid., pp. 128-129).

A similar position is taken by Conforti in his commentary on article 1 of the Treaty instituting the European Coal and Steel Community, *Trattato istitutivo della Comunità Europea del Carbone e dell'Acciaio: Commentario*, vol. I, pp. 37-39. In the sense that resort to "self-help" measures would be justified when the Member State does not comply with its obligations following a judgement by the Court, see also Kapteyn and Verloren van Themaat, *Introduction to the Law of the European Communities after Accession of New Member States*, p. 27.

²⁵³ *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987).

²⁵⁴ "Legal consequences of wrongful acts in international economic law", *Netherlands Yearbook of International Law* (1985), pp. 137 *et seq.*, particularly p. 162.

101. The other two examples of allegedly self-contained regimes, namely the rules on the protection of human rights and those governing diplomatic relations and the status of diplomatic envoys, are even less convincing.²⁵⁵

102. The "self-contained" regime of human rights would consist of treaty-based rules, more precisely of one or other of the treaty-based systems in force at the worldwide or regional level.²⁵⁶ The literature is divided but, with the exception of writers from the socialist countries, the negative view decidedly predominates.²⁵⁷ Some writers address themselves to the two somewhat

²⁵⁵ Riphagen considered the three cases in question as instances of "objective regimes". (See *Yearbook ... 1983*, vol. II (Part One) (footnote 51 above), paras. 89-91.)

²⁵⁶ Actually, the discussion centres not so much upon the hypothesis of a single self-contained regime resulting from a combination of the various human rights conventions, as upon that of a number of self-contained regimes, one for each of the various human rights "systems" in existence (e.g. the International Covenants, the European Convention, etc.).

²⁵⁷ According to Henkin:

"The effort to create an international law of human rights has been largely a struggle to develop effective machinery to implement agreed norms. Arduous effort had not brought forth machinery of notable effectiveness. It would be ironic if the meager successes in establishing such machinery should become the basis for interpreting the agreements as excluding other traditional means of enforcement, where they are most needed, and for denying them to States willing to use them . . .

"No human rights agreements, even those that establish elaborate enforcement machinery, expressly or by clear implication exclude the ordinary inter-State remedies. In fact, the principal human rights agreements clearly imply the contrary: that every party to the agreements has a legal interest in having it observed by other parties and can invoke ordinary legal remedies to enforce it." ("Human rights and 'domestic jurisdiction'", *Human Rights, International Law and the Helsinki Accord*, p. 31.)

According to Simma:

"It has yet to be proved that such a 'decoupling' of human rights treaties from the enforcement processes of general international law was actually intended by the negotiating States. As long as such proof is not furnished one has to stick to the premise that multilateral treaties for the protection of human rights, like all other treaties, embody correlative rights and duties between the contracting parties *uti singuli*, resulting in a duty on each party to fulfil its obligations *vis-à-vis* all the others, and conversely, in a right for each party to demand compliance from every other party and, if necessary, to enforce it through countermeasures." (Loc. cit., p. 133.)

According to Lattanzi,

"... whenever the procedures provided for in the treaty do not manage to secure respect for human rights . . . States have no alternative but to resort to the coercive measures available to induce [the author State] to fulfil [its] obligations" (op. cit., p. 261, footnote 41).

The *Restatement of the Law Third* (see footnote 39 above), states that:

"(1) A State party to an international human rights agreement has, as against any other State party violating the agreement, the remedies generally available for violation of an international agreement, *as well as* any special remedies provided by the agreement." (Sect. 703 (Remedies for Violation of Human Rights Obligations), p. 175. See also reporters' notes, 2, at pp. 178-179.)

The contrary view is taken by Maddrey, together with a number of writers from the socialist countries:

"There are two barriers to the application of the law of reprisals to human rights enforcement. First, because there is a lack of consensus concerning the substantive norms of human rights law . . . This uncertainty about the substantive content of human rights law and the binding nature of accepted norms makes it difficult to determine when a breach gives rise to a permissible reprisal.

more plausible cases of a self-contained human rights regime: the International Covenant on Civil and Political Rights "system" of 1966 and the European Convention on the Protection of Human Rights and Fundamental Freedoms "system" of 1950.²⁵⁸

103. The International Covenant on Civil and Political Rights has been considered in this context by Tomuschat,²⁵⁹ Meron,²⁶⁰ Simma,²⁶¹ and others. The present writer is inclined to share their view that the provision of article 44 of the Covenant²⁶² is sufficient to exclude the Covenant "system" from being properly categorized as a self-contained regime.

104. On the European Convention "system", which is the most advanced among the existing human rights instruments, scholars take a more cautious approach. The prevailing view is that in this case too the normal rights and remedies, namely the general international legal

"Second, some jurists contend that under the customary law of reprisals only those States directly affected by an act of the offending State are allowed to take retaliatory action. Because human rights complaints involve a State's treatment of its own nationals, there is no direct injury to another State under traditional terms. Other jurists have argued that the breach of international law creates a public right of reprisal, one allowing all nations to take retaliatory action. But the lack of consensus on this point makes it difficult to determine when a right to intervene has arisen. With these two difficulties, therefore, the law of reprisals affords little legitimacy to unauthorized actions taken to promote human rights." ("Economic sanctions against South Africa: problems and prospects for enforcement of human rights norms", *Virginia Journal of International Law* (1982), pp. 362-363.)

Along the same lines, Frowein is cited by Meron, op. cit., p. 229, footnote 305, as the principal representative of the view that the remedies envisaged by human rights instruments exclude resort to other means.

²⁵⁸ According to Meron, in fact: "Whether a particular human rights treaty excludes remedies dehors the treaty depends . . . not on abstract legal theory but on good faith interpretation of the terms of the treaty . . ." (ibid., p. 231).

²⁵⁹ In Tomuschat's view, the hypothesis that article 41 represents an exclusive arrangement excluding every other method for the implementation of the treaty should be expressly denied, because this would have the result that those States which have not chosen to recognize the competence of the Committee to receive and consider communications from a State Party claiming that another State Party is not fulfilling its obligations under the Covenant, cannot be called to account for their conduct, except within the framework of the provision on the submission of reports. The burden of proof rests on those who maintain such a derogation (deviation) from general international legal rules ("Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen", *Vereinte Nationen*, 1978, p. 8).

²⁶⁰ According to this writer,

"In view of the rather limited nature of the settlement of disputes contained in the . . . Covenant, it is not surprising that article 44 of the Covenant liberally allows States parties that have recognized the competence of the Human Rights Committee with regard to inter-State complaints under article 41 to resort to other means of settling disputes concerning the Covenant's interpretation and application, including the ICJ." (Op. cit., p. 232.)

²⁶¹ Loc. cit.

²⁶² Article 44 of the International Covenant on Civil and Political Rights reads:

"The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them".

rights and remedies, essentially remain intact.²⁶³ An indication of this is the provision of article 62 of the Convention, which (albeit under a special agreement) expressly envisages the right to resort to dispute settlement procedures other than those set up by the Convention.²⁶⁴ From this point of view the European system is open to general international remedies.

105. With reference to both human rights "systems"—and implicitly any similar instruments—the present writer has had occasion to affirm that the obligations set forth therein "... are subject to the general rules of international law with regard to implementation, regardless of any ad hoc procedures made available to single individuals or groups, or to States themselves ...".²⁶⁵ Henkin, with further reference to the procedures envisaged either by the Covenant or by the European Convention, states that "they were clearly intended to supplement not to supplant general remedies available to one party against violation by another ...".²⁶⁶

106. The study of some recent cases seems to lend support to the view that there is no such thing as a worldwide or regional self-contained regime for human

²⁶³ Henkin, loc. cit., pp. 32-33. Simma believes, more generally, that the presence of human rights instruments has not determined a "decoupling" (of remedies) with general international law; he adds, however, that

"In the case of a treaty like the European Convention, which provides an effective system of individual and State complaints, the necessity of resorting to enforcement according to general international law will hardly ever arise." (Loc. cit., p. 133.)

Meron, for his part, warns that

"... the European Convention on Human Rights, which establishes a very effective settlement of disputes system, explicitly excludes resort to means of settlement dehors the Convention, such as the International Court of Justice or United Nations human rights organs. Article 62 of the Convention provides that States parties, 'except by special agreement', may submit disputes concerning the interpretation or application of the Convention only to a means of settlement provided in the Convention." (Op. cit., pp. 232-233.)

The same writer, however, states that

"The inclusion of article 62 in the Convention indicates the drafters' understanding that, in absence of this provision, States parties would be permitted to use settlement of disputes procedures dehors the Convention." (Ibid., p. 233.)

²⁶⁴ This article reads:

"The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of a petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

²⁶⁵ Arangio-Ruiz, "Human rights and non-intervention ...", loc. cit., p. 247.

²⁶⁶ Henkin, loc. cit., p. 31. It is not without interest, in particular as regards the allegedly self-contained regime represented by the system of the European Convention on the Protection of Human Rights and Fundamental Freedoms, that the European Court of Human Rights applies the provisions of the Convention concerning the substantive consequences of violations (notably article 50) as embodying the general rules of international law governing such consequences (Lattanzi, op. cit., pp. 207 *et seq.* and pp. 236 *et seq.*). See, *inter alia*, the following cases: *Engel and others* (Publications of the European Court of Human Rights, Series A: Judgments and Decisions, Judgment of 23 November 1976, vol. 22, p. 70); *Deweert* (ibid., Judgment of 27 February 1980, vol. 35, p. 31); *König* (ibid., Judgment of 10 March 1980, vol. 36, p. 20); and *Artico* (ibid., Judgment of 13 May 1980, vol. 37, p. 22).

rights.²⁶⁷ The only difficulty with such cases is that it is not always easy to distinguish cases of countermeasures *stricto sensu* from cases of mere retortion.²⁶⁸

107. From the point of view of the existence of a (regional) self-contained regime, paragraph 267 of the ICJ judgment in the *Military and Paramilitary Activities in and against Nicaragua* case is also inconclusive. With regard to charges of human rights violations by Nicaragua, the Court stated, *inter alia*, that

... where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or

²⁶⁷ Following the murder in Washington, D.C. of the former Chilean Foreign Minister by Chilean agents, the United States of America in 1976 suspended the military assistance agreement with Chile (case quoted in Lattanzi, op. cit., pp. 322-324). In 1975, Mexico suspended consular relations with Spain following the passing of death sentences on eleven Basque separatists ("Chronique ...", RGDIP (1976), pp. 590 *et seq.*, in particular p. 595). Countermeasures *stricto sensu* seem also to have been involved in the French decision of 23 May 1979 to suspend any form of military assistance to the Central African Empire—a State party to the International Covenant on Civil and Political Rights—following the execution on 18 April of that year of 85 young people by Emperor Bokassa's personal guard. On 17 August 1979, following confirmation of the facts by a Commission of five African magistrates, France extended the measures to all financial assistance to the Empire (with the exception of food, medical and educational assistance programmes) (ibid. (1980), pp. 363-364, and Lattanzi, op. cit., p. 322). A countermeasure proper was also taken by the Netherlands Government when it suspended all agreements in force with Suriname—a State party to the Covenant—following the unexplained death of 15 prominent figures in that country. The Dutch Minister for Development Cooperation declared in Parliament in August 1983 that

"Before terminating this suspension [of agreements with Suriname], the Netherlands Government expects Suriname to take positive steps towards the restoration of democracy and law and order, respecting at the same time fundamental human rights and providing structures capable of preventing a recurrence of what happened in December 1982." ("Netherlands State practice", *Netherlands Yearbook of International Law*, vol. XV (1984), p. 321, sect. 6.4341.)

Also of interest is the statement by a spokesman of the Federal Republic of Germany (1982), according to which:

"Der Internationale Pakt über bürgerliche und politische Rechte ist ein völkerrechtlicher Vertrag, auf den die Regeln über völkerrechtliche Verträge Anwendung finden. Nach diesen Regeln richten sich die Rechte und Pflichten der Vertragsparteien in erster Linie nach den in dem Vertrag selbst getroffenen Bestimmungen. Dies gilt auch für den Fall der Nichterfüllung von Verpflichtungen. Ergänzend kommt das allgemeine Völkerrecht zur Anwendung." (Bundestags-Drucksache, 9/1981, p. 2—cited in Simma, loc. cit., p. 134.)

²⁶⁸ As recalled by Lattanzi, Anzilotti saw the issue in the clearest terms long before the proliferation of human rights instruments. In 1906 he wrote:

"... rien ne s'oppose, et les exemples ne manquent pas, à ce qu'un État s'oblige envers d'autres États à traiter ses propres sujets d'une manière déterminée, en leur octroyant notamment certains droits. L'État, alors, est internationalement tenu de se comporter envers ses nationaux de la façon promise; le refus de leur accorder les droits annoncés constituerait un défaut d'exécution de l'obligation, qui autoriserait les États envers lesquels l'engagement a été pris à en réclamer l'accomplissement par tous les moyens du droit international." [There is nothing to prevent a State—and there are all too many examples of this—from entering into an undertaking with other States to treat its own subjects in a given way, in particular by granting them certain rights. The State is then internationally bound to conduct itself towards its nationals as promised; refusal to grant them the rights stated would amount to failure to perform the obligation, and this would entitle the States with which the undertaking was entered into to call for it to be performed by all means available under international law] ("La responsabilité internationale des États à raison des dommages soufferts par des étrangers", RGDIP (1906), p. 10).

ensuring respect for human rights as are provided for in the conventions themselves.

...

The political pledge by Nicaragua [to respect human rights] was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports... following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.²⁶⁹

Nothing is said here about a "self-contained" inter-American human rights regime, in any case, not in the sense of a "closed legal circuit". There is simply the acknowledgement of the existence of regional human rights arrangements and machinery. The very fact of stressing that such arrangements and machinery had functioned seems to imply that a "fall-back" on general remedies would have followed had it been otherwise.

108. According to a possible interpretation of a *dictum* of ICJ, another case of an allegedly self-contained regime would be the law of diplomatic relations and, in particular, of the privileges and immunities of diplomatic envoys and premises.

109. According to the *dictum* of ICJ in the *United States Diplomatic and Consular Staff in Tehran* case,

The rules of diplomatic law... constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious.²⁷⁰

It seemed to follow, according to the Court, that a State injured by a violation of another State's duty in the field of diplomatic relations could only "employ the remedies placed at its disposal by diplomatic law specifically".²⁷¹

110. Nevertheless, doubts have been expressed in many quarters about the self-contained nature of diplomatic law.²⁷² The most convincing is the theory according to which any real limitations on "diplomatic" countermeasures, so to speak, derive not from any "specificity" of diplomatic law, but simply from the normal application, in the area of diplomatic law, of the general rules and principles constituting the regime of

countermeasures (namely the various kinds of general limitations; the absolute limitation of *jus cogens*; the limitations imposed by the need to respect human rights; and possibly specific limitations deriving from *given rules* of the law of diplomatic relations). This is the position taken by Simma²⁷³ and, to a certain extent, Dominicé.²⁷⁴

111. In his comment to draft article 2 of part 2,²⁷⁵ Riphagen suggests that an example of a possible derogation from the general regime could be a customs tariff treaty establishing the consequences of the violation of its own rules, in derogation from the general rules on the consequences of internationally wrongful acts. This would presumably be the case—if we understand his position correctly—of the General Agreement on Tariffs and Trade,²⁷⁶ certain articles of which affect countermeasures, with regard to settlement of disputes (art. XXIII), quantitative restrictions to imports in violation of the Agreement (art. XII), safeguards (art. XIX) and the modification of tariff concessions (art. XXVIII). While Riphagen seems to envisage here not so much a self-contained regime, but just a number of treaty-based "derogations" from general rules, the concept of self-contained regimes may appear to be evoked, in connection with the General Agreement on Tariffs and Trade, in a recent work on countermeasures in international economic relations, according to which:

Le respect des dispositions de l'Accord général ne permet pas à un État de manquer au respect de ses engagements au titre d'un exercice de contre-mesure à l'encontre d'un autre État partie au GATT, en dehors des hypothèses prévues par l'Accord général. En effet, les possibilités d'exercice de contre-mesures à l'encontre d'États auxquels est attribuable un fait qui relève du domaine d'application de l'Accord général et qui puisse être générateur d'un exercice de contre-mesures sont strictement délimitées et réglementées, ce qui rend illicite tout exercice de mesures prétendument contre-mesures et qui ne serait pas conforme aux prescriptions de l'Accord général... [Observance of the provisions of the General Agreement does not entitle a State to fail to observe its commitments because of the application of a countermeasure against another State party to GATT, save in the cases specified in the General Agreement. The possibilities for the application of countermeasures against States to which is attributed an act that falls within the scope of the General Agreement and that may give rise to the application of countermeasures are strictly circumscribed and regulated, and this renders unlawful any application of measures alleged to be countermeasures which is not in accordance with the terms of the General Agreement...]²⁷⁷

In relations between the contracting States, the prohibition of countermeasures other than those contemplated in the Agreement would apply also to the suspension of

²⁶⁹ *I.C.J. Reports 1986* (see footnote 147 above), p. 134.

²⁷⁰ *I.C.J. Reports 1980* (see footnote 37 above), p. 40, para. 86.

²⁷¹ *Ibid.*, para. 87.

²⁷² According to Simma:

"There is no question that serious breaches of diplomatic law such as, for instance, acts of State terrorism committed by means of diplomatic agents, may justify countermeasures (reprisals) in the form of suspension of obligations towards the violator in other fields. Therefore, even if one agrees with the opinion of the Court that countermeasures to abuses of diplomatic immunity may not affect the immunity of the diplomats concerned, this legal construction can be labelled 'self-contained' only in a very narrow sense." (*Loc. cit.*, pp. 120-121.)

Tomuschat has stated that:

"... only a hard core of the immunities of diplomatic and consular missions and staff should be protected... other immunities might be legitimately restricted by way of reciprocity or reprisal." (*Yearbook...* 1985, vol. I, 1896th meeting, para. 41.)

²⁷³ "[I]t is indeed to the general limits of countermeasures to internationally wrongful acts that the Commission, in this writer's opinion, should also subject the secondary rules of diplomatic law: i.e. proportionality, *jus cogens* and the higher law of the UN Charter" (*loc. cit.*, p. 122).

²⁷⁴ "[P]our affirmer qu'une violation initiale du droit diplomatique ne peut en aucune manière autoriser l'État qui en est la victime à le transgresser, à son tour, l'argument du régime se suffisant à lui-même n'est pas nécessaire" [The assertion that an initial violation of diplomatic law can on no account authorize the victim State, in turn, to break that law, does not require the self-contained regime argument] ("Représailles et droit diplomatique", *Recht als Prozess und Gefüge—Festschrift für Hans Huber zum 80. Geburtstag*).

²⁷⁵ *Yearbook...* 1985, vol. II (Part One) (see footnote 11 above), p. 5, para. 2.

²⁷⁶ GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).

²⁷⁷ Boisson de Chazournes, *op. cit.*, p. 148.

compliance with one or more obligations of the Agreement by way of reaction to the violation of international obligations other than those deriving from the Agreement itself. Subject, however, to further study, this "system" does not seem to constitute a really self-contained regime. The writer herself seems to acknowledge this when she notes that the participating States do resort, in some cases, to

... mesures adoptées en dehors de tout cadre réglementaire, telles que les mesures dites de la zone grise et les accords d'auto-limitation [... mesures adopted outside any regulatory framework, such as the so-called grey area measures and voluntary restraint agreements].²⁷⁸

This would indicate that the GATT "system" is not really a self-contained regime in the sense in which the former Special Rapporteur seems to have used that expression.

112. In conclusion, none of the supposedly self-contained regimes seems to materialize *in concreto*. Furthermore, the analysis of these cases gives rise to the most serious doubts as to the very admissibility *in abstracto* of the concept of self-contained regimes as "subsystems" of the law of State responsibility or, in the words of the former Special Rapporteur, "closed legal circuit[s] for particular field[s] of factual relationships",²⁷⁹ such as those created by human rights law, the law of diplomatic relations, the law of tariffs and trade, or the law of the European Communities. To be sure, any substantive rules or any more or less articulated and organized set of such rules may well introduce provisions which aim to improve the regulation of the consequences of possible violations, this with the purpose of

... rendering the response on the part of the injured party more certain and violations therefore more prohibitive, or of limiting the response and thus avoiding excessive reaction, counter-reaction, and the eventual breakdown

of the rules or set of rules in question.²⁸⁰ In some of the cases considered, the aim may be either to achieve, by means of ad hoc machinery, a more effective, organized monitoring of violations and responses thereto (as in some human rights instruments and some international institutions) or to prevent a reaction to a violation from defeating the more general purpose of the breached rule (as in the rules on the protection of diplomatic envoys). In so doing, the rules or sets of rules in question do not exclude the validity and operation of the rules of general international law governing the consequences (substantive or instrumental) of internationally wrongful acts. The special, ad hoc, rules merely represent contractual (or perhaps customary) law derogations from the general rules in question, such derogations being admissible to the extent that they are not incompatible with the latter. Indeed, no derogation from those essential rules and principles on the consequences of internationally wrongful acts that are inherent to international relations and international law could be conceivable, unless the implementation of those rules brought about a degree of union

that would lead to the surrender of the international legal personality of the participating States and their integration within a "national" (constitutional) system. In particular, no treaty-based provisions would be admissible that would involve derogation from (a) the prohibition of the use of force; (b) the rule of respect for fundamental rights; (c) the basic exigencies of diplomatic relations; (d) other peremptory rules of general international law; (e) the duty to respect the rights of "third" States; (f) the principle of proportionality; or (g) the rule under which the lawfulness of any unilateral measure must be assessed in the light of its ultimate legal function. Within the framework of such principles and rules there is no obstacle to States establishing, bilaterally or multilaterally, special machinery which envisages particular measures or sanctions, *either* in response to wrongful acts involving the infringement of the rules set forth in the same instrument *or* in response to any internationally wrongful act if the particular measures or sanctions contemplated affect the instrument in question in any way.

113. It follows that whenever an injured State finds itself in a position to avail itself of the measures envisaged in a given instrument, precisely to deal with an infringement thereof, it will be entitled to do so simply on the strength of that instrument. The question whether the measure taken is proportional under the general principle or has been preceded by a demand for reparation or *somation*, in conformity with the general rules, will not arise. It will suffice to verify whether the measure is admissible under the relevant instrument in the circumstances, assuming, of course, that the target State is a party thereto. This may also happen—as long as *jus cogens* is respected—in derogation from the general rules of the law of treaties on suspension and termination of multilateral treaties.

114. However, it seems reasonable to assume, in particular, that a State joining a so-called self-contained regime does not thereby restrict, by some kind of self-limitation, its rights or *facultés* of unilateral reaction under general international law to such an extent that there is no possibility of any derogation from or integration of that "regime". Of course, any State accepting the "regime" shall be bound, when confronted with a breach by another State party of an obligation deriving from that "regime", first of all to react—if it so wishes—in conformity with the provisions of the relevant "regime". This does not exclude, however, a certain latitude for general law measures, the extent of such latitude depending on the degree of availability and effectiveness of the remedies envisaged by the treaty-based "regime".²⁸¹

115. Two main hypotheses are conceivable in which the possibility of "fall-back" is and should remain open:

(a) In the first hypothesis, the State injured by a violation of the "system" resorts to that system's institutions, secures a decision in its favour, but fails to obtain, through the system's procedures, the reparation to which it is entitled under that decision. Clearly, as long as the wrongdoing State does not comply in full with its obligations, the injured State may lawfully resort to

²⁷⁸ Ibid., p. 63.

²⁷⁹ Yearbook ... 1982, vol. I, 1731st meeting, para. 16.

²⁸⁰ Simma here refers to the special regime of suspension and termination of treaties in the Vienna Convention on the Law of Treaties, "Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law", *Österreichische Zeitschrift für öffentliches Recht* (1970), p. 82).

²⁸¹ The situation is not dissimilar from that of a State which is bound, *vis-à-vis* the wrongdoing State, by specific, bilateral obligations to submit to given dispute settlement procedures as a first resort when its demand or *somation* has proved unsuccessful.

measures which, although not covered by the "system", are available to it (with the relevant limitations) under general international law.

(b) In the second hypothesis, the internationally wrongful act consists of an ongoing violation of the "regime". In this case too, except of course where the injured State would be entitled to act in self-defence, there is an obligation to seek recourse in the first place through the procedures agreed in the instrument concerned. However, if the unlawful conduct persists while these procedures are in progress—and in spite of any interim measures for which provision is made therein—the injured State may lawfully resort simultaneously to any "external" unilateral measures which may be appropriate to protect its primary or secondary rights, without endangering the "just" solution of the conflict which could be afforded by the "system".

116. It should be added, nevertheless, with regard to both these hypotheses, that each of the States parties to a "regime" has presumably considered the legal rights and obligations covered thereby, and the very integrity of that regime, as a *bien juridique* of major importance. Consequently, any derogation from the "regime" not contemplated therein should be considered as highly exceptional. "External" unilateral measures should thus be resorted to only in extreme cases, namely, only in response to wrongful acts of such gravity as to justify a reaction susceptible of jeopardizing a *bien juridique* very highly prized by both the injured and the lawbreaking State. In other words, the principle of proportionality will have to be applied in a very special way—and very strictly—whenever the measures resorted to consist in the suspension or termination of obligations deriving from an allegedly "self-contained" regime.

117. Finally, it should be re-emphasized that normally a "self-contained" regime would be established by a multilateral treaty. As in the case of any multilateral treaty, this implies that suspension or termination by way of countermeasure may be lawfully resorted to only under the general proviso that it does not cause prejudice to the rights of States parties other than the wrongdoing State or States. In this respect too, as with respect to proportionality, it seems reasonable to assume that the very fact that States participate in a special regime emphasizes the restriction in question, in the sense that each party to the regime would have acquired something more than a merely factual interest in proper compliance with the regime by all parties in all circumstances.

118. The considerations set forth in the preceding paragraphs lead to the conclusion that it would be inappropriate, in codifying the law on State responsibility, to contemplate provisions placing "special" restrictions upon measures consisting in the suspension or termination of obligations arising from treaties creating special regimes or international organizations. A correct interpretation and application of the general rules governing any unilateral measure—including measures affecting compliance with written or unwritten *erga omnes* obligations—should be sufficient to cover the problems which may arise from treaties establishing international organizations or any allegedly "self-contained" regimes.

119. For reasons analogous to those that cast strong doubt on the concept of "self-contained" regimes (or

"closed legal circuits"), draft article 2 of part 2 as adopted on first reading²⁸² is a source of serious perplexity. The link between the subject-matter of that draft article and the problem of allegedly self-contained or otherwise special regimes suggests that that draft article should not be left aside until the second reading stage.

120. Draft article 2 asserts the residual nature of the whole of part 2, namely the fact that the rules set forth in that part are to apply only on the condition and to the extent to which the consequences of an internationally wrongful act are not "determined by other rules of international law relating specifically to the internationally wrongful act in question". This provision derives from Riphagen's belief in the existence, within the framework of international law, of the "self-contained" regimes discussed in paragraphs 97 to 119 above, and from his related belief that the rules of such regimes or systems governing the consequences of the breaches of obligations deriving therefrom would exclude the operation of the general rules on the consequences of internationally wrongful acts within the area covered by the regime or system in question.²⁸³

121. Although a few members did express some doubts during the debate on the proposal,²⁸⁴ the adoption of the draft article by the Commission at its thirty-fifth session²⁸⁵ indicates that the idea was generally accepted.

122. According to the general terms in which draft article 2 refers to "any other rules of international law", it would seem that the special regimes that would enjoy a certain exclusiveness, so to speak, in the regulation of the consequences of internationally wrongful acts, could encompass not only treaty rules but also unwritten customary rules. With regard to unwritten law, however, it is difficult to identify the rules concerned and to see how the special regime they create would relate to the rules to be codified by the Commission. In addition to the rules condemning international crimes of States, the examples of special customary law regimes indicated by Riphagen would seem to be those applying to respect for human rights, the protection of the environment as a "shared resource", and diplomatic immunities.²⁸⁶ As already explained in paragraphs 101 to 109 above, and as recog-

²⁸² For text of articles 1-5 of part 2 as adopted on first reading, see *Yearbook* ... 1991, vol. II (Part Two), pp. 126-127, footnote 359.

²⁸³ See third report (*Yearbook* ... 1982, vol. II (Part One) (footnote 248 above), paras. 52-77); sixth report (*Yearbook* ... 1985, vol. II (Part One) (footnote 11 above), commentary to article 2); see also his comments in *Yearbook* ... 1982, vol. I, 1731st meeting, paras. 16-23, and *Yearbook* ... 1984, vol. I, 1858th meeting, paras. 3-9.

²⁸⁴ Views were expressed against the article by Ushakov (*Yearbook* ... 1982, vol. I, 1734th meeting, para. 47) and Yankov (*ibid.*, 1737th meeting, para. 15). Doubts on the notion of "sub-systems" and on the excessive scope of draft article 2 were also expressed by Calero Rodríguez (*ibid.*, 1736th meeting, paras. 22-24).

²⁸⁵ See *Yearbook* ... 1983, vol. II (Part Two), pp. 42-43. The formulation gave rise to more perplexity in the Sixth Committee. It was stressed by a number of speakers, especially the representatives of Brazil (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 43rd meeting, para. 56), France (*ibid.*, 38th meeting, para. 14), Greece (*ibid.*, 40th meeting, para. 45), and Iraq (*ibid.*, 50th meeting, para. 50), that too many derogations would deprive the draft of its interest.

²⁸⁶ Fourth report (*Yearbook* ... 1983, vol. II (Part One) (see footnote 51 above), paras. 89-91).

nized by Riphagen himself,²⁸⁷ respect for human rights and diplomatic immunities do not give rise to any special forms of international responsibility under unwritten law. On the contrary, the consequences of the violation of human rights or diplomatic law rules—whether substantive or instrumental—are subject to the same restrictions deriving either from the absolute limitations to countermeasures or from the general requirement of compatibility with *jus cogens*. As for the protection of the environment, it is impossible to see in what sense the present state of international practice can justify the assumption that either it is already covered by a special regime of customary, unwritten law or that a special regime of that nature is just around the corner. As a recent contribution to the topic has well demonstrated,²⁸⁸ and as pointed out in paragraphs 139 to 151 below, there are no peculiarities in the regulation of the legal consequences of internationally wrongful acts affecting the environment that are not in some way covered by the application of the general norms and principles of international responsibility. As regards the regime governing the consequences of international crimes, to the extent that it may have to be singled out as *special* compared with that applying to other internationally wrongful acts of States, it has so far been assumed to have been covered within the framework of the draft articles on which the Commission is currently working, notably as an integral component of parts 2 and 3. In conclusion, it would appear that there is not a single area of international legal relations falling under a special regime of unwritten rules on State responsibility to justify a provision which, like the one presently embodied in article 2, would label as merely residual the general rules on State responsibility devised by the Commission.

123. Draft article 2 is questionable too, at least in its present formulation, with respect to treaty-based rules. It would certainly be perfectly correct to say in that article—although it should go without saying—that derogation from the general rules to be set forth in part 2 is not excluded. Of course, States may well derogate from them by treaty. This is a normal feature of any rule of international law which is not a peremptory rule. The tenor of article 2, however, seems to go beyond that obvious statement. As presently drafted, article 2 states that the general rules set forth in part 2 would be inapplicable whenever and to the extent that the legal consequences of a given internationally wrongful act were determined by “other rules of international law”. Even within the confines of treaty law, article 2, as drafted, would mean that whenever a treaty determines the legal consequences of one or more given internationally wrongful acts—for example, the violation of the obligations set forth in that treaty—the rules of part 2 would no longer come into play. Each of the States parties to such a treaty would automatically exclude the application of the general rules as codified—by virtue of an article (draft article 2) forming part of the very codification convention in which those general rules are to be embodied. Such a sweeping consequence calls for further reflection by the Commission.

²⁸⁷ Ibid.; sixth report (*Yearbook* . . . 1985, vol. II (Part One) (see footnote 11 above), pp. 12-13), article 11, para. 1 (c) and article 12, para. (b), and commentaries thereto.

²⁸⁸ Spinedi, “Les conséquences juridiques d’un fait international illicite causant un dommage à l’environnement”, *International Responsibility for Environmental Harm*, pp. 75-124.

124. As already mentioned, when States introduce into a treaty special rules governing the consequences of its violation, their aim is not to exclude, in their mutual relations, the rights, obligations, and *facultés*—in short, the guarantees—which each derives, *vis-à-vis* each of the other parties, from the normal operation of the general rules on State responsibility. On the contrary, the aim pursued is to strengthen the normal, unstructured, and sometimes unsatisfactory guarantees of general law, by making them more dependable and effective, either by means of institutional devices or, failing that, by means of more precise stipulations. In no case does that mean renouncing the possibility of “falling back” on less developed, “natural” guarantees in cases such as those considered in paragraph 115 above. A presumption of total abandonment of the guarantees, such as the one presently expressed in draft article 2, seems thus to be doubly objectionable. On the one hand, it defeats the purpose of States establishing special regimes by attributing unintended derogatory effects to their agreement. On the other hand, it appears to defeat the very purpose of the codification and progressive development of the law of State responsibility undertaken by the General Assembly through the Commission, by making the general rules “residual”.

125. Were a provision such as that of draft article 2 really to remain in the draft articles—a matter on which there is strong doubt—it should be qualified by the addition of at least three limitations:

(a) The first, to be embodied in the text of the article, should specify that the derogation from the general rules set forth in the draft articles is a derogation deriving from contractual instruments (and not from unwritten, customary rules);

(b) The second—also to be included in the text—should specify that for a *true* derogation from the general rules to take effect, the parties to the instrument must expressly indicate that by entering the treaty-based system they exclude the application of certain or of all the general rules of international law on the consequences of internationally wrongful acts, rather than confining themselves to dealing globally with the consequences of the violation of the regime;

(c) The third could be confined to a clarification in the commentary to the draft article to the effect that, notwithstanding point (b), the effects of the treaty-based derogation would not survive a violation of the system which was of such gravity and magnitude as to justify, as a proportional measure against the wrongdoing State, the suspension or termination of the treaty-based system as a whole. By disengaging itself (temporarily or permanently) from the system,²⁸⁹ the injured State would be at liberty to pursue its so-called secondary rights by the means of redress set forth in the general rules.

126. For reasons which partly coincide with and partly transcend those indicated in paragraphs 119 to 125 above, it is felt that draft article 4 of part 2 as adopted on first reading²⁹⁰ may call for some further reflection.

²⁸⁹ A possibility contemplated by paragraphs 1 and 2 (b) and (c) of article 60 of the Vienna Convention on the Law of Treaties.

²⁹⁰ See footnote 282 above.

CHAPTER VIII

The problem of a plurality of equally or unequally injured States

A. The origin of the concept of non-directly injured States

127. Chapter IX of the third report²⁹¹ already called into question the accuracy of the concept of “non-directly” injured or “non-directly” affected States. On further reflection, that concept is now found to be unacceptable.

128. In the Commission and the Sixth Committee the concept of “non-directly” injured States emerged in 1984 in relation to the definition of injured State. It had been prompted by some thoughts put forward by the former Special Rapporteur in his presentation of the draft article that was to become article 5 of part 2 of the draft as adopted on first reading.²⁹² Thereafter, the concept seems to have gained some credence in the literature²⁹³

²⁹¹ *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 89-95, especially paras. 90 and 95.

²⁹² Riphagen, fourth report (*Yearbook ... 1983*, vol. II (Part One) (see footnote 51 above), paras. 31 *et seq.*), and sixth report (*Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above), pp. 6-8, commentary to article 5).

The following members of the Commission were in favour of the distinction between “directly” injured or affected States and “indirectly” injured or affected States as reflected in paras. (e) and (f) of article 5 as subsequently adopted by the Commission on first reading: Sinclair (*Yearbook ... 1984*, vol. I, 1865th meeting, paras. 1-10); Lacleta Muñoz (*ibid.*, 1867th meeting, paras. 15-19); Flitan (*Yearbook ... 1985*, vol. I, 1892nd meeting, paras. 47-56); Ogiso (*ibid.*, 1896th meeting, paras. 1-18); Tomuschat (*ibid.*, paras. 33-46 and 49); and Jagota (*ibid.*, 1901st meeting, paras. 2-19). In the Sixth Committee of the General Assembly, the need to distinguish between “directly” or “indirectly” injured States for the purposes of the legal consequences of an internationally wrongful act had been stressed by the representatives of Afghanistan (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 39); the German Democratic Republic (*ibid.*, 45th meeting, para. 13); Romania (*ibid.*, 43rd meeting, para. 57); the Federal Republic of Germany (*ibid.*, 36th meeting, para. 16, and *ibid.*, *Fortieth Session, Sixth Committee*, 24th meeting, para. 10); Bulgaria (*ibid.*, 27th meeting, para. 25); Czechoslovakia (*ibid.*, 29th meeting, para. 15); France (*ibid.*, 34th meeting, para. 41); New Zealand (*ibid.*, 31st meeting, para. 7); and Viet Nam (*ibid.*, 27th meeting, para. 74).

²⁹³ Some authors have recently dealt with the consequences of unlawful acts, and especially of violations of *erga omnes* or *erga omnes partes* obligations, distinguishing between the rights and *facultés* of the injured party on the basis of whether it was a “directly” or “indirectly” injured State. See, Ramcharan, “State responsibility in respect of violation of treaty rules in general, and of those creating an ‘objective regime’ in particular: specific features with regard to the ‘first, second and third parameters’”, *Indian Journal of International Law* (1986), pp. 1 *et seq.*; Hutchinson, “Solidarity and breaches of multilateral treaties”, *British Year Book of International Law* (1988), pp. 151 *et seq.*; Sachariew, “State responsibility for multilateral treaty violations: identifying the ‘injured State’ and its legal status”, *Netherlands International Law Review* (1988), pp. 273 *et seq.*; Simma, “Bilateralism and community interest in the law of State responsibility”, *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne*, pp. 821-844; Spinedi, *loc. cit.*; Cardona Llorens, “Deberes jurídicos y responsabilidad internacional”, *Hacia un nuevo orden internacional y europeo, Estudios en Homenaje al Profesor Don Manuel Díez de Velasco*. The latter author, however, believes that it would be correct to consider the States in question not as “indirectly” injured by the breach of an obligation (and the corresponding right) but as entitled to react to the breach of an international “duty”.

where it was preferred to the term “third” States, which had also been used in the same regard,²⁹⁴ “third” States being States extraneous to a legal relationship. This term has already been discarded *ictu oculi* as inappropriate.²⁹⁵ The terminology “non-directly” injured or affected State, however, is no better. It appears to be very ambiguous, particularly in the light of a logical understanding of the definition of injured State presumably espoused by the Commission.

129. An essential element of the definition of injured State—more or less satisfactorily reflected in the formulation of article 5²⁹⁶—is that an internationally wrongful act consists not only or not necessarily in inflicting unjust physical damage. More broadly, it constitutes or results in the infringement of a right, that infringement—whether or not damage has been caused—constituting the injury.²⁹⁷ This is in conformity with the meaning of “a breach of an obligation” in article 3 (b) of part 1 of the draft and with the significant absence from that article of any reference to damage as an element or effect of a wrongful act. A State can thus be injured by the breach of an international obligation even if it did not suffer any damage other than the infringement of its right.²⁹⁸ In order to identify the “injured State or States” in each particular case for the purposes of the legal consequences of an internationally wrongful act, it is essential, therefore, to determine which State or States have suffered an infringement of their right.

130. According to the traditional view, all international obligations are structurally such that, even when they are established by a multilateral treaty or a customary rule, their violation in any concrete case infringes the right of only one or of a few given States. Recent developments, however, seem to indicate that this may not necessarily be true. A distinction appears to have emerged. Certainly, the majority of international rules—like the majority of private law rules of national societies—still set

²⁹⁴ Charney, “Third State remedies in international law”, *Michigan Journal of International Law* (1989), pp. 57-101, and “Third State remedies for environmental damage to the world’s common spaces”, *International Responsibility for Environmental Harm*, op. cit., pp. 149-177.

²⁹⁵ Third report (*Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above)), para. 90.

²⁹⁶ See footnote 282 above.

²⁹⁷ As the writer, speaking as the representative of Italy, had stated in the Sixth Committee in 1985:

“Article 5, as provisionally adopted, was not intended to be more than a general definition of the States which, by the fact of possessing the right corresponding to the obligation, non-compliance with which constituted the wrongful act, were legally affected by the act.” (See *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 27th meeting, para. 67.)

²⁹⁸ As was rightly observed by Reuter:

“In draft article 5, the Special Rapporteur had endeavoured to follow the guidelines laid down in part 1 of the draft. Injury was not a constituent element of responsibility and account had been taken only of legal, abstract injury resulting from any breach of an international obligation.” (See *Yearbook ... 1984*, vol. I, 1861st meeting, para. 10.)

forth obligations of the traditional kind, that is to say, obligations the violation of which only affects the right of one or more given States. This applies both to the rules of bilateral treaties as well as to most rules of multilateral treaties or customary law. With regard to multilateral rules, it has been suggested that while they apply to a plurality of States they create legal (obligation/right) relationships *dont chacun des destinataires de la norme est titulaire envers un seulement des autres destinataires*.²⁹⁹ In other words, despite the multilateral sphere of action of the rule, it only creates bilateral relationships. It is precisely this kind of obligation—and the corresponding rights—to which reference is made in article 5, paragraphs 2 (a) to (e) of part 2, as adopted on first reading,³⁰⁰ in defining injured States.

131. On the other hand, there are a number of indications in the practice and literature of international law of the existence of rules that apparently do not fit the pattern of bilateralism described above. These are the rules which, in the pursuit of “general” or “collective” interests, create obligations, compliance with which is in the legally protected interest and, in that sense, a legal right of all the States to which the rule applies. According to Spinedi:

On a parlé, à cet égard, de normes qui ont pour objet la tutelle d'intérêts qui sont simultanément propres à tous les États, ou à tous les États composant une collectivité donnée, et non pas à chacun d'eux pris séparément [Mention has been made in this connection of rules designed to safeguard interests that belong to all States simultaneously or to all the States of which a given body is composed, and not to each one severally].³⁰¹

Disarmament and arms control, promotion of and respect for human rights, protection of the environment in general and of areas not falling within the jurisdiction of any State, are examples of the spheres covered by such rules. Spinedi goes on to state that:

Ces normes imposent à chaque État des obligations envers tous les autres États, chacun desquels est titulaire du droit subjectif correspondant. La violation de ces obligations lèse simultanément les droits subjectifs de tous les États liés par la norme, qu'ils aient ou non été spécialement atteints, à l'exception, naturellement, du droit subjectif de l'État auteur de la violation. Pour désigner les obligations dont il s'agit on emploie généralement l'expression “obligation erga omnes” [These rules impose on every State obligations towards all the other States in each of which the corresponding subjective right is vested. A breach of these obligations simultaneously injures the subjective rights of all the States bound by the rule, whether or not they have been especially affected—apart, of course, from the subjective right of the State that committed the breach. The term “*erga omnes* obligation” is generally used to denote the obligations in question].³⁰²

²⁹⁹ Spinedi, loc. cit., p. 88, citing Morelli, “A proposito di norme internazionali cogenti”, *Rivista di diritto internazionale* (1968), pp. 114-115.

³⁰⁰ See footnote 282 above.

³⁰¹ Loc. cit., pp. 88-89.

³⁰² Ibid., p. 89. On the structure and contents of such norms, see the ICJ statements in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (I.C.J. Reports 1951, p. 23) and in *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment* (I.C.J. Reports 1970, p. 32). As regards the literature, see, Morelli, loc. cit.; Juste Ruiz, “Las obligaciones erga omnes en derecho internacional público”, *Estudios de derecho internacional, Homenaje al Profesor Miaja de la Muela*, vol. 1, pp. 219-234; Picone, “Obblighi reciproci e obblighi erga omnes degli Stati nel campo della protezione dell'ambiente marino dall'inquinamento”, *Diritto internazionale e protezione dell'ambiente marino, Studi e documenti sul diritto internazionale del*

The provisions of article 5, paragraphs 2 (e) (ii), (iii), (f), and 3 as adopted on first reading refer precisely to the legal relationships or situations determined by the violation of rules of this kind.

132. Nowadays, the debate no longer so much concerns the existence of *erga omnes* obligations. Apart from the problem of identifying *in concreto* the treaty or customary rules establishing *erga omnes* obligations—which need not be discussed here—the main issue in the area of State responsibility is to determine the consequences of the fact that *erga omnes* obligations carry corresponding *omnium* rights. It is therefore necessary to determine, in view of the possible violation of those obligations, the precise position of the various States for the benefit of which they exist:

(a) Is that position the same as, or does it differ from, that of States qualifying as injured States under rules other than *erga omnes* rules?

(b) Are the positions of the injured States under an *erga omnes* rule all the same? If not, in what sense do they differ and with what effects?

It is in connection with questions such as these that such concepts as “directly” and “non-directly” injured States, “specially” affected and “non-specially” affected States, or “third” States arise.

133. Having rejected the concept of “third” States, the time has come to deal with the other two. It should not be too difficult to show why and in what sense they are unacceptable.

B. Impropriety of the concept of non-directly injured States

134. It may be useful to take the example of a violation of *erga omnes* rules on the protection of human rights. As generally acknowledged, rules of this kind create among the States to which they apply a legal relationship characterized by each State's obligation to ensure the enjoyment of human rights for everyone under its jurisdiction, irrespective of nationality. Any violation of its obligation by State A will constitute a simultaneous infringement of the corresponding right of States B, C, D and E respectively.³⁰³ The rights of all the latter States being the same—namely the right to have State A respect the human rights of those under its jurisdiction—no one of them is more or less directly affected by the violation than any other.³⁰⁴ There may, of course, be a

mare, vol. 12, pp. 15 *et seq.*; Lattanzi, op. cit., pp. 97-149; Sperduti, “Les obligations solidaires en droit international”, *Essays in International Law in Honour of Judge Manfred Lachs*, 1984, pp. 271-276; Hutchinson, loc. cit.; Gaja, “Obligations erga omnes, international crimes and jus cogens: a tentative analysis of three related concepts”, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, pp. 151-160; *Restatement of the Law Third* (see footnote 39 above), pp. 339 and 342-343; Cardona Llorens, “Interés, interés jurídico y derecho subjetivo en derecho internacional público”, *Estudios en recuerdo de la Profesora Sylvia Romeu Alfaro*, pp. 231 *et seq.*; and Sicilianos, op. cit., pp. 103 *et seq.*

³⁰³ A remarkable analysis of the matter may be found in Lattanzi, op. cit., pp. 79-155.

³⁰⁴ Within the system of the European Convention on the Protection of Human Rights and Fundamental Freedoms this situation occurs in the case of inter-State disputes in which a group of States acts against

difference where one or more of the injured States feel particularly affected because State A has violated the human rights of individuals with whom they have ethnic or other ties. This, however, does not make the injury sustained by those States *legally* more direct than that suffered by the other States.

135. Another example would be the breach of an *erga omnes* obligation related to environmental protection in outer space or in any area where contamination or pollution would affect the whole planet. An internationally wrongful act causing depletion of the ozone layer, for example, would physically affect all States and would constitute a simultaneous *legal* injury for all the States parties to a multilateral treaty setting forth the obligation that has been breached. Here again, there would either be equal infringement of "equally equal" rights or, at most, qualitatively or quantitatively different injuries. Although differences could emerge from the point of view of the degree of exposure of States to the negative impact of the ozone depletion, in no case would it be correct to define this difference in terms of a "direct", "less direct" or "indirect" juridical injury. Again, the concept of non-directly injured States appears to be logically untenable and to reduce the injured States' entitlement to claim cessation or reparation.

136. A further example could be the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas. Such an act would affect many interests: (a) those of any State or States whose ships were on the point of entering the canal when the restriction was put into effect; (b) those of the State or States whose ships were sailing towards the canal intending to traverse it on their usual sea route or planned itinerary; and (c) those of all other States, because, according to the law of the sea, all States have the right of innocent passage through the canal.³⁰⁵ In this case too it seems fairly clear that there is no such thing as an indirectly injured or affected State. Since all States

have a right of innocent passage through the canal, all the States are *legally* injured by State A's breach. The situations of the various States or groups of States do not differ in the sense that some are indirectly injured and others directly injured. States in the category described under (c) would appear to be as directly injured by the breach as those in categories (a) and (b). All that can be said is that the three groups of States are *all* injured, albeit in three different ways. Further differences may well appear *in concreto* among the States belonging to each of the three categories, but only as regards the extent of the damage sustained or feared. Another example, from the area of crimes, which for the time being has been left aside, would be the various legal positions of States confronted with an act of aggression.³⁰⁶

137. The conclusion seems to be that the distinction between directly and non-directly injured States does not hold water. The examples considered would seem to indicate that to draw such a distinction would, in cases such as human rights, and possibly the global environment, lead to the characterization of *all the States* whose rights are infringed by a violation, as *non-directly injured* States, and, in other cases, such as freedom of navigation, or aggression, to an *improper portrayal*, in terms of "directness" or "indirectness", of *differences relating only to the nature or the degree of the injury*.³⁰⁷

³⁰⁶ Here again, the injured States would fall into a number of categories. One category would of course consist of the State(s) which are the target of the aggression; others could respectively include the States whose territories are bordering those of the aggressor or the victim State(s); the States of the region; the allies of the victim State(s) and the States which depend upon the victim State's vital exports; all the States participating in a collective security system together with the aggressor and the victim State; all the other States bound by the rule of general international law which condemns aggression. In view of the special nature of aggression, this case will be left to some future date when the problem of the consequences of international crimes is tackled. For the moment it may be useful to note that the specific nature of the wrongful act in question may *prima facie* lead to the victim State(s) being referred to as "directly" injured and to all the others as "indirectly" injured. However, the *erga omnes* scope of the infringed rule suggests that such a distinction would unduly restrict the circle of legally injured States, particularly those States parties to a relevant collective security system. A distinction in terms of "specially" or "non-specially" affected States would, in view of its ambiguity, not be any better. The only real distinguishing feature—and the one which would be more consistent with solidarity among the members of a collective security system—would seem to be the nature and the gravity of the actual injury sustained by each State.

³⁰⁷ It must further be stressed that the possibility of a State qualifying as an injured State on the ground of the mere violation of its subjective right (*nudum ius*), in the absence of any physical or other damage to any of its elements or assets, is not confined to the realm of *erga omnes* obligations as considered, for example, by Lattanzi (op. cit., pp. 120 *et seq.*). It can also occur in a strictly bilateral context. If State A undertakes by a bilateral treaty to grant aid or other forms of assistance in return for State B's undertaking to respect its own nationals' civil and political rights, any violation by the latter of its obligation constitutes a legal injury to State A, notwithstanding the fact that none of its elements or assets is affected. In contrast to (*erga omnes*) human rights obligations the obligations in the present (bilateral) case are synallagmatically related, something which is not normally a feature of human rights undertakings. Be that as it may, to say that in such a bilateral situation State A would be "indirectly" injured would be as meaningless as would be the same proposition within the context of an *erga omnes* human rights system. Thus, it becomes all the clearer that the whole concept of "indirectly" injured States is the fruit of a gross misunderstanding which derives from an inadequate absorption of the definition of an internationally wrongful act, as laid down in article 3 of part 1 of the draft.

another with regard to the same violation. Examples are the cases brought against Greece (*Yearbook of the European Convention on Human Rights*, vol. 12, 1969) and Turkey (*European Human Rights Reports*, vol. 6, August 1984, pp. 241-257), in which several States complained about the violation of article 3 of the Convention (prohibition of torture and inhuman or degrading treatment or punishment).

Cases in which more than one State has reacted under general international law against human rights violations are rare and usually refer to violations amounting to so-called international crimes of States. Examples of cases in which several States felt entitled to react without specifically referring to the "criminal" nature of the wrongful act include measures taken against the practices of a repressive military regime in Chile; against the proclamation of a state of siege in Poland; and those taken by States other than the United States of America against Iran following the taking of the hostages. On this practice, see Lattanzi, op. cit., pp. 492-501.

³⁰⁵ The S.S. "Wimbledon" case, decided by PCIJ, may in many respects be considered to be similar. Germany had prohibited the ship's transit through the Kiel Canal. The violation of articles 380 to 386 of the Treaty of Versailles was the object of complaints not only by the United Kingdom and France, which, as recalled by Hutchinson, had "a particular connection with that vessel—the former as the State of nationality of its charterers, the latter as the State of registry" (loc. cit., pp. 179-180), but also by Italy and Japan which were also parties to the Treaty but were connected with the case only by the fact that they possessed merchant ships and were therefore interested in the proper enforcement of the regime of navigation provided for under article 380 (Judgment of 17 August 1923, P.C.I.J., Series A, No. 1, pp. 6 *et seq.*, see particularly p. 20).

138. The only reasonable starting-point for the substantive as well as the instrumental consequences of a violation of *erga omnes* obligations—and the consequences of any other kind of international bilateral or multilateral obligation—thus appears to be the characterization of each injured State's position according to the nature and the degree of the injury sustained.³⁰⁸

C. Conceivable and possible solutions in case of a plurality of injured States

139. The fact that the breach of *erga omnes* obligations results in a plurality of injured States, combined with the fact that such States may not be injured in the same way or to the same degree, complicates the responsibility relationship. Both the substantive and the instrumental consequences of the breach are affected. With regard to the substantive consequences, the question is whether, to what extent, and under what conditions the States thus injured (equally or unequally) are all entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition. With regard to the instrumental consequences, the question is whether, to what extent, and under what conditions the various (equally or unequally) injured States may lawfully resort to sanctions or countermeasures. Up until now these problems have been considered, both within and outside United Nations bodies (under the ambiguous concepts of "non-directly" and "directly" injured or affected States), in connection with wrongful acts frequently labelled as "crimes" under article 19 of part 1.³⁰⁹ The same problems may well arise, however, with regard to the consequences of those more ordinary wrongful acts which are commonly referred to as "delicts".

140. As noted by some of those who have dealt with the matter so far,³¹⁰ the problems may present themselves in two possible ways. The first possibility is that the relevant rules, either *erga omnes* or more general rules, envisage procedures for the monitoring and sanctioning of violations which are more or less effective and exhaustive. The other possibility is that such procedures are either totally non-existent or not exhaustive.

141. To the extent that the substantive and/or instrumental consequences of violations were covered by procedures giving a decisive role to an international body, their operation would in principle exclude any necessity

of unilateral claims and/or measures on the part of the injured States. Although severally affected, the various injured States would in principle be in such a position that the problem of any unilateral claim, sanction or measure would not arise. It would be up to the competent international body to take due account, in putting forward claims or devising or implementing sanctions, of the plurality of equally injured States and of any differences among the unequally affected States which may have a bearing on their respective, individual positions.³¹¹ Any issues of unilateral claims or measures would only arise if and to the extent to which the collective or institutional system were to fail.

142. Where no organized collective system is present—which is usually the case—some writers doubt that all the injured States are severally entitled to put forward unilateral claims and to resort to countermeasures unilaterally. They fear, in particular, that the broadening of the *faculté* of unilateral countermeasures may lead to reactions that are not justified by the aim of securing compliance with the obligation infringed³¹² or may create confusion and uncertainty in the enforcement of the law and in the safeguarding of the interests involved.³¹³ Indeed, some of the writers cited contend that to entrust the pursuit of collective interests to the unilateral reaction of single States would not be in conformity with the very structure of the so-called primary relationship.³¹⁴

143. While such preoccupations may be justified and may have some merit, they are not sufficient either to prove *de lege lata* or to justify *de lege ferenda* a derogation from the substantive or instrumental legal consequences of an internationally wrongful act. To exclude the lawfulness of individual State claims or measures would be to accept that the *erga omnes* violations in question would not give rise to liability (*responsabilité*); and this would be tantamount to accepting that the rules infringed are not binding.³¹⁵ In particular, it would be incorrect to assume that, in the absence of an agreed treaty-based collective monitoring and sanctioning system, no reaction would be provided for under general international law. In the corpus of general international law there is really no "gap" to be filled with respect to individual claims or countermeasures. Each one of the

³⁰⁸ It is for this reason that, in the Sixth Committee in 1985, the writer, speaking as the representative of Italy, stated that "...the monistic concept of 'injured State' ... did not imply 'a parallel monistic treatment' of 'injured States'". (See *Official Records of the General Assembly, Fortieth Session, Sixth Committee, 27th meeting*, para. 67.)

That same year in the Commission, he had stressed the need to refer to the concept of "material or moral injury (*préjudice*) ... as a factor which must certainly affect the kind of reparation or the severity of the countermeasures to which each injured State would be entitled to have recourse." (See *Yearbook ... 1985*, vol. I, 1900th meeting, para. 13.)

³⁰⁹ See footnote 8 above. See also *Yearbook ... 1991*, vol. II (Part One) (footnote 1 above), para. 91, especially footnote 174, together with the reports and discussions on this matter collected in *International Crimes of State ...*, op. cit.

³¹⁰ See, in so far as delicts are concerned, the authors referred to in footnotes 293 and 294 above.

³¹¹ The institutionalized or otherwise "integrated" or organized systems, though not numerous, may vary according to the degree of "centralization" and according to whether they organize only the monitoring, the reaction, or both. To the extent that one or other function is effectively centralized, the legal interests of the various equally or differently injured States may be more or less adequately and effectively protected and harmonized. For the same reasons indicated in paras. 112-115 above with respect to the so-called self-contained regimes, any limitations placed by the systems in question on the rights of States parties only affect such States *inter sese* at the level of treaty law. Those limitations do not extend to the level of general international law, which is where the articles the Commission is in the process of drafting are intended to find their place by way of codification or progressive development of the general rules on State responsibility.

³¹² See, for example, Hutchinson, loc. cit., p. 214; and Sachariew, loc. cit., pp. 282-285.

³¹³ Charney, "Third State remedies in international law", loc. cit., pp. 88-90.

³¹⁴ Sachariew, loc. cit., pp. 282-285.

³¹⁵ The absurdity of such a consequence is stressed by Hutchinson, loc. cit., pp. 214-215; Charney, "Third State remedies in international law", loc. cit., p. 92; and Spinedi, loc. cit., pp. 121-124.

States participating in an *inter omnes* legal relationship is indeed entitled to the same kind of rights and *facultés* as those to which it would be entitled within the framework of any bilateral or international responsibility relationship. The only real peculiarities of the situations determined by the presence of a plurality of injured States, that is to say, by the fact that the infringed rule is an *erga plurimos* or *erga omnes* rule—is that the rights and *facultés* of the various injured States must be determined *in concreto* and implemented with a view to the pursuit of the totally or partially *common* legal interest infringed by the breach. First substantive rights and then *facultés* will each be considered briefly.

144. To begin with substantive rights, the proposition frequently encountered is that to the extent that the States involved are “only indirectly” injured by the *erga omnes* breach they would be entitled to claim cessation and guarantees of non-repetition,³¹⁶ but not pecuniary compensation,³¹⁷ or, according to some, restitution in kind.³¹⁸ Although it may be true in certain instances, such as when a State is injured by an *erga omnes* violation, this is not a consequence of any alleged “indirectness” of the injury. It is merely a consequence of the kind of injury involved. If, for example, within the framework of a human rights arrangement, a State violates the rights of its own nationals by making arbitrary arrests and every other State is only entitled to claim cessation of such conduct and adequate guarantees of non-repetition, this would surely not be a consequence of any “indirectness” of the injury but merely of the fact that the claims are sufficient to restore the *droit subjectif* of the claimant State and of the others. The aim of the *droit subjectif* is to ensure that no State bound by the rule violates the rights of any human being, irrespective of nationality. If there is no right to compensation, again, this is not due to any “indirectness” of the injury but to the fact that the breach has not given rise to damage. This situation is no different from that of a State injured by a breach of an obligation deriving from a bilateral treaty and not involving any damage.³¹⁹

³¹⁶ All the writers who distinguish between “directly” and “indirectly” injured States agree on this point. See footnotes 293 and 294 above.

³¹⁷ The possibility that “indirectly” injured States may, at least in some cases, be entitled to demand reparation by equivalent is not ruled out by Lattanzi (op. cit., pp. 169 *et seq.*) or Spinedi (loc. cit., p. 106 *et seq.*). In the Commission the inadmissibility of “damages” in favour of the States in question was affirmed by Riphagen in his preliminary report (*Yearbook* . . . 1980, vol. II (Part One) (see footnote 130 above), para. 40) and by Sinclair (*Yearbook* . . . 1984, vol. I, 1865th meeting, para. 3). That position was shared by the representative of the Federal Republic of Germany in the Sixth Committee (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee, 36th meeting, paras. 13-17*).

³¹⁸ “Indirectly” injured States do not have a right to *restitutio* according to Picone, loc. cit., pp. 84-86; and Sachariew, loc. cit., p. 282. The opposite view is taken by Ramcharan, loc. cit., p. 28; and Spinedi, loc. cit., pp. 100-101.

³¹⁹ This is what Riphagen himself admitted when he said that the injured States in question could “not claim damages *ex tunc*, since by definition there is no injury to [their] *material interest*” (*Yearbook* . . . 1980, vol. II (Part One) (see footnote 130 above), para. 40). Lattanzi, instead, is of the opinion that any compensation the State infringing human rights may pay to the individual victim(s) of the violation is in compliance with the obligation of reparation by equivalent as a form of responsibility towards all the States to which the norm protecting the infringed right applies. (In this respect, consideration should be given, for example, to the practice under article 50 of the European Convention on the Protection of Human Rights and Fundamental

145. A similar reasoning, in the same situation, would apply to restitution in kind. Each one of the States involved will be entitled to claim *naturalis restitutio* if and to the extent that the restoration of its right so demands. In the hypothesis considered in paragraph 144 above, there would presumably be no room for a claim of restitution in kind, the release of those arrested, that is to say, the cessation of the unlawful act, together with appropriate guarantees for the future, will suffice to restore the infringed legal interest. This would, however, not necessarily be the case if, for example, some of those detained had suffered any physical or moral damage. Each one of the States entitled to claim compliance with the infringed rule—although, “non-directly” injured (to use the current, albeit incorrect terminology), would be entitled to claim restitution in kind.³²⁰ Similar considerations would apply, *mutatis mutandis*, in the case of unlawful oil pollution of the high seas. Assuming the existence of an *erga omnes* breach, would the injured States be entitled severally to claim restitution in kind to restore the damaged ecosystem? The answer should be in the affirmative because each one of the parties in the legal relationship established by the *erga omnes* rule has suffered a violation of its right and is consequently entitled to claim the “restoration” (in kind) of the protected “global commons”.

146. Moving now to the instrumental consequences,³²¹ it is easy to see that any special restrictions of the individual *faculté* of resort to countermeasure on the part of the States injured by the breach of an *erga omnes* obligation, do not derive from any alleged indirectness of the injury. They are merely the consequence of the application, in each hypothetical or actual situation, of the general rules

Freedoms, or article 63 of the American Convention on Human Rights.) The States in question would therefore be entitled to this form of reparation as well (Lattanzi, op. cit., pp. 234-239). For an example of the right of any injured State to demand pecuniary reparation for the violation of *erga omnes* obligations for the protection of the environment as such, see Spinedi, loc. cit., pp. 106-111. Finally, it should not be forgotten that an *erga omnes* violation may in addition to causing a “legal injury” to all the States to which the norm applies also “materially affect” one or more of those States to varying degrees. Such could be the case in the example already cited of the violation of the right of innocent passage through straits linking international waters (see para. 136 above). In cases such as these, each injured State will obviously have a right to reparation by equivalent to the extent that it has suffered (economically assessable) damage.

³²⁰ This is what could take place in case of a violation of article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. A State bringing a complaint before the competent body against the violation of that article would also enjoy the right, under article 50 of the Convention, to request rehabilitation or, at least, the sum of money necessary to obtain medical assistance, for the victims of the violation. To the extent that the prohibition of torture is considered to be covered by an unwritten *erga omnes* obligation (see, on this point, Marchese, op. cit., chap. IV), such claims could also be made under the general rules of State responsibility.

³²¹ As already recalled in para. 139 above, the problem of resort to countermeasures on the part of States which are “only indirectly affected” has been discussed almost exclusively in the context of the consequences of international crimes and in relation to the practice, beginning in the late 1970s and lasting until the mid-1980s, of some Western States in reaction to particularly serious crimes (proclamation of a state of siege in Poland, Soviet intervention in Afghanistan, occupation of the United States Embassy in Tehran, the Falkland Islands (Malvinas) crisis, and the downing of the Korean airliner). Considering, however, that for the time being discussion is being confined to so-called delicts, the reference here is to the *erga omnes* structure of the responsibility relationship and not to the degree of seriousness of the breach.

or principles governing countermeasures, such as the obligation of prior demand for cessation or reparation or prior exhaustion of dispute settlement procedures, and, of course, the requirement of proportionality.

147. The execution of those obligations explains, for example, the doctrine according to which "indirectly" injured States would be entitled to resort to countermeasures only in the absence of a collective pronouncement on the part of a representative body on the measures to be adopted³²² and, in any case, only as *extrema ratio*, in the absence of other remedies.³²³ As explained in chapter I above (see in particular paras. 13-23), the *faculté* of any injured State to resort to reprisals does not

³²² This position is taken by Charney, "Third State remedies in international law", loc. cit., pp. 91 and 97-98; Cardona Llorens, "Deberes jurídicos...", loc. cit.; and among the members of the Commission by Lacleta Muñoz, according to whom

"When the internationally wrongful act affected the collective interests of all the States parties, the response should be collective." (Yearbook... 1984, vol. I, 1867th meeting, para. 17.)

This line of reasoning would find some support, according to some authors, in article 60, paragraph 2 (a) of the Vienna Convention on the Law of Treaties, according to which the States parties "not specially affected" could only suspend or terminate compliance with the treaty to the detriment of the State which committed the internationally wrongful act by an *inter sese* agreement (see, for example, Sachariew, loc. cit., p. 284). Reference to that article does not, however, appear to be of great significance. It simply spells out the conditions under which a State party to the infringed treaty may resort to suspension or termination by way of countermeasure. However, *nothing is said, or was intended to be said* in article 60 about the conditions under which the States injured by a treaty breach—whether "specially affected" or "not specially affected"—could resort to countermeasures. When Riphagen, for his part, stated in his fourth report that:

"... the common or collective interest created by the group of States parties to an objective regime does indeed exclude the admissibility of reprisals consisting in the non-performance of an obligation under that regime, otherwise than in consequence of a collective decision... of such group of States" (see Yearbook... 1983, vol. II (Part One) (footnote 51 above), para. 97)

he was concerned with the identification not of the States entitled to react but of the obligations which could not be violated by way of countermeasures. He did not, therefore, submit any possible reaction to *erga omnes* violations to the collective decision of the States sharing the infringed collective interest; he simply ruled out the admissibility, outside any collective conclusion, of those unilateral measures which would violate the interest in question.

³²³ Charney, "Third State remedies in international law", loc. cit., p. 95 and "Third State remedies for environmental damage...", loc. cit., p. 161.

The admissibility of resort to any measure by the States in question is summarily ruled out completely by Ramcharan, loc. cit., pp. 40-41. In relation to the consequences of *delicts*, a similar position has been taken in the Commission by Tomuschat, according to whom only "directly" injured States would be entitled to adopt countermeasures (Yearbook... 1985, vol. I, 1896th meeting, para. 38). The representative of the Federal Republic of Germany expressed a similar position in the Sixth Committee (see *Official Records of the General Assembly, Fortieth session, Sixth Committee*, 24th meeting, para. 10). In support of the opinion according to which the States in question would not be entitled to resort to countermeasures, reference is sometimes made to the ICJ judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see footnote 147 above); see, for example, Hutchinson, loc. cit., p. 194; Charney, "Third State remedies in international law", loc. cit., p. 57; and Sicilianos, op. cit., pp. 153-154. The passage to which reference is made reads:

"The acts of which Nicaragua is accused... could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force" (*I.C.J. Reports 1986* (see footnote 147 above), para. 249).

arise automatically from the breach but only after a prior intimation or *sommation* has proved unsuccessful, and only after exhaustion of dispute settlement procedures (see chap. II above, in particular paras. 41-51). In some cases the general rules creating "integral" legal relationships are embodied in instruments envisaging ad hoc procedures to be applied in view, or as a consequence of, possible violations.³²⁴ In such cases only if the wrongdoing State failed to meet its liabilities, as determined through the relevant procedures, would any of the injured States be entitled "individually" to resort to unilateral measures in order to protect its (individual) right to obtain respect for the common, legally protected interest (see chap. VII above, in particular paras. 114-115). More precisely, according to the current presentation, the allegedly "special" restriction that would characterize the admissibility of unilateral measures on the part of the so-called "indirectly" injured States, would therefore appear to be an effect of the mere application to the situation of the conditions generally required for lawful resort to countermeasures in any concrete case.

148. A similar general principle explains another allegedly "special" restriction that would characterize the situation of the so-called indirectly injured States, namely the need for any "individual" measures to be in conformity with the pursuit of the collective interest³²⁵ and the condition that adequate measures have not already been taken by another injured State.³²⁶ These con-

However, that statement cannot be interpreted as supporting the inadmissibility, in general terms, of measures by States "not specially affected" by an *erga omnes* violation. In the first place, because the Court's principal aim was to condemn measures "involving the use of force" taken by the United States, measures *which are always prohibited*—except in self-defence—regardless of whether the State resorting to them may be "more or less directly injured", and most importantly, because the alleged wrongful act committed by Nicaragua consisted essentially in the violation of an obligation of non-intervention (as well as "minor" violations of the prohibition of the use of force). The Court, therefore, simply considered—and rightly so—that the obligation in question, under both general international law and the Charter of the United Nations, is of a bilateral not an *erga omnes* nature. In other words, that rather than there being a right of every State to respect for the principle of non-intervention, there was only a right of each State to be protected from intervention in violation of its own sovereignty. As the breach of the obligation only violates a bilateral relationship, it is obvious that no "third" State will enjoy secondary rights with respect to that legal relationship. Less still will it be entitled to resort to countermeasures against the author of the wrongful act.

³²⁴ Consider, for example, in the field of human rights, the system of the international covenants (articles 16-23 of the International Covenant on Economic, Social and Cultural Rights and articles 28-45 of the International Covenant on Civil and Political Rights and the Optional Protocol thereto) or the more "jurisdictional" systems of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights. On the systems covering environmental protection and areas not falling within the jurisdiction of any State, see Charney, "Third State remedies for environmental damage...", loc. cit., pp. 166-174.

³²⁵ See, for example, Sachariew, loc. cit., p. 285.

³²⁶ Charney, "Third State remedies in international law", loc. cit., pp. 95-96, and—at least in so far as reactions referred to as "solidarity reactions *stricto sensu*" are concerned—Hutchinson, loc. cit., pp. 163-164. In the Commission, McCaffrey expressed the opinion that the position of "indirectly" injured States is supplementary to that of the main victim of the internationally wrongful act (see Yearbook... 1985, vol. I, 1892nd meeting, paras. 7-11). The representative of the United States of America in the Sixth Committee expressed similar doubts as to whether an "indirectly" injured State may resort to countermeasures when a "directly injured" State exists (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 9).

ditions derive from the general principle inherent in the very function of international responsibility, namely to ensure compliance with international obligations. As pointed out in previous reports, the aim of the rules to ensure implementation of the rights created by the rules that have been infringed is to obtain cessation, *restitutio*, pecuniary compensation, satisfaction and guarantees of non-repetition. Countermeasures are, in turn, instrumental to cessation or *restitutio* and to the other forms of reparation, and ultimately to compliance with the so-called primary obligation. Once that aim is achieved, the rules on responsibility cease to operate, so to speak. They leave the field open to the normal play of the so-called primary rules with regard to which their supporting function has been performed (see chap. I above, in particular paras. 3-4). This is precisely the mechanism that comes into operation when an *erga omnes* obligation has been breached and there are a number of injured States.

149. Indeed, two features characterize the instrumental consequences of a violation of an *erga omnes* obligation. The first is that the result to be pursued by the unilateral measures, because of the identity of the collective interest protected by the rule, is the same for all the injured parties. The second is that that result may be pursued severally by a plurality of injured parties. The first peculiarity explains why unilateral countermeasures by any single State are justified only in so far as they conform to the common interest. As the infringed rule protects a collective interest, any reactions to the breach, however numerous and unilateral, may be lawfully resorted to only to the extent to which they perform the function of guaranteeing the (primary) legal situation represented by the common legal interest. Were any reactions not to be in conformity with such a function (for example, because they pursue individual aims of a given State or ends otherwise not protected by the infringed rule) they would fall outside the sphere of the consequences (substantive or instrumental) of the given *erga omnes* breach: to the extent that they were in violation of international obligations, they would in turn be unlawful. Both features

explain why, if adequate unilateral measures have at any given time been taken—collectively or individually—no further reaction would be lawful on the part of any of the remaining injured States. Once redress has been obtained for all (in one or more of the relevant forms) through the action of one or more of the injured parties, any further measures would serve no legitimate purpose and thus be unlawful.

150. If, on the contrary, the measure(s) taken did not achieve the right result, the question of admissibility of any further measures cannot be resolved positively or negatively *a priori*. The question can only be approached in the light of proportionality. This is a general, flexible principle ensuring that the exercise of international responsibility does not lead to inequitable results (see chap. IV above, in particular, paras. 54-56). Where measures are taken by several States as a consequence of one and the same breach, respect for proportionality should prevent any disproportion arising between the reaction and the breach or its effects as a result of the cumulative effect of the unilateral measures.

151. In conclusion, it is believed that the particular problems raised by the violation of *erga omnes* obligations—wrongly presented in terms of a plurality of “directly” or “indirectly” injured States—call neither for amendments to the draft articles adopted or proposed so far, nor for the addition or interpolation of further ad hoc draft articles. Those problems, which are more correctly to be identified in terms of a plurality of equally or unequally injured States, call simply for a proper understanding and application of the general rules adopted or proposed so far. The only useful—and probably indispensable—ad hoc provision would be a new draft article to follow article 5 as adopted on first reading for the definition of injured State. The additional draft article would simply provide that whenever an internationally wrongful act affects more than one injured State, each one of them is entitled to exercise the rights and *facultés* laid down in the relevant articles, to the extent that any such rights or *facultés* appertain to it by virtue of the right infringed and the injury sustained.

CHAPTER IX

Proposed draft article

152. A very tentative draft of a possible article 5 *bis* is proposed, reading as follows:

Article 5 bis

Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 3]

DOCUMENT A/CN.4/442

Tenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

[Original: French]
[20 March 1992]

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Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, p. 171.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	<i>Ibid.</i> , vol. 1015, p. 243.

Introduction

1. This report addresses the question of the possible establishment of an international criminal jurisdiction. Part one will be devoted to a consideration of certain objections to the possible establishment of an international criminal jurisdiction, while part two will deal with the formulation of some possible draft provisions. In this connection, it should be noted that the General Assembly, in resolution 46/54, invited the Commission

... to consider further and analyse the issues raised in its report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter.

2. It is a happy coincidence that this was precisely the approach taken in the ninth report of the Special Rapporteur, presented to the Commission at its forty-third session,¹ which sought to analyse two major issues raised by the establishment of an international criminal court, namely the jurisdiction of the court and criminal pro-

ceedings. That approach had involved proposing possible draft provisions for the sole purpose of better stimulating and guiding the Commission's discussion of those issues.

3. With the same aim, the present report will seek to return to those two major issues and devote to them two possible draft provisions prepared in the light of the discussions on the topic at the forty-third session of the Commission² and at the forty-sixth session of the General Assembly.³

4. In addition, new possible draft provisions are being submitted to the Commission, dealing with the law to be applied by the court, proceedings relating to compensation for injury, the handing over of the alleged perpetrator to the court, and the double-hearing principle.

² For a summary of the discussions, see *Yearbook ... 1991*, vol. II (Part Two), paras. 67-165.

³ For a summary of the discussions, see "Topical summary, prepared by the secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-sixth session of the General Assembly" (A/CN.4/L.469), paras. 217-255.

¹ See *Yearbook ... 1991*, vol. II (Part One), p. 37, document A/CN.4/435 and Add.I.

Part one. Consideration of certain objections to the possible establishment of an international criminal jurisdiction

5. Before examining in detail some of the issues relating to the establishment of an international criminal court, it may be useful to take a hard look at certain reservations or objections voiced by some States in United Nations forums or within their own domestic institutions, regarding the establishment of such a court. Some of the objections have to do with the desirability or otherwise of establishing such a court, given the current international situation, others relate to the question of compatibility between such a court and domestic legal provisions of States.

6. One of the objections falling within the first category is that the current system of international proceedings

based on the rule of universal jurisdiction has produced reasonably satisfactory results, and that the establishment of a court could restrict the scope of that rule and impede its application.

7. This objection fails to take account of the fact that the principle of universal jurisdiction has major drawbacks. States are often placed under extreme duress, or even become victims of blackmail or violent crimes perpetrated by groups of terrorists or other criminals bent on blocking either the trial of an offender by the State concerned or extradition. Under such duress, the State concerned fails to extradite the accused, and if it decides to prosecute, the outcome of the trial may not be equitable:

either because the defendant is acquitted or because the penalty imposed is completely farcical—a slap on the wrist that does not fit the crime. Because of the principle *non bis in idem* the accused cannot be prosecuted again.

8. It has also been argued that a State that was reluctant to extradite a suspect at the request of another State would be just as reluctant to deal with an international criminal court. An international court, however, would seem to offer greater guarantees of objectivity and independence than a third State, which would be more open to all kinds of pressures and more responsive to political interference.

9. Another contention is that an international criminal court might become politicized, and thus might often be lacking in objectivity. International experience shows that this is much more likely to happen when the proceedings are instituted by a weak State whose governmental structure is not strong enough to counter moves by criminal organizations. Moreover, recent international developments make the politicization of an international criminal court a much more remote possibility.

10. Another objection to the possible establishment of an international criminal court is based on the complexity of the problems posed. There are those who doubt that it would be possible to reach international agreement on such complicated and intractable problems as the waiver by a State of its sovereign competence to try its nationals, the jurisdiction of the court, the rules of procedure, evidence, the prosecuting authority, and applicable penalties.

11. The fact is, however, that most of those issues are no more complex than similar issues already considered and settled at the time of the establishment of other international judicial organs, such as ICJ or the European Court of Human Rights. Instead of pointing to a technical snag, such objections seem to reflect a lack of political will.

12. On the question of the incompatibility between an international criminal court and domestic legal provisions of some States, the argument most often cited as the most important is perhaps that of the protection of basic human rights. The objection here is that an international court would be less capable of guaranteeing protection of those rights than a national court, which would be bound by constitutional provisions of domestic law governing human rights.

13. Yet, a cursory review of the international situation seems to point to just the opposite conclusion. Very often, when a State is alone in trying to combat the activities of organized crime, such as terrorism or drug trafficking, it encounters difficulties which it can only handle by using enforcement methods that are sometimes far from compatible with respect for basic human rights. An international court, however, would make it possible to put some distance between the alleged offender and the victim State, thus establishing all the internationally required judicial guarantees.

14. In fact, behind many of the objections lies an apparent failure to recognize the existence of a very wide range of possible solutions which could ease the concerns raised, if only there was a willingness to search them out. That is what the draft provisions below aim to do.

Part two. Possible draft provisions

A. The law to be applied

1. POSSIBLE DRAFT PROVISION (ALTERNATIVES A AND B)

15. On the subject of the law to be applied, and for the purposes stated in paragraphs 2 and 3 above, the following two versions of a possible draft provision are proposed:

ALTERNATIVE A

The Court shall apply international criminal law and, where appropriate, national law.

ALTERNATIVE B

The Court shall apply:

(a) International conventions, whether general or particular, relating to the prosecution and prevention of crimes under international law;

(b) International custom, as evidence of a practice accepted as law;

(c) The general principles of criminal law recognized by the United Nations;

(d) Judicial decisions and teachings of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;

(e) Internal law, where appropriate.

2. COMMENTS

16. Alternative A is generic and all-encompassing, whereas alternative B is analytical and enumerative, but there is no substantive difference between them.

17. The “international criminal law” covered globally by alternative A is constituted by international conventions, international custom, the general principles of criminal law, judicial decisions and international doctrine, all of which are enumerated in alternative B. Alternative A is based on the approach used in the revised draft statute prepared by the 1953 United Nations Committee on International Criminal Jurisdiction.⁴ According to article 2 of that draft

⁴ See “Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953” (*Official Records of the General Assembly, Ninth Session, Supplement No. 12*) (A/2645), annex.

The Court shall apply international law, including international criminal law, and where appropriate, national law.⁵

18. He preferred to use in French the term *droit international pénal* instead of *droit pénal international*, because there is a difference in the content and scope of those two concepts, at least in French law. The French term *droit pénal international* refers to a discipline involving the study of conflicts between domestic criminal laws, and the solutions offered by States, acting unilaterally or on the basis of agreements or conventions, to such conflicts. In that sense, *droit pénal international* would be a branch of domestic law, for it is States, as sovereign entities, that enact the rules to be applied to such conflicts of law or conclude the relevant agreements.

19. The French term *droit international pénal* covers a completely different area. It is not concerned with conflicts between domestic laws. Its sphere is that of crimes under international law (*jus gentium*), that is to say, crimes which because of their extreme seriousness or their particularly heinous or monstrous nature, affect the human race as a whole. That is why the definition and characterization of such offences are generally considered to be matters of international law. It is therefore understandable that the international community should be seeking an international system to combat such crimes.

20. There are already two international conventions in existence that explicitly confer jurisdiction (admittedly, optional jurisdiction) on an international penal tribunal to take cognizance of such offences, namely the Convention on the Prevention and Punishment of the Crime of Genocide (art. VI) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (art. V).

21. Before the adoption of those Conventions, the Charters annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis,⁶ and to the special proclamation by the Supreme Commander for the Allied Powers, issued at Tokyo on 19 January 1946,⁷ had laid the juridical basis for the establishment of the International Military Tribunals at Nürmberg and Tokyo respectively, with a view to punishing the major war criminals. For its part, Law No. 10 of the Allied Control Council⁸ established international tribunals in the occupation zones to punish war criminals who had held lower-ranking posts in the military, administrative or civilian hierarchy.

22. It is true that the establishment of those jurisdictions has been criticized on the grounds that they were ad hoc tribunals instituted for a specific purpose, in violation of the rule *nullum crimen sine lege, nulla poena*

sine lege. The fact remains, however, that their establishment was consistent with the belief that the serious, heinous and monstrous nature of some crimes justified giving competence to an international criminal jurisdiction.

23. Within the confines of a commentary, it is impossible to list all the conventions dealing with internationally wrongful acts that may today be described as international crimes. Reference may be made to the draft Code of Crimes against the Peace and Security of Mankind, which, if adopted, would constitute the broadest normative base to be found in a treaty instrument, for it enumerates the criminal acts which, as of now, are of greatest concern to the international community. Conventions are not, however, the only source of applicable law, despite all the codification work undertaken. Custom also plays a role that must not be overlooked.

24. The draft Convention for the Creation of an International Criminal Court, adopted by the London International Assembly in 1943,⁹ listed custom first among the rules of law to be applied by an international criminal jurisdiction, pending the adoption of a convention laying down the main principles of international criminal law, defining the crimes and affixing penalties to them (art. 27).

25. It should also be noted that the draft Statute of the International Penal Court, prepared by ILA in 1926,¹⁰ had referred to "international custom, as evidence of a general practice accepted as law" (art. 23, para. 2).

26. All the same, it is very awkward to apply custom in international criminal law, because of the strict nature of that branch of law, where written rules usually prevail.

27. It may be difficult to apply custom, but it is no less difficult to apply general principles of law. Their application also provokes much discussion. Members of a certain formalistic school used to argue that some principles, such as the principle *nullum crimen sine lege*, could only be recognized in international criminal law if they were established in conventions.

28. This controversy has died down now that the principle has been established in international instruments with the adoption of the Universal Declaration of Human Rights¹¹ (art. 11, para. 2) and the International Covenant on Civil and Political Rights (art. 15, para. 1), but the difficulty remains with regard to the principle *non bis in idem*, which was given only a lukewarm reception by the Commission in article 9 of the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading.¹² As a rule, however, the principles relating to basic human rights are undoubtedly applicable under international criminal law.

29. It may be worth pointing out that ILA, in the draft Statute for an International Criminal Court, adopted at its

⁵ Ibid., p. 23.

⁶ Nürmberg Charter (United Nations, *Treaty Series*, vol. 82, p. 279).

⁷ Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946, *Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 *et seq.*

⁸ Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

⁹ For the text of the draft, see United Nations, *Historical survey* . . . , p. 97, appendix 9 B.

¹⁰ See ILA, *Report of the Thirty-fourth Conference, Vienna, 5-11 August 1926* (London, 1927), pp. 113-125. Reproduced in United Nations, *Historical survey* . . . , p. 61, appendix 4.

¹¹ General Assembly resolution 217 A (III).

¹² For the text of the draft Code as provisionally adopted on first reading, see *Yearbook* . . . 1991, vol. II (Part Two), pp. 94-97.

Sixty-first Conference, held in Paris in 1984,¹³ included the following wording (art. 22):

The Court shall apply the definition of a particular offence which is prescribed by convention(s) in force in the appropriate Contracting State(s). The Court shall apply international law including general principles of law recognized by nations.

There can also be no doubt that judicial decisions and doctrine are applicable in international criminal law when they reflect a generally accepted practice.

30. Lastly, the elements constituting the law to be applied must also include national law. It should not be forgotten that the court may have to apply the national law of a State which has conferred jurisdiction on it, for example in the determination of the penalty. Of course, in such a situation, the national law of the State must not be incompatible with the general principles of criminal law.

31. The situation envisaged above was covered in the 1943 draft prepared by the London International Assembly, which stated:

If the Court has to consider . . . the law of a State of which no judge sitting on the Bench is a national, the Court may invite a jurist who has an acknowledged authority on such law to sit with it, in a consultative capacity on points of law only (art. 27, para. 4).¹⁴

32. This, then, is what is covered by the French term *droit international pénal*.

33. Alternative A, which is generic and all-encompassing in nature, is not as innovative as it might appear. It follows the approach taken in the draft prepared by the 1953 United Nations Committee on International Criminal Jurisdiction,¹⁵ except for the difference in terminology noted at the beginning of this commentary.

34. Alternative B reflects the more usual trend. All the proposed statutes of an international criminal court prepared to date, with the exception of the draft mentioned in paragraphs 17 and 33 above, have used this enumerative method. This is equally true of the draft Convention prepared by the London International Assembly in 1943¹⁶ (art. 27); the ILA draft Statute of 1926¹⁷ (art. 23); and, in another context, Article 38 of the Statute of ICJ.

35. In sum, there are no substantive differences between the two versions; it will be for the Commission to choose.

B. Jurisdiction of the court *ratione materiae*

1. POSSIBLE DRAFT PROVISION

36. On the subject of the jurisdiction of the court *ratione materiae*, and for the purposes stated in paragraphs 2 and 3 above, the following possible draft provision is proposed:

1. All States Parties to this Statute shall recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes:

Genocide;

Systematic or mass violations of human rights;

Apartheid;

Illicit international trafficking in drugs;

Seizure of aircraft and kidnapping of diplomats or internationally protected persons.

2. The Court may take cognizance of crimes other than those listed above only if jurisdiction has been conferred on it by the State(s) in whose territory the crime is alleged to have been committed and by the State which has been the victim or whose nationals have been the victims.

3. The Court shall not be competent to hear appeals against decisions rendered by national jurisdictions.

2. COMMENTS

37. The above provision provides a dual regime of jurisdiction: exclusive jurisdiction and optional jurisdiction.

Paragraph 1

38. Paragraph 1 deals with the exclusive jurisdiction of the court. Any State acceding to the statute of the court shall recognize that exclusive jurisdiction. Certain crimes because of their particular gravity, heinous nature, and the considerable detriment they cause to mankind, must come within the purview of an international criminal court.

39. The proposed list is restrictive. However, the Commission may wish to expand it or, on the contrary, shorten it. The approach to be taken will be based on the need for prudence. The court will have to demonstrate wisdom and restraint in order to inspire confidence and overcome reluctance. In this way, the scope of exclusive jurisdiction may gradually be expanded.

Paragraph 2

40. Some quite strong opposition had emerged within the Commission to the rule of exclusive jurisdiction. The opponents of that rule took the view that recourse should be had to the court only if jurisdiction was conferred on it by the States directly affected by the crime, either because it had been committed in their territory, or because they or their nationals had been the victims. For this reason, paragraph 2 also provides for optional jurisdiction. This dual regime of jurisdiction thus reduces the scope of the conferment-of-jurisdiction rule, which is no longer as systematic and absolute as in the draft prepared by the 1953 United Nations Committee¹⁸ (art. 27). By this means, it is possible to make a distinction between the most serious crimes, such as genocide and apartheid, which involve mass and systematic violations of universal values, and other crimes, and to limit the exclusive-jurisdiction rule to crimes in the first category.

¹³ ILA, *Report of the Sixty-first Conference, Paris, 26 August-1 September 1984* (London, 1985), p. 257, appendix A 1.

¹⁴ See footnote 9 above.

¹⁵ See footnote 4 above.

¹⁶ See footnote 9 above.

¹⁷ See footnote 10 above.

¹⁸ See footnote 4 above.

41. The present possible draft provision is therefore a midway solution between the demand for exclusive jurisdiction and the demand for systematic and general application of the conferment-of-jurisdiction rule.

Paragraph 3

42. Paragraph 3 closes a discussion that emerged in the Commission as to whether the court could be competent to hear appeals against decisions handed down by the highest national jurisdictions. The view taken by many representatives in statements before the Sixth Committee of the General Assembly was that such an appeal would be incompatible with State sovereignty.¹⁹

C. Complaints before the court

1. POSSIBLE DRAFT PROVISION

43. On the subject of complaints before the court, and for the purposes stated in paragraphs 2 and 3 above, the following possible draft provision, governing the submission of cases to the court, is proposed:

1. Only States and international organizations shall have the right to bring complaints before the Court.

2. It shall be immaterial whether the person against whom a complaint is directed acted as a private individual or in an official capacity.

2. COMMENTS

44. In connection with a possible draft provision proposed in the ninth report of the Special Rapporteur,²⁰ an interesting discussion developed in the Commission concerning the conditions under which the public right of action could be exercised.²¹ One aspect of the debate had to do with whether the public right of action could be exercised by States. It turned out to be a non-issue. It is obvious that no State has the right itself to exercise directly a power that has been vested in the court alone or in an authority competent to bring a public action at the international level. It is equally obvious, however, that any State injured by an international offence has the power to bring a complaint before the court. If the complaint is justified, it should set in motion a public action at the international level.

45. The draft Statute for the Creation of a Criminal Chamber of the International Court of Justice, adopted by the International Association for Penal Law in Paris, on 16 January 1928, and revised in 1946²² in chapter III, section 1 (International criminal proceedings), stated that international criminal proceedings "may equally be undertaken by any State" (art. 20, second para.).

¹⁹ For a summary of the discussion, see "Topical summary ..." (footnote 3 above), para. 233.

²⁰ See footnote 1 above.

²¹ See the ninth report of the Special Rapporteur (footnote 1 above), paras. 56-59, and *Yearbook ... 1991*, vol. II (Part Two), paras. 146-152.

²² Reproduced in United Nations, *Historical survey ...*, p. 75, appendix 7.

46. In order to put an end to any discussion on this point, the wording "complaints before the Court" has been preferred here.

47. Paragraph 2 makes a necessary clarification. There might be a temptation to believe that complaints may be directed only against private individuals. That would be a serious mistake. Most of the crimes falling within the exclusive jurisdiction of the court (genocide, apartheid, and the like) can be committed only by persons vested with the power of command. Such crimes also take the form of abuses of power or authority. The perpetrators of such crimes would be able to go unpunished if their official position gave them some kind of impunity.

48. Moreover, both the 1954 draft Code of Offences against the Peace and Security of Mankind²³ (art. 3) and the Nürnberg Principles adopted by the Commission²⁴ (Principle III) state that the fact that the perpetrator of the crime acted as head of State or responsible government official does not relieve him of responsibility under international law. Likewise, the draft Code of Crimes against the Peace and Security of Mankind, adopted on first reading,²⁵ states:

Article 13. Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind ... does not relieve him of criminal responsibility.

49. The draft provision proposed in paragraph 43 above gives only States and international organizations the right to bring a complaint. The question arises as to whether juridical persons under municipal law, such as anti-racist or human rights organizations, should be able to bring a complaint before the court. Although such organizations are constituted under municipal law, would it not be possible to take into consideration the universality of their goals? This report takes no clear-cut position, but the question certainly merits discussion by the Commission.

D. Proceedings relating to compensation

1. POSSIBLE DRAFT PROVISION

50. On the subject of proceedings relating to compensation, and for the purposes stated in paragraphs 2 and 3 above, the following possible draft provision is proposed:

1. Any State or international organization may bring proceedings to obtain compensation for injury sustained as a result of a crime referred to the Court.

2. A State may also bring such proceedings on behalf of its nationals.

²³ Adopted by the Commission at its sixth session. The text is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

²⁴ Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 12, para. 45.

²⁵ See footnote 12 above.

2. COMMENTS

Paragraph 1

51. Paragraph 1 sets forth the general principle of the right to compensation. Proceedings relating to compensation for injury sustained as a result of a criminal act may be brought concurrently with criminal proceedings, or separately.

52. Under national law, proceedings relating to compensation may be combined with criminal proceedings. In such instances, the criminal-court judge is required to rule in response to both the criminal proceedings and the civil action. There are also situations in which the victim of an offence prefers to seek compensation for injury in civil court rather than bringing a criminal action.

53. A similar situation is conceivable under international law. There would be nothing to prevent the victim of an internationally wrongful act that constitutes a crime from having recourse to ICJ, under Article 36, paragraph 2 (d), of its Statute, solely in order to obtain compensation for the injury sustained, even if an international criminal court existed. The question that arises is whether it would be possible to invoke, in such a situation, the rule that criminal proceedings take precedence over civil actions. Would ICJ have to suspend consideration of the proceedings relating to compensation pending a ruling by the international criminal court on culpability?

54. This would be tantamount to anticipating how rules of national law are to be applied under international law, and it might be better to be cautious at this stage in the development of international criminal law.

Paragraph 2

55. This paragraph gives only States and international organizations the right to bring proceedings relating to compensation, and States may act either on their own behalf or on behalf of their nationals. The question arises, however, whether national associations or organizations pursuing humanitarian goals should not also be authorized to bring proceedings relating to compensation before the international criminal court. This is a matter of choice, on which the Commission's discussion could provide useful guidance.

E. Handing over the subject of criminal proceedings to the court

1. POSSIBLE DRAFT PROVISION (ALTERNATIVES A AND B)

56. On the question of handing over the subject of criminal proceedings to the court, and for the purposes stated in paragraphs 2 and 3 above, the following two versions of a possible draft provision are proposed:

ALTERNATIVE A

The handing over of an alleged perpetrator of a crime to the prosecuting authority of the Court is not an extradition. The International Criminal Court is

deemed for the purpose of this Statute a Court common to all the States Parties to the Statute, and justice administered by this Court shall not be considered as justice emanating from a foreign court.

ALTERNATIVE B

Every State Party to this Statute shall be required to hand over to the prosecuting authority of the Court, at the request of the Court, any alleged perpetrator of a crime coming within its jurisdiction.

2. COMMENTS

57. The words "handing over" in the title of this draft provision are used advisedly, in order to make it clear that extradition is not involved here. Extradition takes place in a system of universal jurisdiction, such as the one provided for in article 6 (formerly article 4) of the draft Code of Crimes against the Peace and Security of Mankind as adopted on first reading.²⁶ Extradition may also take place between the court and a State not party to its statute.

58. However, when a State party to the statute of the court is concerned, it seems that what is involved cannot be extradition, but rather a handing over to the court. The introduction of this provision into the statute of the court would settle the matter once and for all. Every State party, knowing that it was bound by the statute, would also know that it was bound by the obligation set forth therein.

59. Alternative A, which is longer and more explanatory, clearly shows why the process is not an extradition, but simply a handing over, when a State party to the statute of the court is involved. Extradition occurs only when a State not party to the statute of the court is involved.

60. Alternative A is based on article 5 of the 1943 draft Convention for the Creation of an International Criminal Court, which reads as follows:

*Article 5. Legal nature of the handing over
to the [International Criminal Court] of Accused Persons*

The handing over of an accused person to the prosecuting authority of the [International Criminal Court] is not an extradition. The [International Criminal Court] is deemed for the purpose of this Convention a Criminal Court common to all nations, and justice administered by this Court shall not be considered as foreign.²⁷

61. Alternative B, which is shorter, merely states the rule, without explanation. There is no substantive difference between the two versions.

F. The court and the double-hearing principle

1. POSSIBLE DRAFT PROVISION

62. On the subject of the double-hearing principle, and for the purposes stated in paragraphs 2 and 3 above, the following possible draft provision is proposed:

²⁶ Ibid.

²⁷ See footnote 9 above.

1. The Court shall be both a court of first instance and a court of final appeal in respect of criminal cases within its jurisdiction.

2. Nevertheless, in order to guarantee the double-hearing principle, a special chamber of judges, excluding those who were involved in making a ruling, may consider an appeal against that ruling.

2. COMMENTS

Paragraph 1

63. Paragraph 1 is based on the practice in certain legal systems according to which rulings by the assizes, the highest national courts hearing criminal cases, are not subject to appeal. This is the situation in the French legal

system and in systems related to it. The only possible recourse against rulings by the assizes is an application for judicial review, a review which is limited to consideration of whether the ruling was in conformity with the law, but in which the facts of the case cannot be reopened.

Paragraph 2

64. Paragraph 2 takes into account the opinion expressed in the Commission, that the right of appeal is a basic human right. Since it is impossible to establish an appellate jurisdiction that would be hierarchically superior to the international criminal court, an internal appellate system has been devised to give judges who were not involved in making a ruling the power to review it on appeal.

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

[Agenda item 5]

DOCUMENT A/CN.4/443*

Eighth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

*[Original: English/Spanish]
[15 April 1992]*

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* Incorporating documents A/CN.4/443/Corr.1 and 3.

Multilateral instruments cited in the present report

	Source
Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952)	United Nations, <i>Treaty Series</i> , vol. 310, p. 181.
Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and Additional Protocol (Paris, 28 January 1964)	<i>Ibid.</i> , vol. 956, pp. 251 and 325.
Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962)	IAEA, <i>International Conventions on Civil Liability for Nuclear Damage</i> , Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 34.
Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (Brussels, 31 January 1963)	<i>Ibid.</i> , p. 43.
Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963)	United Nations, <i>Treaty Series</i> , vol. 1063, p. 265.
Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963)	<i>Ibid.</i> , vol. 480, p. 43.
International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)	<i>Ibid.</i> , vol. 973, p. 3.
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil thereof (London, Moscow and Washington, 11 February 1971)	<i>Ibid.</i> , vol. 955, p. 115.
Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar, 2 February 1971)	<i>Ibid.</i> , vol. 996, p. 245.
Convention on International Liability for Damage Caused by Space Objects (London, Moscow and Washington, 29 March 1972)	<i>Ibid.</i> , vol. 961, p. 187.
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	<i>Ibid.</i> , vol. 1108, p. 151.
Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 17 December 1976)	UNEP, <i>Selected Multilateral Treaties in the Field of the Environment</i> , Reference Series 3 (Nairobi, 1983), p. 474.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	ECE, <i>Environmental Conventions</i> , United Nations publication, 1992, p. 1.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (Sales No. E.84.V.3), p. 151, document A/CONF.62/122.
Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXVII, No. 4 (July 1988), p. 868.
Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) (Geneva, 10 October 1989)	<i>Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD)</i> , United Nations publication (Sales No. E.90.II.E.39), appendix.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, <i>Environmental Conventions</i> , United Nations publication, 1992, p. 95.

Introduction

A. The articles proposed to date

1. This being the first year of the Commission's current five-year term, and there being many new members, it is appropriate to review the status of the topic. Here, a reading of the seventh report of the Special Rapporteur¹ will be very useful: in it he attempted to provide an overall review of the draft articles proposed to date and of the reaction to them both in the Commission and in the Sixth Committee. The reader will also find there some suggested guidelines for future development of the most important aspects of the draft articles.

2. This said, it should be noted that the general-debate phase is over, and it is proposed to limit the discussion as far as possible to the content of the present report.

B. The first 10 articles

1. GENERAL COMMENTS

3. The Commission has considered two sets of texts. One set consists of the first 10 draft articles submitted in the fourth report of the Special Rapporteur², which were transmitted to the Drafting Committee for review.³ During the debate preceding their transmittal, important suggestions were made for possible amendment of the articles, including proposed rewording to improve the text. In considering the report, the Sixth Committee put forward other considerations⁴ that, in the Special Rapporteur's view, also deserved to be taken into account. In his fifth report,⁵ those comments were incorporated into nine articles, which were discussed in the Commission and added to the material for consideration by the Drafting Committee. There were nine articles rather than 10 because a consensus emerged to delete the original article 8 (Participation).⁶ As a result of further debate, the sixth report included some footnotes to certain of the articles,⁷ presenting other, somewhat different drafting proposals for consideration of the Drafting Committee and, naturally, for the attention of the Commission at the appropriate time.

4. The Drafting Committee will thus have before it the version of the first 10 articles originally referred to it, plus the material for consideration consisting of the nine articles from the fifth report and the proposals contained

in the footnotes to some of these articles from the annex to the sixth report.

2. ARTICLE 2

5. Owing to the very special nature of the topic and the lack of precedents for a general instrument of the kind the Commission might wish to recommend, as from the sixth report, most of the articles proposed are purely exploratory. The intention has been simply to elicit the reaction of members of the Commission and of the Sixth Committee, and to give a full picture of the possible scope of the draft articles. On a trial basis, in an attempt to satisfy a small but insistent line of thinking that favoured establishing a list of dangerous activities in order to define the scope of the topic more precisely, the concept of "dangerous substances" and other similar substances was included, as in the Council of Europe's important draft Convention on civil liability for damage resulting from activities dangerous to the environment.⁸ As a result, the original text of article 2 (Use of terms) and of other articles had to be amended to correspond to the new idea of dangerous substances. The Commission and the Sixth Committee did not prove receptive to the inclusion of such a concept or, consequently, to the resulting amendments. The Drafting Committee knows, therefore, that subparagraphs (a), (b), (c) and (d) of article 2, as proposed in the sixth report⁹ are not acceptable, and that it should, in principle, revert to the wording proposed in the fifth report, amended as indicated below, as the basis for its consideration.

6. Article 2 is of a very special nature. It was noted at one point¹⁰ that the article was open to the introduction of new terms and the adaptation of existing ones to subsequent developments. It is thus a flexible article. The sixth report discussed other amendments to article 2 and other general provisions¹¹ that the Drafting Committee should take into account, which were related not to the concept of "dangerous substances" but to other concepts that had required definition after article 2 had been referred to the Drafting Committee as part of the first 10 articles.

C. The second set of articles

1. THE PRINCIPLE OF NON-DISCRIMINATION (ART. 10)

7. The sixth report contained a new draft article 10 (Non-discrimination),¹² which had met with general sup-

¹ Reproduced in *Yearbook* ... 1991, vol. II (Part One), p. 71, document A/CN.4/437.

² Reproduced in *Yearbook* ... 1988, vol. II (Part One), p. 251, document A/CN.4/413.

³ *Yearbook* ... 1988, vol. II (Part Two), p. 21, para. 101.

⁴ See "Topical summary prepared by the secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly" (A/CN.4/L.431), sect. B.

⁵ See *Yearbook* ... 1989, vol. II (Part One), p. 131, document A/CN.4/423.

⁶ For the proposed text, see *Yearbook* ... 1988, vol. II (Part Two), para. 22.

⁷ *Yearbook* ... 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1, annex, footnotes a-j.

⁸ The text on which the discussion in the present report is based is the draft contained in Council of Europe document DIR/JUR (92) 1 of 27 January 1992, which was subsequently adopted as document DIR/JUR (92) 3 on 31 July 1992. For discussion based on an earlier draft, see the sixth report of the Special Rapporteur (*Yearbook* ... 1990, vol. II (Part One) (see footnote 7 above), pp. 87-88), paras. 15-17.

⁹ *Ibid.*, annex.

¹⁰ *Ibid.*, pp. 88-89, para. 19.

¹¹ *Ibid.*, pp. 89-91, paras. 22-25.

¹² *Ibid.*, annex. See also p. 91, para. 29.

port. It should thus be referred at this session to the Drafting Committee, so that it can conclude its review of the governing principles proposed to date for inclusion in chapter II.

2. THE REMAINING ARTICLES

8. Next comes a set of articles numbered 11 to 33,¹³ grouped into various chapters: chapter III develops the principle of prevention; chapter IV that of State liability; and chapter V that of civil liability. All these chapters are, as stated earlier, merely exploratory, and the newly-

¹³ Ibid., annex.

constituted Commission should forget them for the moment. As it proceeds with the topic, these or other more definitive texts will be proposed in the light of the debates in the Commission and in the General Assembly. In this report, for instance, having waited to draw on the conclusions of the latest, decisive debate, it has been possible to submit draft articles on the development of the principle of prevention that are already more concrete (see chap. II below). In addition, some of the definitions set forth in article 2 are reconsidered in an appendix to this report. These definitions have been put in an appendix in order to emphasize that article 2 has already been referred to the Drafting Committee, and that the debate is simply a continuation of the one that has already taken place.

CHAPTER I

Development of the principle of prevention

A. Obligations of prevention

9. In the discussions on obligations of prevention, the Commission asked two basic questions: (a) should there be, in connection with the activities covered by article 1, obligations of prevention in addition to obligations of reparation? (b) if so, should activities involving risk and activities with harmful effects be addressed jointly or separately? On the first question, a substantial body of opinion favoured a separate, recommendatory instrument on obligations of prevention that were simply procedural, such as those set forth in draft articles 11 to 15 in the version contained in the sixth report. The opinion of those who wanted procedural obligations eliminated, purely and simply, must also be taken into account. The conclusion, then, is that a decisive majority was against the retention of procedural obligations. Accordingly, it is now proposed that such procedural obligations be included in an annex as a mere recommendation.

10. There were some, however, who argued that unilateral preventive measures, such as those envisaged in article 16 of the text contained in the sixth report,¹⁴ should be obligations binding on the State.¹⁵ A clarification is called for in this connection: time and again, the Commission and the Sixth Committee have heard comments associating risk with prevention, and harm with

reparation. Thus, prevention would be related solely to what are termed "activities involving risk", that is to say, activities likely to be a source of significant transboundary harm. There is, however, one fact that speaks volumes and should give pause for thought on that first impulse which leads to acceptance of the idea that "prevention is better than cure", and that has led to one of the thorniest problems facing this draft. That fact is that international instruments governing specific activities "involving risk" include no provisions on prevention, if "prevention" is to mean avoiding the occurrence of accidents. They are instruments that establish the civil liability of certain private individuals for harm caused by activities considered dangerous, as with nuclear energy, maritime carriage of oil, aviation and the like.¹⁶ In those conventions which do not establish State responsibility, or in which it is subsidiary to civil liability, such as the Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage, it is impossible to attach to the same subject (the operator responsible) and for the same event both the responsibility for the breach of obligations of prevention—for a wrongful act—and strict liability (*sine delicto*). The reason is that, in regard to responsibility, wrongfulness is precluded if the subject of the obligation exercised due diligence, and, in regard to strict liability, the subject must provide compensation, irrespective of any measures taken in the attempt to prevent the event. Reference may be made here to articles 21 and 23 of part 1 of the draft articles on State responsibility.¹⁷ Moreover, strict liability is usually a suf-

¹⁴ Ibid. These obligations, along the lines of obligations of due diligence, would rest with the State of origin. This would mean that legislative, administrative and enforcement action would be needed to ensure that the individuals conducting the activity took substantive measures. Suggestions for improving the wording of article 16 were made. For example, it was said that the reference to insurance belonged in the domain of liability, rather than prevention; and the final sentence concerning the handling of imminent and grave risk might more appropriately be placed in articles regarding an emergency procedure.

¹⁵ In earlier reports, the adjective "hard" was used to describe this type of obligation. These will simply be referred to as "obligations" in future, on the understanding that there are really no "soft obligations". Rather than "soft obligations", the term "recommendations" will be used.

¹⁶ The only convention to establish State responsibility/liability is the Convention on International Liability for Damage Caused by Space Objects, but it does not contain obligations of prevention. To some extent, the Convention on the Regulation of Antarctic Mineral Resource Activities establishes State responsibility/liability, but for wrongful acts.

¹⁷ For text, see *Yearbook . . . 1980*, vol. II (Part Two), p. 32. For this very reason, the Convention on International Liability for Damage Caused by Space Objects contains no provisions on prevention: all the

ficient incentive for those in authority to take adequate preventive measures, inasmuch as compensation would have to be provided after any accident. The only way to include both forms of responsibility in the same legal instrument is to attach responsibility to different acts or to different subjects (for example, responsibility of the State for prevention, and civil liability for reparation).

11. Such being the case, it might be more practical to consign all the obligations of prevention (both the procedural obligations and those that have been described as "unilateral" or as obligations of due diligence) to an annex consisting of purely recommendatory provisions to guide States in better complying with the articles in the main text. The reasons are as follows:

(a) As already stated, the existing conventions on responsibility and liability tend not to address prevention¹⁸ as defined earlier;

(b) These would be obligations resting with the State,¹⁹ and any breach would entail State responsibility. While it is true that there are two different subjects here (the State and private operators), the same incident (namely the same episode of transboundary harm), may involve responsibility on the part of the State for a wrongful act, as well as strict liability or liability for risk, on the part of private operators. Although it may be argued that the Conventions on nuclear damage (see para. 10 above) establish some responsibility on the part of the State, such responsibility is not for wrongful acts, but is merely subsidiary to the strict liability of private individuals and is intended to cover damage for which they do not provide compensation. There is no need to choose between two options—one leading to State responsibility, the other leading to civil liability—which would not be very easy to reconcile, not to mention the fact that States have been extremely reluctant to assume responsibility/liability in existing conventions, or draft conventions, regulating certain activities involving risk.²⁰ Likewise, in the only draft dealing *in general* with

obligations rest with the State, and as the responsibility/liability of the State is absolute, there is no point in requesting it to take certain preventive action. It would be almost like wanting to punish attempted suicide with the death penalty.

¹⁸ As will be seen, in such conventions prevention is viewed solely in terms of action aimed at containing or minimizing the harmful effects of an incident *that has already occurred*, that is to say, at *preventing* such effects from realizing their full potential for causing transboundary harm. It is generally considered to be a cost that might be incurred by any party—the affected State or private individuals—and that party must be compensated by the State of origin. It is one component of damage.

¹⁹ As the text of the recommendation suggested below will show, it will be for the State to take the necessary legislative, administrative and enforcement measures to ensure that those responsible for the activities covered by the draft articles take *substantive* preventive measures.

²⁰ See G. Doeker and T. Gehring, "Private or international liability for transnational environmental damage—The precedent of conventional liability regimes", *Journal of Environmental Law* (Oxford), vol. 2, No. 1 (1990), in which the authors consider several treaty-based liability regimes. They find that to date only the Convention on International Liability for Damage Caused by Space Objects provides for *strict* liability on the part of the State; all the others rely on civil liability.

"Regarding space activities, military and civil components were at the time of regime creation, and are still today, heavily intertwined. Military and global-political considerations have always been a domain of governmental interest. At the time of negotiations on liability for space activities, this interest obviously prevailed." (Ibid., pp. 14-15.)

activities that are dangerous to the environment, the Council of Europe's draft Convention on civil liability for damage resulting from activities dangerous to the environment,²¹ there are no provisions on State responsibility;

(c) As has been said time and again, the imposition of primary obligations of prevention would make any breach a wrongful and therefore prohibited act. This leads to what is by now the standard objection: that the Commission would be dealing with prohibited acts, whereas its mandate from the General Assembly is to examine the question of liability for acts *not* prohibited by international law. Although in the opinion of the present writer and of many other members of the Commission, this is not a fundamental objection,²² it is always wise to preserve methodological purity. Defining the relationship between State responsibility for wrongful acts and the liability of private individuals *sine delicto* is not easy, especially in connection with an item that is in itself complicated; and

The authors make a distinction between, on the one hand, such cases and, on the other, the *civilian* use of nuclear energy and the transport of dangerous substances, where the activity is of a purely commercial nature. Furthermore, in differentiating between solutions with regard to civilian nuclear activities and the transport of dangerous substances, they argue that there is subsidiary State involvement in the first instance, but none in the second instance. They quote the statement made by the United States representative at the 1969 Brussels Conference, to the effect that State participation

"should only be considered if it could be shown that incremental insurance costs resulting from a traditional type though high limit maritime law solution were so huge as to make it uneconomic for vessel owners to continue in business. In other words, *States were not prepared to engage in subsidiary liability as long as the industry in question itself is able to bear the burden of increased liability*." (Ibid., p. 15.)

If that reasoning is correct, there is even more justification for applying it to the case of State responsibility for wrongful acts in draft articles intended to become a framework convention governing any activity that causes, or creates a risk of causing, significant transboundary harm. Along the same lines, Alfred Rest states:

"Altogether the Code favours the *civil liability approach* and does not demonstrate the possibilities of a State responsibility/liability concept, which should be combined with the civil liability concept. It is worth mentioning that, for instance, in the precedent draft Code of February 1988, prepared by the ECE secretariat, 'the development of international law regarding international responsibility, liability and compensation' was still explicitly ruled. The deletion of this phrase illustrates again in a very impressive manner that States refuse or are very reluctant to bind themselves by compulsory State liability regulations." ("New tendencies in environmental responsibility/liability law—The work of the UN/ECE Task Force on Responsibility and Liability regarding Transboundary Water Pollution", *Environmental Policy and Law*, vol. 21, Nos. 3/4 (July 1991), p. 136.)

²¹ See footnote 8 above.

²² The question was considered at great length in earlier debates, and it was suggested that the title should refer to *activities*, not to acts (see, in particular, *Yearbook . . . 1986*, vol. II (Part Two), para. 216, and *Yearbook . . . 1992*, vol. II (Part Two), para. 348). It would be in keeping with the Commission's mandate to settle all matters relating to the activities concerned, including responsibility (in the sense of a whole range of primary obligations) for *wrongful acts* committed in the conduct of such activities.

That being the case, the English title should be amended to reflect the fact that the articles deal with *responsibility and liability for injurious consequences of activities not prohibited by international law*. See the seventh report, quoting Quentin-Baxter and referring to the "Informal Composite Negotiating Text/Revision 2" of the Third United Nations Conference on the Law of the Sea, which examines the meaning of the terms "responsibility" and "liability" (*Yearbook . . . 1991*, vol. II (Part One) (footnote 1 above), para. 6, footnote 5).

(d) If an element of prevention is included that is as important as the one covered in this article, the same will have to be done at least with regard to one procedural obligation resting with the State of origin, namely the obligation to consult any States that may be affected before authorizing an activity with *harmful effects*, as will be seen shortly. That would be contrary to the almost unanimous desire not to introduce procedural obligations into the body of the instrument. It would have to be included because, as will be seen, consultation regarding a regime legalizing activities with harmful effects is practically the only useful aspect of any draft.

12. The annex should have a *chapeau* which, in addition to declaring that the provisions are purely recommendatory and that they would make for fuller compliance with the objectives and principles of the articles in the main body of the text, would rely on international law as the basis for the responsibility/liability that might come into play if non-compliance with any of those provisions also constituted a breach of an international obligation. In other words, adopting some provisions as recommendations would have the effect of facilitating implementation of the draft; failure to follow the recommendations would not entail consequences *within the regime of the draft articles*, but no position is taken concerning consequences that might arise in the area of general international law or under other agreements. Reference may be made in this connection to articles 4 (Relationship between the present articles and other international agreements) and 5 (Absence of effect upon other rules of international law).²³

B. An alternative

13. The prevailing opinion is that the procedural articles should be moved to the annex but that the unilateral obligations of prevention should remain, even if that would complicate the part dealing with responsibility/liability, and there would be the obstacle posed by the reluctance of States to assume obligations of prevention: article I²⁴ of the annex could be placed in the main text, with the mood of the verbs being changed. In that event, the text should at least include the obligation to consult with regard to activities with harmful effects.

C. Joint treatment of unilateral preventive measures

14. The question now is whether an article of this nature, wherever it may be placed in the draft, would apply to both types of activities mentioned in article 1, namely activities involving risk and activities with harmful effects. To answer this question, it is necessary to consider once again the nature of the preventive role attributed to the State in each case. It has already been

seen that the preventive measures to be taken by the State would be very different from those to be taken by individual operators: the State would have to set forth a prudent and comprehensive set of rules (including legislation and administrative regulations) in respect of prevention, and would have to monitor compliance using the legal means at its disposal. Individual operators would be obliged to adopt whatever substantive measures the State required of them.

15. It is with regard to substantive measures that the role of prevention differs, depending on whether the activity is one that involves risk or one that has harmful effects. In the former case, the result of prevention is uncertain since, by definition, incidents may occur in spite of the precautions that have been taken, while, in the latter, prevention is either entirely effective and prevents the harmful consequences from occurring (or from reaching the threshold of "significant" harm) or it is wholly or partly ineffective, in which case it fails to prevent the significant harm from occurring.²⁵

16. But so far as the State is concerned, its role is the same no matter what the activity being regulated: in other words, it must adopt certain legislative, administrative and enforcement measures in order either to minimize the risk of accidents or to prevent the transboundary harm from exceeding the tolerable threshold and becoming *significant*. These will still be legislative, administrative or enforcement measures, in other words identical in nature, within the context of the concept of "due diligence". So far as prevention is concerned, the State would have to legislate and monitor.

17. In order to be able to adopt such measures, the State must place under a special regime all activities under its jurisdiction or control which may *prima facie* cause or risk causing transboundary harm. This is assumed to be what the majority of countries already do at present to protect their own population. What criteria must a Government apply in recognizing such activities? The first is the general definition of such activities given in article 2. As has already been suggested, this article could be accompanied by an annex, giving an indicative list of dangerous substances and possibly also of dangerous activities; since the list would be merely indicative, the drawbacks (of which so much has been heard) of an exhaustive and mandatory list would not apply. If such an approach is taken to prevention, there should be no serious problems, since the activities which involve risk, such as those set forth in article 2, may already require prior authorization in most States. So far as the draft articles are concerned, when assessing the impact of a particular activity on the environment, health or property of their own population, Governments would also have to take into account the possible transboundary effects. They would undoubtedly delegate this task to the private operators under their jurisdiction or control, and require the latter to provide, at their own cost, the data necessary to make the assessment.

²³ For text, see *Yearbook ... 1990*, vol. II (Part One) (footnote 7 above), annex.

²⁴ Roman numerals have been used to differentiate the draft articles proposed for possible inclusion in an annex from those forming the main body of the instrument.

²⁵ If such significant harm is inevitably related to the activity, it would be worth giving serious consideration to the possibility that, prior to authorizing the activity, the State of origin might require the operator to propose alternatives that do not produce that harm, as will be seen.

D. The need to consult: differences according to the activity

18. As to the need to consult at the start of the activity, it is worth analysing how activities involving risk differ from activities with harmful effects. The former create a risk of transboundary harm, whereas the latter cause harm directly, because they are activities which by definition cause harm in the course of their normal operation. There is already a considerable body of international theory and practice to support the view that transboundary harm caused by these activities, when significant, is, in principle, prohibited under general international law. That being so, an activity of this type could be conducted only if the affected States gave prior consent in some form. This principle is rendered somewhat less hard and fast by the fact that the harmful transboundary effects of certain activities are cumulative, gradually exceeding the threshold of tolerance to reach the level of "significant harm". An example is the air pollution which produces acid rain in Europe and in North America. Although it has proved impossible to prohibit such harmful activities, there is no doubt that international cooperation has been mobilized in an effort to eliminate their most harmful features. The Convention on Long-range Transboundary Air Pollution is one example, although it does not contain any clauses relating to liability. By cooperating in this way, States concede that the situation has, for important reasons, to be tolerated in the short term, but that it will eventually have to be eradicated. In addition, owing to the difficulty of proving the cause-and-effect relationship between the various sources and the harm, it is clear that everything that has to do with compensation becomes secondary. What emerges from all this is that, in practice, the major, or even sole, interest in respect of activities of this type is prevention through consultation, either to work out an acceptable regime that will allow the start-up of the activity or, where the activity is already under way—as in the case of the burning of fossil fuels that causes long-range air pollution—a regime that will make the activity tolerable and ultimately provide an alternative to significant transboundary harm.

19. In its "Elements for a draft convention on environmental protection and sustainable development", the Experts Group on Environmental Law of the World Commission on Environment and Development, proposes that the issue of lawfulness or unlawfulness of risk and harm should be dealt with by means of one principle and two exceptions. In its proposed article 10 it states a principle that reflects the general prohibition on causing, or creating the risk of causing, transboundary harm, as follows:

States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e., harm which is not minor or insignificant.²⁶

²⁶ *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development) (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1987), p. 75.

The comment states that:

... article 10 lays down the well-established basic principle governing transboundary environmental interferences*, viz. that States shall prevent or abate any such interference which causes, or entails a significant risk of causing, substantial harm in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction.²⁷

This principle would amount to a blanket prohibition on causing "substantial" transboundary harm—to use the words of that draft article—and would correspond to the principle of inviolability of the territorial sovereignty of the affected State. Reuter used to ask:

Do not the rules of territorial sovereignty lay down the principle of the prohibition of any physical activity that affects the territory of a State from a source located in the territory of another State (physical interference)?²⁸

It is also interesting to see what the ECE Task Force²⁹ has to say, with regard to transboundary water pollution.

20. With respect to activities involving risk, article 11, paragraph 1, as proposed by the Experts Group, sets forth the first exception, based on the balance-of-interests concept.

²⁷ Ibid. In support of this position, the Experts Group quotes the classic statement in the arbitral award of the *Trail Smelter case* (*United States v. Canada*), which reads:

"... under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1965.)

It is obvious from the above that only harm which is not minor or insignificant is relevant for purposes of international law.

It also quotes article 192, paragraph 2, of the United Nations Convention on the Law of the Sea, and refers to the acceptance of the concept, implicitly or explicitly, in numerous international instruments, including Principle 21 of the Stockholm Declaration (see United Nations, *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (Sales No. E.73.II.A.14 and corrigendum), part one, chap. I); General Assembly resolutions 2995 (XXVII) on cooperation between States in the field of the environment (para. 1); 3129 (XXVIII) on cooperation in the field of the environment concerning natural resources shared by two or more States; and 3281 (XXIX), adopting the Charter of Economic Rights and Duties of States (arts. 2 and 30). It points out that the judgement of 16 December 1983 of the District Court of Rotterdam, in the case of *Mines domaniales de Potasse d'Alsace* (see *Netherlands Yearbook of International Law*, vol. XV (1984), judicial decisions No. 9.924), also sets forth the same principle and agrees with the foregoing (*Environmental Protection*... (see footnote 26 above), pp. 77-78).

Furthermore, the now traditional references, namely the *Corfu Channel case* (*I.C.J. Reports* 1949, p. 4), the *Lake Lanoux case* (United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281 (partial translations in *International Law Reports*, 1957 (London), vol. 24 (1961), p. 101; and *Yearbook*... 1974, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068), the *Gut Dam Claims case* (*International Legal Materials* (Washington, D.C.), vol. VIII (1969), p. 118), and others which illustrate the basis of liability for transboundary harm, such as the *Island of Palmas case* (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 838), have been cited repeatedly in the course of the Commission's debates. All these judicial precedents have been reviewed time and again and there is no point in dwelling upon them here.

²⁸ "Principes de droit international public", *Recueil des cours*... 1961-II (Leiden, Sijthoff, 1962), vol. 103, quoted in Quentin-Baxter's second report (*Yearbook*... 1981, vol. II (Part One), p. 116, document A/CN.4/346 and Add.1-2, footnote 95).

²⁹ See footnote 20 above.

1. If one or more activities create a significant risk of substantial harm as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail*, the State which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction.³⁰

21. It is also important to point out that the jurists of the World Commission on Environment and Development do not envisage the possibility of submitting the activity in question to prior authorization or consultation at the international level, provided that the balance-of-interests test cited above is met. The conclusion to be drawn is that, if the opposing interests present themselves in the proportions indicated, a principle of law exists here that authorizes the activity in question to be undertaken or to continue without prior consultation or authorization at the international level.

22. This seems to be confirmed by current practice. Dangerous activities have been conducted that have caused, or threatened to cause, harm to third States. After a while, States have sought legal regimes for such activities to establish the principle of balance of interests, generally by transferring liability to the individual operators. Examples include nuclear activity, on which there are several conventions, the maritime carriage of oil, aviation, and accidental and non-accidental transboundary pollution of inland waters.³¹ On those occasions when it has been impossible to establish such a balance, the activity has been prohibited by treaty, as in the case of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, the Convention on the Prohibition of Military or any other Hostile Uses of Environmental Modification Techniques and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on

³⁰ *Environmental Protection* . . . (see footnote 26 above), p. 80.

³¹ In the work cited (*ibid.*, p. 82), reference is made to the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (art. 1); the Convention on Third Party Liability in the Field of Nuclear Energy, amended by the 1964 Additional Protocol and by the 1963 Brussels Convention Supplementary to the 1960 Paris Convention; the Vienna Convention on Civil Liability for Nuclear Damage; the Convention on the Liability of Operators of Nuclear Ships; the International Convention on Civil Liability for Oil Pollution Damage; and the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources. It also cites conclusion 35 of the 1981 UNEP Study on the Legal Aspects concerning the Environment related to Offshore Mining and Drilling within the Limits of National Jurisdiction (UNEP, *Environmental Law, Guidelines and Principles* (No. 4), *Offshore Mining and Drilling* (UNEP (092)/E5), p. 10).

Reference is also made to the acceptance by many major countries—Egypt, Ethiopia, France, Germany, India, Iraq, Japan, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Madagascar, Mexico, Senegal, the former Soviet Union, Syrian Arab Republic, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela—of the principle of strict liability under national law. Based on that widespread acceptance, it concludes that:

“The increasing acceptance of strict liability for ultrahazardous activities at the national level is evidence of an emerging principle of [national] law recognized by civilized nations. As known, according to Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, such a principle may also govern the relationship between sovereign States when there is no treaty or rule of customary international law calling for the application of a different principle or rule.” (*Environmental Protection* . . . (see footnote 26 above), p. 84).

the Sea-Bed and the Ocean Floor and in the Subsoil Thereof.

23. Starting from the basis of the prohibition, in principle, of all substantial transboundary harm, any activity under the jurisdiction or control of a State that inevitably caused such harm (such as activities with harmful effects) would, in principle, be internationally wrongful. But here too, balance of interests can play an important role. Returning to the discussion of the issue by the Experts Group of the World Commission on Environment and Development, article 12 of the principles adopted by the Group states:

1. If a State is planning to carry out or permit an activity which will entail a transboundary environmental interference causing harm which is substantial but far less than the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such interference*, such State shall enter into negotiations with the affected State on the equitable conditions, both technical and financial, under which the activity could be carried out.

2. In the event of a failure to reach a solution on the basis of equitable principles within a period of 18 months after the beginning of the negotiations or within any other period of time agreed upon by the States concerned, the dispute shall at the request of any of the States concerned, and under the conditions set forth in paragraphs 3 and 4 of article 22, be submitted to conciliation or thereafter to arbitration or judicial settlement in order to reach a solution on the basis of equitable principles.³²

24. There is a common basis for the two types of activity: the transboundary harm caused must, in the long run, be less than the cost (overall technical and socio-economic cost or loss of benefits) involved in preventing or reducing such harm or risk. Otherwise, if the cost of preventing the harm or risk is, in the long run, much lower than that of the harm caused, the activity will clearly be unlawful, the difference in cost perhaps being the measure of the negligence of the State of origin.

25. On the other hand, if the balance of interests tilts in the direction indicated by the above-mentioned texts, then there are two separate consequences, depending on the type of activity involved: (a) activities involving risk would be lawful provided that the State of origin accepts strict liability for the harm caused (the balance being righted by payment of appropriate compensation plus costs of preventive measures;³³ and (b) activities with harmful effects would not be regarded either as clearly lawful or as clearly unlawful (consequently, they would not be prohibited), pending substantiation of the obligation to negotiate or the settlement of the relevant dispute, as the case may be.³⁴

26. Although it is not the intention to follow the proposal of the Experts Group literally, the legal analysis which the experts carried out seems basically correct, in that States of origin may undertake activities involving risk, provided they ensure that appropriate compensation will be paid in the event that transboundary harm does, in fact, occur. It is felt that it would not be practical to require proof that the overall technical and socio-economic costs or loss of benefits in the long run exceed

³² *Ibid.*, pp. 85 and 86.

³³ Here “prevention” means measures taken after the incident to contain or minimize the harm. Strict liability with compensation is perhaps a good incentive for adopting reasonable preventive measures to avert an incident so that the activity may continue with all possible precautions.

³⁴ See *Environmental Protection* . . . (footnote 26 above), p. 87.

the harm, or vice versa, as a precondition for initiation of the activity. On the contrary, an activity involving risk may start up just as long as the condition mentioned above is met. However, the State of origin would nevertheless have to consult with those States which might subsequently be affected, to consider whether the preventive measures imposed on individual operators were acceptable, bearing in mind the factors set forth in former article 17, which is now article IX of the annex.

27. With regard to activities with harmful effects, which, by definition, cause harm in the course of their normal operation, it is recommended that the initiation of such activities should be made conditional upon prior consultation with the affected States, with a view to working out an agreement on the regime under which the activities would be permitted. The procedure would have to be supplemented by a mechanism for the settlement of disputes. This, of course, would be without prejudice to any action to which victims might have recourse under international law in respect of harm already caused and in relation to the State's obligations in terms of its responsibility for wrongful acts (due diligence), or possibly in relation to the strict liability of private operators.

28. If the consultations referred to in paragraph 27 above were to indicate that there is no effective means of preventing the significant transboundary harm, or if the affected State can demonstrate that there is no satisfactory way of compensating the victims, the State of origin would not authorize the activity unless the operator proposed alternatives which would not entail "significant" harm.

E. Notification, information and warning by the affected State

29. It is advisable to read the fifth and sixth reports of the Special Rapporteur on this point. The first of these

shows that consultation is closely linked with *notification* of the situation that gives rise to it and with prior *information* on the nature of such a situation (para. 74), to the point that if no reference was made to notification and information they would be implicit. The fifth report³⁵ also states that the general obligation to cooperate is one of the bases for notification (para. 76), "because in some cases there is a need for joint action by both the State of origin and the affected State if prevention is to be effective" (para. 77); and that the other basic principle of notification is the duty of a State to refrain from the conscious use of its territory to cause harm (para. 78). A commentary on the international practice in the matter is to be found in paragraphs 79 to 95.

30. The procedure suggested in the fifth report was simplified and somewhat modified in the sixth³⁶; and in the present report, it is further simplified. Article 12 (Participation by the international organization), has been deleted because in fact the States concerned can always consult with such organizations on a voluntary basis, depending on the extent to which the organization in question is permitted by its statutes to participate if so requested by States. On the other hand, reference to the recommended recourse to an international organization to determine which States would be affected as a result of an activity with very widespread effects or a long-distance impact is being retained, bearing in mind that some international organizations have agreements and means for assessing the impact of certain occurrences or activities. For example, UNEP has organized a Global Environmental Monitoring System based on national systems. This is a good instance of the kind of assistance an international organization can provide.

³⁵ *Yearbook* ... 1989, vol. II (Part One) (see footnote 5 above), pp. 142 *et seq.*, paras. 72 *et seq.*

³⁶ *Yearbook* ... 1990, vol. II (Part One) (see footnote 7 above), pp. 91-94, paras. 31-42.

CHAPTER II

Recommendatory provisions on prevention (arts. I-IX)

31. On the basis of the draft articles on prevention and the comments and observations made during the debate on the question, the articles hereunder are proposed for inclusion in an annex. They are accompanied by commentaries on the drafting.³⁷

objectives and principles, the following provisions are in the nature of recommendations, without prejudice to any corresponding responsibilities arising under international law.

Article I. Preventive measures

The activities referred to in article 1 of the main text should require the prior authorization of the State under whose jurisdiction or control they are to be carried out. Before authorizing or undertaking any such activity, the State should arrange for an assessment of any transboundary harm it might cause, and should ensure, by adopting legislative, administrative and enforcement measures, that the persons respon-

ANNEX

In respect of the activities referred to in draft article 1, and in the interest of fuller compliance with its

³⁷ The commentaries are confined to such matters as explaining the reasons why certain drafting changes were made other than those proposed in the sixth report, or similar matters.

sible for conducting the activity apply the best available technology to prevent or to minimize the risk of significant transboundary harm, as appropriate.

Commentary

(1) This article refers to what in former article 16 were called "unilateral preventive measures", that is to say, measures that a State adopts of its own accord, without prior consultation with any other, and as a first precaution. It is considered preferable to change the order established in the sixth report and place this article at the beginning, in order to emphasize the need for prior authorization by the State of origin and make that contingent upon an assessment of the transboundary impact. The text sets out the first duty of a Government in respect of activities that appear to come under article 1. The assessment of potential transboundary effects was a provision of article 11 (Assessment, notification and information)³⁸ as proposed in the sixth report. If a State discovers that an activity that appears to come under article 1 is already being conducted without its authorization, it will no doubt review it and, if necessary, insist on the need for prior authorization. Such authorization is called for with respect to both types of activities referred to in this article; but, in the case of activities involving risk, only if the State's authorization is not contingent upon any prior international procedure. In the case of such activities, the purpose of the recommended consultation (if it is indeed called for by the special nature of the activity) is merely to make the necessary adjustments to the regime established by the State of origin for the conduct of the activity—for example, to reach an agreement on coordinated precautionary measures such as contingency plans—with the proviso that the compensatory regime must be the one established in the main text, which will in principle be a regime of strict liability.

(2) Furthermore, if international criteria come into play, the present articles will in no way affect their validity or their character: if they are compulsory by reason of some international or regional agreement or custom, the fact that under the provisions of this article the choice of the means to be used is left to the State of origin in no way erodes the binding nature of the other instrument or custom. The phrase "best available technology" has been taken from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters.³⁹

Article II. Notification and information

If the assessment referred to in the preceding article indicates the certainty or the probability of significant transboundary harm, the State of origin should notify the States presumed to be affected regarding this situation and should transmit to them the available technical information in support of its assessment. If the transboundary effect may extend

to more than one State, or if the State of origin is unable to determine precisely which States will be affected, the State of origin should seek the assistance of an international organization with competence in that area in identifying the affected States.

Commentary

As has been said, information is closely linked to notification and consultation: hence the need to provide information on the outcome of the assessment of the transboundary impact. Information does not entail an additional effort to investigate beyond what has already been done; the word "available" was therefore used to convey that idea. The State of origin gives what it has; it is not under an obligation to make further or more extensive inquiries than it has already conducted. If it proves difficult to discern the extent of the probable effects of the activity, the State of origin shall try to avail itself of the services of an international organization with competence in the area.

Article III. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin should cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

Commentary

This article simplifies and incorporates parts of former articles 11 (Assessment, notification and information) and 15 (Protection of national security or industrial secrets) as proposed in the sixth report.⁴⁰ Unlike the former article 11, it does not include the option of also providing information on precautionary measures the State is attempting to take, because a description of such measures would be a normal part of the information that has to be transmitted to the affected State or States, given the very nature of the consultations, which would surely centre on the regime to be applied.

Article IV. Activities with harmful effects: prior consultation

Before undertaking or authorizing an activity with harmful effects, the State of origin should consult with the affected States with a view to establishing a legal regime for the activity in question that is acceptable to all the parties concerned.

Commentary

This article reflects a norm that is not found in the sixth report, and it follows the thinking that, to the extent that an activity causes transboundary harm in the normal course of its operation, it must become suspect as a

³⁸ For text, see *Yearbook . . . 1990*, vol. II (Part One) (footnote 7 above), annex.

³⁹ ECE, *Code of Conduct on Accidental Pollution of Transboundary Inland Waters* (United Nations publication, Sales No. E.90.II.E.28), sect. II, art. 1.

⁴⁰ See footnote 38 above.

wrongful activity: either such harm is avoidable, in which case the State of origin is obliged to require the applicant for authorization to take the necessary preventive measures, or else it is unavoidable, and no further steps can be taken without some kind of consultation with the affected States in the course of which they will have an opportunity to make counterproposals regarding the conduct of the activity, if they so wish.

Article V. Alternatives to an activity with harmful effects

If such consultations show that transboundary harm is unavoidable under the conditions proposed for the activity, or that such harm cannot be adequately compensated, the affected State may ask the State of origin to request the party requesting authorization to put forward alternatives which may make the activity acceptable.

Commentary

The wording of this article is similar to that of article 20 (Prohibition of the activity) as proposed in the sixth report.⁴¹

Article VI. Activities involving risk: consultations on a regime

In the case of activities involving risk, the States concerned should enter into consultations, if necessary, in order to determine the risk and amount of potential transboundary harm, with the aim of arriving at an arrangement with regard to such adjustments and modifications of the planned activity, preventive measures and contingency plans as will give the affected States satisfaction, on the understanding that liability for the harm caused will be subject to the provisions of the corresponding articles of the main text.⁴²

Commentary

The reasons for this provision, which takes a different approach from that taken in the sixth report, have already been stated above. It is important to point out that the fact that the State has no obligation of due diligence does not make any applicable international criteria which may exist in this connection less valid.

Article VII. Initiative by the affected States

If a State has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a risk of causing it such harm, it may ask that State to comply with

the provisions of article II of this Annex. The request should be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1 of the main text, the State of origin should pay compensation for the cost of the study.

Commentary

This text is based on article 13 (Initiative by the presumed affected State) as proposed in the sixth report.⁴³

Article VIII. Settlement of disputes

If the consultations held under articles IV and VI above do not lead to an agreement, the parties should submit their differences for consideration under the procedures for the settlement of disputes set out in Annex ...

Commentary

It is clear that an expeditious procedure for the settlement of disputes is altogether necessary in order to settle any differences, regarding either the need for a given regime in the case of activities involving risk, or authorization to carry out an activity with harmful effects; otherwise a point would be reached where there would be instances of real vetoes by affected States.

Article IX. Factors involved in a balance of interests

In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and likely incidence of cumulative effects of the activity in the affected States;

(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;

(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) Economic viability of the activity in relation to possible means of prevention;

(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

⁴¹ Ibid.

⁴² The text of this article is based on that of sect. VII, art. 7 of the ECE Code of Conduct ... (see footnote 39 above).

⁴³ See footnote 38 above.

(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;

(h) Benefits which the State of origin or the affected State derive from the activity;

(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) Extent to which assistance from international organizations is available to the State of origin;

(m) Applicability of relevant principles and norms of international law.

Commentary

In the sixth report of the Special Rapporteur, it was indicated that the concepts contained in what was then article 17 (Balance of interests) were "recommendations or guidelines for conduct" rather than "genuine legal norms".⁴⁴ Those desiring a somewhat fuller discussion of the reasons for including these recommendations in an annex are referred to the relevant discussion in the sixth report.⁴⁵ However, enough has been said to indicate that the appropriate place for this article is precisely in an annex containing non-binding provisions, and, to be more exact, in the part on consultations; it is at the time when consultations are being held that the criteria listed in article IX are useful—namely at a time when the respective interests of the parties are being compared in order to decide whether an activity involving risk or having some harmful effect is admissible.

⁴⁴ *Yearbook ... 1990*, vol. II (Part One) (footnote 7 above), para. 39.

⁴⁵ *Ibid.*

APPENDIX

Development of some concepts in draft article 2 appearing in previous reports

A. General comments

1. As was pointed out earlier (para. 6 above), article 2 is "open" in nature, and some of the definitions it contains appear to require further thought. This fact, together with the recent appearance of certain drafts and studies on liability for activities not prohibited by international law, points to the desirability of bringing the following ideas to the attention of the Commission, in the hope that the ensuing debate will provide guidance for the Drafting Committee, which is already working on this article.

B. The concept of risk

2. Risk was defined in the fourth report as

... the risk occasioned by the use of substances whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury throughout the process (art. 2 (a) (i))

and "appreciable risk" as

... the risk which may be identified through a simple examination of the activity and the substances involved (art. 2 (a) (ii)).^a

In other words, an attempt was made to define an activity involving risk in terms of the substances used, and "appreciable risk" by the possibility of the risk being identifiable; there had to be a perceptible risk, not a hidden risk that only became evident after a thorough examination. It was also required to be of not insignificant magnitude. Thus the concept "appreciable" introduced a duality of meanings.

3. In the sixth report, on the other hand, "activities involving risk" are defined as those involving dangerous substances, technologies or genetically altered organisms and micro-organisms (art. 2 (a)).^b Having defined the activities dealt with in the draft in this way, there was no need for a general definition of risk. The concept of "appreciable risk", or "significant risk", whichever of the terms the Commission decides to use, was however an issue, as it involved a concept which was to be dealt with in the draft. The sixth report included the relevant definition in article 2 (e).^c

4. Now that the idea of dangerous substances has been discarded as a result of the preference expressed both in the Commission and in the General Assembly,^d the definition of risk needs to be re-examined. This is important in order to define clearly the scope of the articles, so that Governments will know in respect of which activities they will have to adjust their domestic legislation in order to assign liability to those they consider should be responsible for the corresponding compensation payments, and make the necessary provision to secure such payments. Models are not abundant, because the conventions on specific activities do not need to deal with the concept of risk in order to define their scope; the activities covered under such agreements are presumed to involve appreciable or significant risk. The only general instrument is the Council of Europe's draft Convention on civil liability for damage resulting from activities dangerous to the environment, to which reference has already been made (see paras. 5 and 11 above). As has already been seen, a considerable number of Commission members and representatives to the Sixth Committee did not find its approach adequate (see para. 5 above).

5. A definition of risk exists in relation to the accidental pollution of transboundary inland waters. The ECE Code of Conduct on this subject, defines, *inter alia*, three closely related concepts:

^a *Yearbook ... 1988*, vol. II (Part One) (see footnote 2 above), p. 254, para. 17.

^b *Yearbook ... 1990*, vol. II (Part One) (see footnote 7 above), p. 106.

^c *Ibid.*

^d See the seventh report (*Yearbook ... 1991*, vol. II (Part One) (footnote 1 above)), paras. 25-29.

...
(f) "Risk" means the combined effect of the probability of occurrence of an undesirable event and its magnitude;

(g) "Hazardous activity" means any activity which by its nature involves a significant risk of accidental pollution of transboundary inland waters; and

(h) "Hazardous substance" means any substance or energy involving a significant risk of accidental pollution of transboundary inland waters, including toxic, persistent and bio-accumulative substances and harmful micro-organisms;

...^e

The Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) does not define risk, but only dangerous goods (art. 1, para. 9), and does so simply by reference to certain lists contained in a European agreement. The ECE draft framework agreement on environmental impact assessment in a transboundary context^f establishes the need for such assessment in respect of certain activities, but also does so by means of lists. Article 1 (v), defines a "proposed activity" which should be assessed in terms of its transboundary impact, as

... any activity or any major change to an activity subject to a decision in accordance with an applicable national procedure.

Appendix I cites as planned activities likely to have a transboundary impact such works as, for example, crude-oil refineries and installations for the gasification or liquefaction of coal, thermal power stations and other combustion installations, nuclear installations and the like. Appendix III establishes general criteria to assist in the determination of the environmental significance of activities not listed in appendix I, although their application in specific cases would be subject to the consent of the States concerned (art. 2, para. 5). These criteria are:

1. ...

(a) *Size*: proposed activities that are large for the type of the activity;

(b) *Location*: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, national parks, nature reserves, sites of special scientific interest or sites of archaeological, cultural or historical importance); also activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;

(c) *Effects*: proposed activities with particularly complex and potentially adverse effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.

2. The concerned Parties shall consider for this purpose proposed activities located close to an international frontier, as well as more remote proposed activities which could give rise to significant transboundary effects far removed from the site of development.

6. To sum up, it is apparent from the above review that there are various elements associated with risk: (a) the activities themselves, in terms of their size and their foreseeable likely transboundary effects; (b) the location of the activity in relation to the international frontier or to sensitive areas in neighbouring States that might be particularly affected; (c) the objects of the activity or those with which they deal, objects being taken to mean a variety of things, such as certain technologies, sub-

stances, and dangerous genetically modified organisms or dangerous micro-organisms. Moreover, the definition involving the combination of the probability of an accident occurring and its magnitude appears to fit the description of *appreciable*, *significant* or *substantial* risk, depending on where the minimum level or threshold of risk is to be set.

7. The attempt at a definition in the fourth report, as already pointed out (para. 33 above), covered only activities involving dangerous substances. However, some of the concepts it contains, applied to the activities themselves and not to the substances involved, figure in the foregoing summary. Dangerous substances are either intrinsically dangerous, or become so in relation to the place, environment or way in which they are used. For example, explosives, and radioactive, toxic or inflammable materials, are intrinsically dangerous. Dangerous substances when used in activities conducted close to an international frontier or to a particularly sensitive ecological region, or where their effects are wind-borne until they become transboundary, are dangerous in relation to their location. When the substances in question have a particular effect on water or air they are dangerous in relation to the environment in which they are used. Substances used in space activities or aviation, or wherever adequate arrangements for their storage are lacking, or substances accumulated in large quantities, such as oil, which is harmless in small quantities and becomes dangerous when 200,000 tons of it are transported by ship, become dangerous in relation to the way in which they are used. Likewise, an activity such as the construction of a dam which retains in its impoundment a quantity of water sufficient to cause damage of various kinds (environmental or accidental, leading to the flooding of neighbouring countries or a change in the flow rate of their rivers, etc.) may become dangerous in relation to location or environment.

8. An attempt at a definition should begin with the activities themselves, employing criteria such as those used in the ECE draft framework agreement: magnitude, location and effects. The paragraph in question might be drafted as follows:

" 'Risk' means the combined effect of the probability of occurrence of an accident and the magnitude of the harm threatened. 'Activities involving risk', for purposes of the present articles, are activities in which the result of the above combination is significant. This situation may arise when the effects of the activity are threatening, as when dangerous technologies, substances, genetically modified organisms or micro-organisms are used, or when major works are undertaken, or when their effects are accentuated by the location of the sites at which they are carried out, or by the conditions, ways or media in which they are conducted."

9. The above text could be divided so that the first two sentences would form a paragraph of article 2 and the remainder could be included in the commentary to the article. In addition, lists of dangerous substances and perhaps also examples of activities involving risk, along the lines of appendix I to the ECE draft framework agreement, could be placed in an annex which would be purely indicative in nature. Naturally, this general definition, or any other that might be attempted, including the

^e See footnote 39 above, sect. I.

^f This subsequently became the Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo (Finland) on 25 February 1991. References in this report are to the final text of the Convention.

provision of examples in the annexes, will not guarantee that all activities involving risk will *a priori* be included in the draft. However, something along these lines could provide guidance to Governments as to how the articles will operate.

C. The concept of harm

10. The Guidelines drawn up by the ECE Task Force on Responsibility and Liability regarding Transboundary Water Pollution^g attempt what Rest describes as a "*definition of damage*" as the basic indication for the amount of reparation or compensation due in case of responsibility^h, which reads as follows:

(m) "*Damage*" means:

- Any loss of life, impairment of health or any personal injury;
- Any loss or damage to property or loss of profit;
- Detrimental changes in ecosystems including:
 - (i) The equivalent costs of reasonable measures or reinstatement actually undertaken or to be undertaken and
 - (ii) Further damages exceeding those referred to under (i) such as the equivalent costs of measures for replacement of habitats of particular conservation concern;
- The cost of preventive measures and further loss caused by preventive measures;
 - which arise from transboundary water pollution ...

Rest describes the third item as "progressive and innovative", because it opens the door for compensation of *ecological damage*, and he adds:

New is the regulation on the *content and amount of the compensation*. Not only the costs of reasonable preventive measures or measures of reinstatement actually undertaken are to be paid. Even in the case where a measure of reinstatement is impossible because of the factual situation, with the consequence that no costs arise, the polluter now has to grant compensation, not in the form of paying money, but by *replacing habitats of particular conservation concern*. ... the Guidelines follow the new concept of [debt for] nature swap system. But it must be admitted that the word "reasonable" measure still can hinder the implementation of this system. The Working Group of the Task Force had a very controversial discussion on the insertion of this word, which in the end came into the text for reasons of political opportunity. The still existing, unsatisfying situation can be illustrated by the example of the "Exxon Valdez Case". As in this case it was impossible to clean up the oil-polluted seabed of the Gulf of Alaska because of the factual situation, the Exxon Corporation ... saved the clean-up costs. This seems to be unjust. According to the Guidelines, the polluter could perhaps be obliged to grant *equivalent compensation*, for instance, by replacing fish or by establishing a nature park. Certainly, the very complex problem of evaluating and stating the amount of the ecological damage still raises a lot of unanswered questions. But in general, the purpose of the "damage definition" is to be welcomed and should be supported.ⁱ

The article goes on to quote the Council of Europe definition of *measures of reinstatement* (see paragraph 11 below).

11. The Council of Europe's draft Convention on civil liability for damage resulting from activities dangerous to the environment,^j defines damage in article 2, paragraph 8, with the exception of subparagraphs (a) and (b), which are substantially similar to those in the Guidelines,^k as:

(a) ...

(b) ...

(c) loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of subparagraphs (a) and (b) provided that compensation for impairment of the environment ... shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken;

(d) the costs of preventive measures and further loss or damage caused by preventive measures ...

In paragraph 9, "measures of reinstatement" are defined as

... any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment or to introduce, when reasonable, the equivalent of these components into the environment.

12. The Convention on the Regulation of Antarctic Mineral Resource Activities provides that an operator shall be strictly liable for

... damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante* (art. 8, para. 2 (a))

and for

... reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean-up and removal measures, and action taken to restore the *status quo ante* (ibid., para. 2 (d)).

13. The CRTD provides for:

(a) loss of life or personal injury ...

(b) loss of or damage to property ...

(c) loss or damage by contamination to the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(d) the costs of preventive measures and further loss or damage caused by preventive measures (art. 1, para. 10).

14. Subparagraphs (a) and (b) present no problems, since they figure in any definition of harm. The concept of *harm to the environment*, which was welcomed by the Commission and the General Assembly when it was introduced in the fifth report,^l has continued to evolve. The sixth report introduced an article 24 (Harm to the environment and resulting harm to persons and property). Liability for harm to the environment comprised

... the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore these conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered (para. 1).^m

15. It had been pointed out during the debate on draft article 24 that conventions or drafts had up until that time not included the idea of making compensation which extended beyond reasonable operations to reinstate the conditions that existed before the harm,ⁿ and that accordingly an effort should be made to follow that trend. It appears that the Guidelines drawn up by the ECE Task Force, as well as the Council of Europe draft quoted respectively in paragraphs 10 and 11 above, open the door to an idea similar to that contained in the sixth

^g See ENVWA/R.45, annex.

^h Loc. cit. (see footnote 20 above), p. 137.

ⁱ Ibid.

^j See footnote 8 above.

^k See footnote g above.

^l For summary of the discussions, see *Yearbook ... 1989*, vol. II (Part Two), paras. 335-350, and "Topical summary ..." (A/CN.4/L.431, sect. B).

^m See footnote 7 above.

ⁿ See, for example, Graefrath (*Yearbook ... 1990*, vol. I, 2183rd meeting, para. 51).

report, though perhaps more practical by virtue of being less broad, in that it appears not to contemplate pecuniary compensation, which is very difficult to establish.

16. Initial consideration would indicate the desirability of combining in a single text, in article 2 which, as in almost all the instruments reviewed, related to the use of terms, the concepts of harm to persons, objects or the environment, each to be covered under a separate paragraph. Likewise, the definition should include not only the concept of harm, but that of *transboundary* harm, the only type of harm which gives rise to *international* liability. The first paragraph would then read:

“ ‘Damage’ means:

“(a) any loss of life, impairment of health or any personal injury;

“(b) damage to property;

“(c) detrimental alteration of the environment, provided that the corresponding compensation would comprise, in addition to loss of profit, the cost of reasonable reinstatement or restorative measures actually taken or to be taken;

“(d) the cost of preventive measures and additional harm caused by such measures”.

17. Paragraph (l) as proposed in the sixth report^o would be replaced by the following:

“ ‘Restorative measures’ means reasonable measures to reinstate or restore damaged or destroyed components of the environment, or to reintroduce, when reasonable, the equivalent of those components into the environment”.

18. Paragraph (m)^p would read as follows:

“ ‘Preventive measures’ means reasonable measures taken by any person following the occurrence of an incident to prevent or minimize the damage referred to in paragraph . . . of this article”.

In this respect, it should be pointed out that such measures have been defined in two ways: (a) those designed to prevent or avoid the occurrence of an incident (and with it the causing of the consequent harm), and (b) those designed to contain or minimize the harmful effects of an incident that has already occurred. In fact, conventions or drafts on *liability* take only the latter into account, generally as *costs additional* to the other compensation payable by the person liable. Frequently, these preventive measures are taken by the affected State, or by individuals within the affected State, to prevent the harm from spreading and reaching its full potential for damage. When such measures could be taken within the jurisdiction or control of the State of origin, they would also constitute an *obligation* on its part.

19. The concept of “transboundary harm” should be defined in a separate paragraph as “the harm which arises in the territory or other areas under the jurisdiction or control of a State as a physical consequence of an activity under article 1 which is conducted under the jurisdiction or control of another State”.

20. The description of harm as “appreciable” or “significant”, calls for two comments. First, the general view tends to favour “significant”, because it appears to require a level somewhat higher than “appreciable”, and, above all, because the latter word has the ambiguity of meanings already pointed out. Secondly, to date, the attempt made in the sixth report to define the threshold of harm (art. 2, para. (h))^q has not met with approval. One possibility, therefore, is not to insist on trying to describe the harm, but to leave it to practice to determine when harm is “significant”. Recently, the Guidelines drawn up by the ECE Task Force have put forward a definition which may perhaps be more successful than the previous attempt. It reads:

The threshold of damage (as distinguished from mere harm) is that accepted by the States universally or by the concerned States. If no such level is agreed, damage occurs where an affected State is required, as the result of the activity on the territory of the State of origin, to take measures in the interest of the protection of the environment or population, or rehabilitation measures.^r

True, the subjective element is not totally eliminated, because the State taking measures to protect the environment or the population may have a much greater sensitivity to environmental or public health concerns than that of the State of origin, in which case a difference in perception would arise whereby the State of origin would consider it unjust to have to bear the cost of measures which it deemed to be excessive.^s However, this definition is at least more objective than such criteria as “harm that is not insignificant, or trivial, or a mere nuisance” that have been used in an attempt to describe the indefinable threshold. When a State takes measures, that is to say, incurs costs and so forth, it is reasonable to think that it is motivated by something other than a desire to spend money unnecessarily. It is also possible, for instance, to speak of levels that are regionally acceptable. In any event, if the definition reproduced above meets with a certain measure of acceptance, it could be included. At the same time, the commentary would mention all the criteria summarized above, in order to facilitate a quantification of magnitude that can only be established by broad international practice, particularly in a set of articles covering every possible activity that causes or may cause transboundary harm.

^q Ibid.

^r Para. 16.2 (see footnote g above).

^s This is what happened, for example, regarding some of the actions taken by national Governments in Western Europe following the Chernobyl incident, which experts in other countries found to be excessive (destruction of agricultural produce supposedly exposed to radiation, slaughter of livestock, and so on).

^o See footnote 7 above.

^p Ibid.

CHECK-LIST OF DOCUMENTS OF THE FORTY-FOURTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/441	Provisional agenda	Mimeographed. For agenda as adopted see <i>Yearbook ... 1992</i> , vol. II (Part Two), chap. I, para. 9.
A/CN.4/442	Tenth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in the present volume (p. 51).
A/CN.4/443 [and Corr.1 and 3]	Eighth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem</i> (p. 59).
A/CN.4/444 et Add.1 [and Corr.1] and Add.2-3	Fourth report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem</i> (p. 1).
A/CN.4/L.469	Topical summary, prepared by the secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-sixth session of the General Assembly	Mimeographed.
A/CN.4/L.470	Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law	<i>Idem</i> .
A/CN.4/L.471	Draft Code of Crimes against the Peace and Security of Mankind: Report of the Working Group on the question of an international criminal jurisdiction	Reproduced in <i>Yearbook ... 1992</i> , vol. II (Part Two), annex.
A/CN.4/L.472	Draft articles on State responsibility. Titles and texts of articles adopted by the Drafting Committee: Part 2	Texts reproduced in <i>Yearbook ... 1992</i> , vol. I, summary record of the 2288th meeting (para. 5).
A/CN.4/L.473 and Rev.1	Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation	Mimeographed.
A/CN.4/L.474 and Add.1	Draft report of the International Law Commission on the work of its forty-fourth session: chapter I (Organization of the session)	Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10)</i> . The final text appears in <i>Yearbook ... 1992</i> , vol. II (Part Two).
A/CN.4/L.475 and Rev.1	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem</i> .
A/CN.4/L.476	<i>Idem</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.477 [and Corr.1]	<i>Idem</i> : chapter V (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.478 [and Corr.1] and Add.1-3	<i>Idem</i> : chapter III (State responsibility)	<i>Idem</i> .
A/CN.4/SR.2253-A/CN.4/SR.2294	Provisional summary records of the 2253rd to 2294th meetings	Mimeographed. The final text appears in <i>Yearbook ... 1992</i> , vol. I.

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